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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE EUROPEAN INVESTIGATION ORDER

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Abstract

The European Investigation Order (EIO) is the newest instrument of international judicial cooperation in criminal matters between the Member States of the European Union. The purpose of this paper is to analyse this new European initiative regarding an European Investigation Order (EIO) based on the principle of mutual recognition which shall facilitate the gathering and transmission of evidence in criminal matters between Member States. The author present the necessity of an EIO and analyse if it provides enough safeguards for the protection of the fundamental rights of the defendant and the differences between this proposed instrument and the European Evidence Warrant with shows the ECJ jurisprudence tendency. In the end, after presenting some relevant aspect regarding EIO, including the UK"s post-transition relationship with the EU, the paper ends with proposals for the ferenda law concerning the accomplishment of an adequate juridical framework and the application of the legal stipulation referring to international judicial cooperation in criminal matters.

Keywords: *the European Investigation Order, international judicial cooperation in criminal matters, mutual recognition.*

1. Introduction

At the same time with the opening of the frontiers, international criminality has achieved a bigger and bigger importance.

The new dimension of organized crime in the European space, the need for prevention and effective combating of this phenomenon at the regional level has required the improvement of judicial mechanisms cooperation and the development of instruments based on the principle of mutual recognition at European Union level and on the part of the Member States, stepping up their efforts to harmonize the legislation in the Union.

The founding treaties of the European Communities did not explicitly include criminal law in the mechanism of protection of economic integration.

According to the relevant European Union"s primary and secondary sources – including Directive 2014/41/EU – all Member States must provide for a minimum level of guarantees connected to the right of defence, irrespective of the specific judicial system in force in each country. In particular, in December 2009, following the entry into force of the Lisbon Treaty, The European Council adopts the Stockholm Programme, which aimed at reforming the "current patchwork of rules" and providing a single.

Article 82 of the Treaty on the Functioning of the European Union (TFUE) underlines the importance of the approximation of law and regulation, including those relating to such procedural rights, among Member States. This position is reiterated in Directive 2014/41/EU that explicity refers to Article 82 TFEU and to the main pillars of Judicial Cooperation in Criminal Matters, namely the principle of mutual recognition of judgments and that of mutual confidence between Member States. Accordingly, from Article 82 TFEU, and subsequently Directive 41, derives the necessity to provide minimum common rules in relation to the rights of individuals in criminal procedure.

According to Article 82 (1) TFEU, judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions.

Article 82 (2) of TFUE provides: "To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States [...]"

With the intensification of European integration and the increase of mobility of people, goods, services and capital in the EC internal market, with the growing importance of the external dimension of the internal market, the growing need for a legal regime for judicial cooperation in criminal matters appropriate to the countries involved in the European integration process has become increasingly clear.

The purpose of judicial cooperation in criminal matters is to establish a common European space of freedom, security and justice responding to the mutual trust between the systems of criminal justice in the member states, being supported by the principles of freedom and of democracy of the legal state and respecting the basic rights guaranteed by the European

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Convention for Protecting the Basic Human Rights and Freedoms.

The European Investigation Order repeals the Framework Decision establishing the European Evidence Warrant (EEW) and replaces the corresponding provisions of the Council of Europe mutual assistance Convention and its two protocols (Framework Decision on the Evidence Warrant and Stockholm Programme) as well as the EU Mutual Assistance Convention and its protocol and the relevant provisions of the Schengen Convention.

2. The European Investigation Order and its application

In 2009, when the Stockholm Programme was adopted by the European Council, the existing legal framework was fragmented and too complicated. Directive 2014/41/EU of the European Parliament and of the Council set up a new European judicial decision instrument, called the European Investigation Order [1].

An EIO aims to make legal cooperation between EU Members States easier; it sets up a comprehensive system for obtaining evidence in cases with cross-border dimensions.

It is to be issued for the purpose of having one or several specific investigative measures carried out in the state executing the EIO with a view on gathering evidence.

The instrument applies to all investigative measures aimed at gathering of evidence[2], as well as at obtaining evidence that is already in the possession of the executing authority (Article 1(1) of the EIO Directive).

The EIO Directive came into force on May 22, 2017, with the EU having allowed time for Member States, with the exception of Ireland and Denmark[3], to implement it into their national legislation.

An EIO is a judicial decision, issued or validated by a judicial authority of a Member State (the issuing state) for the purpose of having one or several specific investigative measures carried out in another Member State (the executing state) to obtain evidence. An EIO may also be issued for obtaining evidence that is already in the possession of the competent authorities of the executing state. The issuing of an EIO may be requested by prosecutors or judges, but also by the suspected or accused person as well as by lawyers on their behalf (within the framework of defence rights).

The EIO can be used in criminal proceedings, but also in those brought by administrative authorities, with judicial validation, when there is a criminal dimension.

The Directive 2014/41/EU on the European Investigation Order in Criminal matters obviously covers any other investigation measure except[4]: setting up of Joint Investigation Teams and gathering of evidence with such teams, expressly excluded from the EIO scope in according to Article 3 of the directive and - the freezing with a view of confiscation and the confiscation itself, taking into account that the existing legal basis for the latter is not replaced in accordance with Article 34 (1) of the directive.

Also, it does not apply to: service and notification of documents, on the one had because this is not an investigation measure per se, and, on the other hand, the "service by post" rule established in Article 5 (1) of the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States of the European Union.

In some situations an EIO might be issued for questioning the suspect via video link in order to determine whether or not to issue an EAW for the purposes of prosecuting him[5].

In Romania, the High Court of Cassation and Justice has decided that the European Investigation Order which has as object the hearing by video conference during the trial is executed by the Court of Appeal[6].

For instance, the order was transposed into the Romanian legislation, through the most recent changes of the Law no. 302/2004 concerning international judicial cooperation in criminal matters (following- "The Law") [7].

When acting as an issuing State, only Romanian judicial authorities have competence, namely the competent Prosecutor"s Office during the investigation phase or the competent court in the trial phase. No administrative authority has competence, as it is not considered investigating authority in criminal proceedings. Some investigative measures such as, surveillance methods including wire-tapping of communications or of any type of remote communications, accessing a computer system, obtaining data regarding the financial transactions of persons, use of undercover investigators and informants, controlled deliveries, etc., cannot be decided by a prosecutor, but only by a Judge of rights and liberties during the investigative phase or a Judge during the trial phase.

[1] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1 (hereafter the EIO Directive).

[2] Art. 3 from EIO Directive.

[3] Preamble paras. 43-45 and art 3 from EIO Directive.

[4] Note on the meaning of „corresponding provisions" and the applicable legal regime in case of delayed transposition of the EIO Directive, disponibil on-line la: http://data.consilium.europa.eu/doc/document/ST-9936-2017-INIT/en/pdf.

[5] JO L c335/1, 06.10.2017, p. 16.

[6] HCCJ, decision no. 432 of 19.p07.2018, www.scj.ro.

[7] Republished in the Official Romanian Journal, Part I, nr. 377 from 31 May 2011, completed through Law nr. 236 from 5 December 2017, published in the Official Romanian Jurnal nr. 993 from 14 December 2017.

When our country is the state of execution, recognition and execution of a European Investigation Order are within the competence of the prosecutor"s office or the court competent materially and according to the quality of the person according to Romanian law.

Territorial competence is determined according to the place where the measure is to be fulfilled the investigation[8].

The Law no. 302/2004 concerning international judicial cooperation in criminal matters does not stipulate which is the competent court in the situation, that have appeared in practice, hence the measures requested to be performed are within the competence of different prosecutor"s offices or courts.

It is necessary to complete the law indicated in the sense of specification the prosecutor"s office or the court that in these causes will rule on the EIO.

EIO"s concerning facts within the competence of Directorate for Investigation of Organized Crime and Terrorism (DIOCT) or National Anti-Corruption Directorate (NACD) is recognized and executed by them.

In the sphere of central authorities it is included the Ministry of Justice which receives a EIO reffering to the judicial activity or execution of judgement as well as the Public Ministry through the specialized structures in the case of European Investigation Orders that refer to the criminal investigation and investigation activity[9].

3. The European Arrest Warrant and the European Investigation Order

The EIO contained several innovations over existing procedures prior to its appearence. The EIO focuses on the investigative measure to be executed, rather than on the type of evidence to be gathered. The EIO has a broad scope – all investigative measures are covered, except those explicitly excluded. In principle, the issuing authority decides on the type of investigative measure to be used. However, flexibility is introduced by allowing, in a limited number of cases, the executing authority to decide to have recourse to an investigative measure other than that provided for in the EIO. Clear time limits are provided for the recognition and, with more flexibility, for the execution of the EIO. The proposal also innovates by providing the legal obligation to execute the EIO with the same celerity and priority as for a similar national case.

The Court of Justice, clarified that public prosecutors can adopt European Investigation Order pursuant to Directive 2014/41, even if there is a risk of the prosecutors being subject to individual instruction from executive branch. The Court has distinguished the role of prosecutors in the course of an EIO to the European arrest warrant, which reassures prosecutors, in line with the Court"s more recent case-law, to ensure standards of independence.

The cause stems from a criminal investigation for fraud initiated in Germany. Under Austrian law, a public prosecutor may not order investigative measures without prior court authorization, which was granted in the specific case at hand.

In decision[10] of the Court of Justice has decided the role of the prosecutor"s in the context of an EIO and a European Arrest Warrant by relaying on an interpretation of Directive 2014/41, which explicitly refers to public prosecutors as issuing authorities, but in the same time on the guarantees, including guarantees of judicial review ensured by Directive 2014/41. Court of Justice concludes that the EAW does not apply to a public prosecutor acting in the context of an EIO.

The Court of Justice held that „it follows from Article 2(d) of Directive 2014/41 that the procedure for executing a European investigation order may require a court authorization in the executing State where that is provided for by its national law. As is apparent from the order for reference, that is the case under Austrian law, which makes the execution of certain investigative measures, such as a request for disclosure of information relating to a bank account, subject to court authorization.

The EIO governed by Directive 2014/41 pursues, in the context of criminal proceedings, a distinct objective from the European arrest warrant governed by Framework Decision 2002/584. While the European Arrest Warrant seeks, in accordance with Article 1(1) of Framework Decision 2002/584, the arrest and surrender of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, the aim of a European Investigation Order, under Article 1(1) of Directive 2014/41, is to have one or several specific investigative measures carried out to obtain evidence.

Except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure, which is the subject of specific guarantees in Articles 22 and 23 of Directive 2014/41, the European investigation order, unlike a European arrest warrant, is not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter".

The issue was raised into national judicial practice to what extent data generated or processed by Facebook by a public prosecutor without the court authorization.

There are several opinions regarding this issue, but the majority one was in the sense that the use of the EIO mechanism presupposes the fulfillment of the

[8] Article 330 paragraph 2 from the amended Law no. 302/2004.
[9] Article 330 paragraph 3 from the amended Law no. 302/2004.
[10] ECJ, C-584/19, A and Others, Judgenent of 8 December 2020, ECLI:EU:C:2020:1002.

procedures provided by the law of the reqesting states for obtaining the evidentiary instrument, respectively the judge"s authorization.

As well, in judicial doctrine[11] it was appreciated that when the EIO is issued by any other authority, and not by a judicial authority, could be capitalized principle developed by the Court of Justice of the European Union in a number of recent decision related to the European Arrest Warrant, in which denied the possibility that the Ministry of Justice of a Member State or prosecutor"s offices that are exposed to the risk of being subjected to orders from the executives power to be included in the scope of the notion of issuing judicial authority. Therefore, it was considering that it is for the executing judicial authorities to identify whether the issuing authority falls within those compatible with the meaning of the notion, as it is recognized by the Directive.

For the purpose of this paper, I looked into the jurisprudence of High Court of Cassation and Justice[12] which addresses issues related to both instruments of cooperation.

In the decision was retained that, in the procedure of execution of the European Arrest Warrant, the prosecutor to the Office of the Prosecutor near the Court of Appel has the competence to attend the court hearing, hether in the procedure for the execution of EIO concerning the facts contained in the European Arrest Warrant was attended by a prosecutor from the Directorate of Investigation of Crimes of Organized Crime and Terrorism.

It was also mentioned that execution of a EIO issued by the authorities of a Member State of the European Union, concerning the facts contained in the EAW issued by the authorities of the same Member State of the European Union not it determines the incidence of optional refusal of execution, regarding the hypothesis in which the request person is subject to a criminal procedure in Romania for the deed that motivated the European Arrest Warrant.

4. The national sovereignty of the States and supremacy of the European Union"s law

Criminal justice is a specific and unique field of law in each State. The negative attitude of the EU Member States towards the unconditional cooperation in criminal matters is still provided. It is an understandable position because the States, protecting their sovereignty, authenticity and independence, avoid unambiguous supporting of the aspiration, declared by the EU, on mutual recognition of the evidence, on which the EIO is also based. The Member States are aware of the significance of recognition of the mutual principle of international cooperation; on the other hand, some EU Member States perceive this principle in a certain sense as the dictatorship, which limited the autonomy of the domestic law[13].

It is important to note that the European Court of Justice (hereinafter referred to as the "ECJ") had an opportunity to pronounce on Council Framework Decision 2002/584/JHA, dated the 13nd of June of the year 2002 on the European arrest warrant and the surrender procedures between Member States, which is practically related to the EIO.

There are two causes, the Radu[14] and the Melloni[15] in which was examined the fundamental right and the mutual recognition[16].

The ECJ stated that the guarantees, foreseen in the national Constitutions of the Member States, have no influence upon the definite case though they foresee a softer regulation towards the convicted person. In this context, the ECJ stated that the guarantees, foreseen in the national Constitutions of the Member States, have no influence upon the definite case though they foresee a softer regulation towards the convicted person. The ECJ points to the supremacy of the European Union"s law against the national legislation.

So, if there are the substantial grounds for believing that execution of the investigative measure, indicated in the EIO, would result in a breach of the fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights, recognized in the Charter, the execution of the EIO should be refused[17].

5. Brexit and its consequence for cooperation in criminal matters

5.1. The regime applicable during the transition period

With the UK"s withdrawal from the EU, the modalities of its cooperation with other EU Member States in criminal matters are bound to change.

On 23 June 2016 the United Kingdom voted to leave the EU and on 29 March 2017 the United Kingdom triggered Article 50 of the Treaty on European Union, the withdrawal clause. From that moment on, the EU and the United Kingdom carried

[11] D. Dediu, European Investigation Order. Theoretical and practical aspects regarding the issuance procedure and execution., Pro Law Magazine, no. 3/2018, p. 36.

[12] High Court of Cassation and Justice, Decision no. 253 of 13 may 2019, www.scj.ro.

[13] Murphy, C. Cian, The European Evidence Warrant: Mutual Recognition and Mutual (Dis)Trust? Social Science Research Network, 2010, Vol. 3, p. 14.

[14] Decision, dated the 29th of January of the year 2013 – case C-396/11 Radu.

[15] Decision, dated the 26th of February of the year 2013 – case C-399/11 Melloni.

[16] Namavičius, J. European Union's fundamental rights in the context of criminal justice. Teisės problemos. 2015. No 3, p. 5-32.

[17] Navickaitė S., The European Investigation Order: Achievents and Challanges, "Social Transformations in Contemporary Society", 2016 (4), ISSN 2345-0126 (online).

out negotiations on a withdrawal agreement (WA), which was agreed upon on 17 October 2019, delaying the date for the United Kingdom to leave the EU until 31 January 2020.

From 1 February 2020 until 31 December 2020 the United Kingdom was in a transition period, as agreed in the WA. During this period the United Kingdom was no longer an EU Member State but remained a member of the single market and the customs union[18]. On 30 December 2020, the EU and the United Kingdom signed a trade and cooperation agreement (TCA)[19], which became provisionally applicable as of 1 January 2021.

In same areas of criminal justice cooperation, the UK"s withdrawal has a limited impact, provided that the requests for cooperation are made before the end of the transition period. This is for instance the case regarding ongoing judicial cooperation proceedings. According to Article 63 of the Withdrawal Agreement, only a series of instruments of judicial cooperation, continue to apply. As the UK had previously tailored its participation in pre-and post-Lisbon EU criminal law instruments, these instruments represent the main ones for judicial cooperation in criminal matters and are for instance included the Framework Decision on the EAW - or the EIO Directive. The same can be said regarding instruments on law enforcement cooperation and exchange of information, as the main ones will remain applicable (Art. 63). The UK authorities also retain the possibility to continue their participation in joint investigation teams, and to share and request information from Eurojust. The main change concerns the participation in new EU criminal law measures, in respect of which two options apply. For proposals amending, replacing or building upon measures in which the UK previously opted in, the UK has the possibility to opt in. However, for new proposals, the UK does not have the right to opt in, and it may only be invited to cooperate with the EU Member States under the modalities foreseen for third countries[20].

There are some Member States decided to make use of the possibility provided for in Article 185 of the Withdrawal Agreement. This provision allows Member States, due to reasons related to fundamental principles of their national law, to declare that, during the transition period, their national executing judicial authorities may refuse to surrender its nationals to the United Kingdom pursuant to an EAW. This refers to the constitutional limits regarding the extradition to nationals outside the EU, which is for instance foreseen in Germany, where the Constitution limits the extradition of nationals to situations in which the request comes from an EU Member State and/or an international court. Only three Member States, namely Germany, Austria and Slovenia, made such notification by January 28th, and the United Kingdom has now one month to notify whether its executing judicial authorities may refuse to surrender its nationals to those Members States[21].

5.2. Modalities of cooperation between the UK and the EU after transition period

After the end of the transition period on 31 December 2020, the following no longer apply to the UK are the European Investigation Order (EIO) and the 2000 Convention and related Protocol on Mutual Assistance in Criminal Matters.

Therefore, an EIO can no longer be issued to obtain evidence located in the UK or to obtain evidence located in EU member states for use in UK criminal investigations or proceedings.

However, in line with the terms of the Withdrawal Agreement, EIOs received before 11 pm on 31 December 2020 will be processed as EIO"s. Any EIO received after this time will be processed as a mutual legal assistance (MLA) request, unless the requesting state objects.

Requests for MLA between the member states of the EU and the UK are now based on cooperation through the Council of Europe 1959 Convention on Mutual Assistance in Criminal Matters and its two additional protocols, as supplemented by provisions agreed in Title VIII of the EU-UK Trade and Cooperation Agreement[22].

An European Investigation Order received after the end of the transition period will be processed as an MLA request and the requesting state will be advised of the same, unless they object.

6. Conclusions

Lately, in addition to the possibility of gathering evidence with the help of instruments of judicial cooperation in criminal matters, which represents horizontal cooperation that is in a continuous development, there have been new forms of vertical cooperation in criminal matters. These are new institution of the European Union, such as the European Anti-Fraud Office and Eurojust, which have a role in gathering evidence without them being considered authentic legal authorities, and last but not least the European Public Prosecutor"s Office.

According to article 12 of the Law no. 6/2021[23], the European Public Prosecutor"s Office is a judicial authority within the meaning of the provision of article

[18] Article 126 from WA.

[19] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (OJ L 444, 31.12.2020, p. 14–1462).

[20] Chloe Briere, Brexit and its consequence for cooperation in criminal matters, europeanlawblog.eu.

[21] Idem.

[22] Guidance, European Investigation Order, www.gov.uk/ guidance/european-investigation-orders-requests.

[23] Law no. 6 of February 18, 2021 on the establishment of measures for the implementation of Council Regulation (EU) 2017/1.939 of 12 October 2017 implementing a form of enhanced cooperation on the establishment European Public Prosecutor's Office (EPPO).

2 paragraph d of Law no. 302/2004 on international judicial cooperation in criminal matters, republished, and will be notified as such as at international legal instrument relevant in the field of international judicial assistance in criminal matters which Romania is a party, as well as in case where, according to the EPPO Regulation, delegates European prosecutors may carry out international judicial cooperation activities under the applicable treaties.

The criminal legislation of the Member States of the European Union, including our country, is in a continous adaption in relation to the directives of the European Union and the needs of the times.

Therefore, I consider that it is necessary to give great importance to the harmonization of European legislation in general and criminal law in particular.

This desideratum can be achieved by elaborating a European procedural code that includes commons rules for all member states on the one hand, and on the other hand for the situation in which are involved the third states.

Also, in the same order of ideas, the new institution of the European Union must be taken into account, respectively the European Prosecutor"s Office with specific competencies.

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- ECJ, C-399/11 Melloni, Judgement of 26 February 2013, ECLI:EU:C:2013:107.

THE RESPONSE OF THE SPANISH CRIMINAL LAW TO FORCED LABOUR PRACTICES IN TRANSNATIONAL CORPORATIONS

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Abstract

This paper aims at studying the criminal liability according to the Spanish law of transnational companies for imposing forced labour on citizens in other countries. The objective is to elucidate whether, under the Spanish law, it is possible to penalise Spanish companies that carry out these practices abroad, practices that are clearly harmful to fundamental rights. For criminal prosecution in Spain to be possible, certain requirements must be met. First, it is necessary that the Spanish Criminal Code acknowledges that legal persons can be held liable. This is a reality since year 2010, although there are a number of problems in attributing responsibility to the parent company for the conducts carried out abroad by the subsidiary. Second, it is required that the Spanish Criminal Code expressly provides that legal persons may be responsible for this type of offences (offences against workers" rights). This is not currently foreseen by the Spanish Criminal Code. Third, it is needed that the Spanish courts are able to prosecute extraterritoriality these criminal offences. This is not possible at the moment according to the current Spanish legislation. Given the situation described, this paper proposes the necessary legal reforms to make it possible to penalise Spanish companies that impose forced labour practices abroad since these practices entail violations of fundamental rights.

Keywords: *criminal responsibility, forced labour, slavery, Spanish Criminal Code, transnational corporations.*

1. Introduction

The aim of this paper is to study the criminal liability of transnational companies under Spanish law for the imposition of forced labour on citizens in other parts of the world[1]. It seeks to answer the question of whether, under Spanish law, criminal penalties can be imposed on Spanish companies that engage in these practices outside of the national borders. Three requirements must be met to make this possible. Firstly, the legal system must recognise that legal persons can be criminally liable. Unlike common law systems, the legal systems in continental Europe have not traditionally recognised this. However, several European and Latin American states have recently included this possibility in their legislation. In the case of Spain, the criminal liability of legal persons was incorporated into the Criminal Code through a reform carried out in 2010. Secondly, under Spanish law, the Criminal Code must expressly state which offences can be attributed to a legal person, as it is governed by a closed list (*numerus clausus*) principle. A major problem arises here, as the Spanish Criminal Code does not currently include violations of workers" rights in this list of offences. Thirdly, Spanish law would need to allow the extraterritorial prosecution of violations of workers" rights committed abroad by Spanish companies. While the current legislation does not allow for this, it makes it possible to prosecute human trafficking for exploitation (including labour exploitation). In other words, Spanish law is not totally foreign to the actual problem that exists at present, but it only provides a criminal law solution to a specific facet of this problem.

In light of the situation described above, this paper aims to offer a proposal *de lege ferenda*, for improving the law in the future, to make it possible to criminally sanction violations of workers" rights by Spanish companies in other countries under Spanish law. This is a response to a practice that is unfortunately common around the world today, as shown by the data that will be provided in the following section. With this proposal *de lege ferenda*, Spain would comply with the supranational mandates that have been developed in this area, such as, for example, the Guiding Principles on Business and Human Rights, adopted by the United Nations in 2011.

It is essential to ensure that national legal systems can address human rights violations such as forced labour and similar practices, as transnational corporations are not subject to international jurisdiction (e.g., the International Criminal Court). Therefore, it is for states to provide an effective response to this problem within their domestic laws[2]. In particular, the focus is on the home states of

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[1] This paper is one of the results of the research project "Hacia un modelo de justicia social: alternativas político-político criminales" ("Towards a model of social justice: criminal policy alternatives"), granted by the Ministry of Science, Innovation and Universities of the Government of Spain, refence RTI2018-095155-A-C22.

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transnational corporations since, as experts have pointed out, there may be corruption problems in the host state that allow multinationals to circumvent the rules and emerge unscathed from criminal proceedings if there is a prosecution[3].

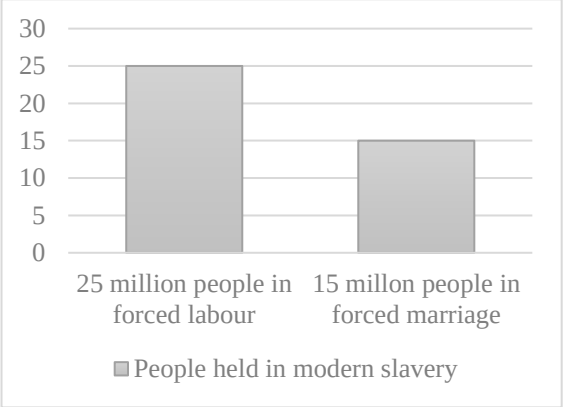
2. Conceptual framework. Some figures on forced labour worldwide

The term "modern slavery" has gained prominence in recent times. It has been used in numerous scientific studies[4], as well as in some national laws and regulations[5]. The International Labour Organisation (ILO) includes forced labour and forced marriage within this term. The term "forced labour" encompasses acts perpetrated either by the state or by the private sector, as well as the sexual exploitation of adults and children, whether in prostitution or pornography[6].

Forced labour was defined as early as 1930, in the ILO Forced Labour Convention (Convention No. 29). Article 2 defines this term as "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily". The Convention obliged ratifying States[7] to abolish all forms of forced labour (Article 1), a mandate that was repeated in the Abolition of Forced Labour Convention, adopted by the same organisation in 1957 (Convention No. 105)[8] and, more recently, in the Protocol to the Forced Labour Convention, 1930, adopted in 2014[9]. Slavery, however, has further implications. The 1926 Slavery Convention (as amended in 1953) defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" (Art. 1) and requires its abolition (Art. 2).

Despite the supranational mandate for the abolition of forced labour practices and slavery, which began almost a century ago, the figures are still devastating today, even though they may not reflect the "unrecorded figures" on this type of crime because many of these practices, by definition, remain hidden from society. At present, the ILO estimates that just over 40 million people in the world (that is, more than twice the population of Romania), are held in conditions of modern slavery (see Graphic 1). This means that 5.4 people in every 1000 are victims of this type of practice. One in four enslaved persons are under the age of 18. Available data also show that slavery has a significant gender bias (see Graphic 2): 71% of victims are either women or girls. They account for 99% of victims in the sex industry sector, and 58% in all other sectors[10].

Graphic 1. People held in modern slavery around the world



Source: International Labour Office, Walk Free Foundation and International Organization for Migration (2017). *Global Estimates of Modern Slavery*. Ginebra

The phenomenon of modern slavery could be considered to be eradicated in Spain, a country with a well-established democracy and rule of law. In fact, the Spanish Constitution, approved in 1978, did not declare slavery abolished or prohibited, probably because at that time it was believed that slavery no longer existed. However, the Global Slavery Index estimates that 105,000 people in Spain are subjected to modern slavery, which means that just over 2 people out of every 1000 experience slavery conditions in Spain[11].

Estudios jurídicos en homenaje al Prof. Dr. Dr. H.c. Juan Mª Terradillos Basoco (617-636). Valencia: Tirant lo Blanch, 2018; Pérez Cepeda, A.I. "Hacia el fin de la impunidad de las empresas transnacionales por violación de los Derechos Humanos". *Revista Penal*, 44, (2019): 141.

[3] Muñoz de Morales Romero, M. "Vías para la responsabilidad de las multinacionales por violaciones graves de Derechos humanos". *Política Criminal*, vol. 15, n. 30 (2020): 948.

[4] See, among others, Scarpa, S. *Trafficking in Human Beings. Modern Slavery*. New York: Oxford University Press, 2008.

[5] United Kingdom, *Modern Slavery Act*, 2015. Australia, *Modern Slavery Act*, 2018.

[6] International Labour Office, Walk Free Foundation & International Organization for Migration. *Global Estimates of Modern Slavery*. Geneva (2017), 17.

[7] Spain ratified the Convention on the 29th August 1932. Romania ratified it on the 28th May 1957.

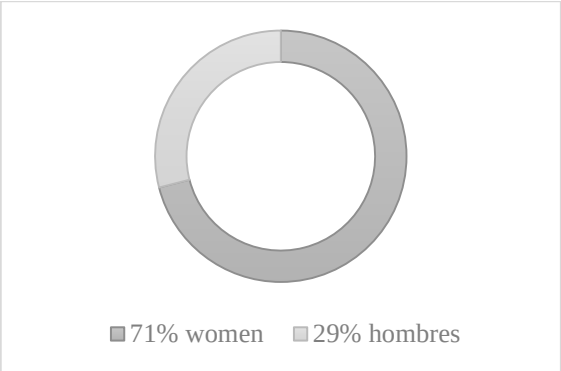
[8] Spain ratified the Convention on the 6th November 1967. Romania ratified it on the 3rd August 1998.

[9] Spain ratified the Convention on the 20th September 2017. Romania has not ratified it yet (last check 21.3.2021).

[10] International Labour Office, Walk Free Foundation & International Organization for Migration, *op. cit.*, 9-10.

[11] Walk Free Foundation. Global Slavery Index. 2018.

Graphic 2. Distribution of forced labour between men and women



Source: International Labour Office, Walk Free Foundation and International Organization for Migration (2017). *Global Estimates of Modern Slavery*. Ginebra

The above data show that slavery practices exist all over the world and that policies are needed to eliminate them. These policies include those that can be adopted in criminal law, although criminal law is certainly not the only way to combat these practices, and sometimes it is not even the most effective way. In fact, as early as 1930, the Forced Labour Convention set out that "the illegal exaction of forced or compulsory labour should be punishable as a penal offence" and penalties should be imposed by states accordingly (Article 25). The treatment of forced labour in Spanish criminal law is explained below.

3. Forced labour as a criminal offence in the Spanish Criminal Code

Title XV (Articles 311-318) of the Spanish Criminal Code regulates violations of workers" rights. It criminalises a wide range of behaviours such as imposing illegal conditions on a worker, simultaneously employing people without a work permit or without registering them with the Social Security authorities, certain behaviours related to labour discrimination, the infringement of health and safety rules that poses serious risk to workers" life or health, etc. (see Table 1). When these behaviours are less serious, they are sanctioned by administrative law[12], a less harming and stigmatising branch of law. Specifically, these sanctions are provided for in the *Law on Labour Offences and Sanctions*[13] outside of criminal law in Spain. However, recent decades have seen an expansion of punitive measures in various forms, both in Spain and elsewhere[14]. In particular, in the area of so-called criminal labour law, this expansion has been characterised by including in the punitive provisions some behaviours that are already sanctioned in non-criminal regulations. This poses a serious problem, because they have largely been incorporated without providing for any additional levels of harm, which would make it possible to distinguish an administrative infringement from a criminal offence.

Despite the fact that criminal labour law has undergone a notable expansion, there are certain truly serious conducts that are not expressly criminalised in the Spanish Criminal Code. These are slavery and forced labour practices. Admittedly, these practices would fall under Art. 311.1º of the Criminal Code, which reads as follows:

"Prison sentences of between 6 months and 6 years and a fine of between 6 and 12 months will be imposed on:

1. Those who, by means of deceit or abuse of a situation of need, impose working or Social Security conditions on the workers in their service that are detrimental to suppress or restrict the rights that are granted to them by law, collective bargaining agreements or individual contracts".

Even though these behaviours are covered by Article 311.1º above, the fact is that this provision includes wide-ranging practices in terms of their degree of harm to workers" rights. This is why the penalties are so broad (the prison sentence ranges from 6 months to 6 years). The inclusion of disparate violations in the same article means that the full extent of slavery and forced labour is little recognised, and legal provisions are not consistent with the situation of our time, as shown by the data in section 2 above. There is such lack of knowledge of the actual situation by the Spanish legislator that the concepts of slavery and forced labour are not even mentioned in these articles of the Criminal Code. Professor Terradillos has noted that there is an important paradox here, as the Criminal Code requires slavery and forced labour practices to be encompassed within more "minor" criminal offences such as the imposition of unlawful working conditions in Article 311.1º, and charged cumulatively with other offences such as offences against moral integrity, illegal detentions, and human trafficking for exploitation, among others. This allows for relatively long prison sentences being given, "but causes the boundaries of very serious crimes, namely, imposing slavery and forced labour, to be blurred"[15].

[12] Fuentes Osorio, J. L. "¿El legislador penal conoce la normativa sancionadora laboral? Superposición del ilícito penal y el administrativo-laboral. El ejemplo del tráfico ilegal de mano de obra". Estudios Penales y Criminológicos, vol. XXVI (2016): 553-603, passim.

[13] Passed on the 4th August 2000.

[14] Silva Sánchez, J.M. La expansión del Derecho penal. Aspectos de Política criminal en las sociedades postindustriales. Montevideo – Buenos Aires: BdeF, 2006, passim.

[15] Terradillos Basoco, J.M. Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea. Barcelona: J.M. Bosch Editor, 2020, 140.

Table 1. Violations of workers" rights in the Spanish Criminal Code

Art. 311.1º	Imposing unlawful conditions
Art. 311.2º	Simultaneously employing a number of workers without registering them with the social security system or without a work permit
Art. 311.1º	Maintaining unlawful conditions
Art. 311.4º	Engaging in the above behaviours resorting to violence or intimidation
Art. 311bis	Repeated hiring of foreign nationals without work permits/Hiring of minors without work permits
Art. 312.1	Workers" trafficking (transfer, placement)
Art. 312.2 (I)	Recruiting or luring people out of employment by offering misleading or false employment or working conditions
Art. 312.2. (II)	Employing foreign nationals without a work permit under conditions that impair, suppress, or restrict rights
Art. 313	Promoting migration by simulating a contract or placement or similar deception
Art. 314	Engaging in serious discrimination and failing to restore equality under the law following a formal notice or administrative sanction
Art. 315	Preventing or limiting the rights to organise a union and take industrial action/Coercing to go on strike
Art. 316 - 318	(Intentional and reckless) violations of health and safety regulations

Source: Spanish Criminal Code

In addition to this situation, which makes it impossible to have an adequate appreciation of slavery or forced labour practices, there is another inconsistency in the Spanish Criminal Code. In 2010, human trafficking was incorporated into Spanish legislation as a separate criminal offence, pursuant to the applicable supranational regulations[39]. The new offence was inserted into Art. 177bis of the Criminal Code. It defines the human trafficking in the same way as supranational regulations do, including the well-known three elements:

- the conducts (inducing, transporting, etc.),
- the means (violence, intimidation, deception, etc.)
- and the purposes (exploitation of various kinds).

These purposes literally include "imposing forced labour or services, slavery or practices similar to slavery, servitude or begging" (Art. 177bis.1.a). This reference is incongruous insofar as these practices do not appear as such in any other provision of the Criminal Code. They could be included in the scope of Art. 311.1, but as mentioned above, it also includes other types of less severe conduct.

The crime against humanity was incorporated into the Spanish Criminal Code in 2003, as required by the Rome Statute of the International Criminal Court. It also punishes subjecting a person to slavery or keeping them in slavery, provided that the acts are perpetrated "as part of a widespread or systematic attack against the civilian population or a part thereof" (Art. 607bis of the Criminal Code). The same provision also sets out a definition of slavery as "the situation of a person over whom another person exercises, albeit de facto, all or some of the attributes of the right of ownership, such as buying, selling, lending, or exchanging such person". The same inconsistency is found here, since slavery as such is not criminalised elsewhere in the Spanish Criminal Code.

In view of the above, there is a certain lack of coherence on these matters in the provisions of the

[39] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000); Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Official Journal L 101, 15 March 2011). See Pérez Cepeda, A. I. & Benito Sánchez, D. *Trafficking in Human Beings. A Comparative Study of the International Legal Documents.* Groningen/Amsterdam: Europa Law Publishing, 2014.

Spanish Criminal Code. It is therefore necessary to incorporate the offences of subjection to slavery and forced labour separately into the Criminal Code. This would be the starting point for holding Spanish companies accountable for such practices.

4. Corporate criminal liability for forced labour practices under Spanish law: unfinished business

Organic Law 5/2010 of 22 June 2010 introduced the criminal liability of legal persons into Spanish criminal law, in line with other legal systems and supranational requirements, especially those of the Organisation for Economic Co-operation and Development. Since the entry into force of the Organic Law, companies can be held liable for certain criminal offences if the requirements in Art. 31bis of the Criminal Code are met. Specifically, Art. 31bis encompasses two events:

1. A legal person can be criminally liable when the offence is committed by its legal representative or a person who individually or collectively has decision-making, organisational or controlling authority.
2. A legal person can be liable when the offence is committed by a person under the authority of the aforementioned.

In both cases, the offence must be committed in the name or on behalf of the entity, in other words, within the scope of duties of the subject in question, and it must be carried out for the direct or indirect benefit of the company. In the second case, a further requirement is that the offence must be enabled by a serious breach of the duties of supervision, monitoring and control by the persons referred to in point (1), considering the circumstances of the case. If the legal person is found guilty of a criminal offence, the applicable penalties are those mentioned in Table 2.

Table 2. Penalties applicable to legal persons under Spanish law

Art. 33.7 Spanish Criminal Code	a) Fine by quotas or proportional
	b) Dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity or act in any way in legal transactions, or to carry out any kind of activity, even if lawful.
	c) Suspension of its activities for a term that may not exceed five years.
	d) Closure of its premises and establishments for a term that may not exceed for five years.
	e) Prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed fifteen years.
	f) Barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years
	g) Judicial intervention to safeguard the rights of workers or creditors for the time deemed necessary, which may not exceed five years.

Source: Spanish Criminal Code

Having explained the cases of attribution of liability to legal persons, it should also be borne in mind that legal persons cannot be liable for *any* of the offences provided for in the Spanish Criminal Code, but only for a closed list of offences (*numerus clausus*), which is shown in Table 3. It is therefore necessary to ensure that the Criminal Code expressly states that the legal person can be liable for the offence in question. This list of offences is essentially composed of so-called white-collar crimes, with one remarkable exception: violations of workers" rights, which do not appear in this list. This has been criticised by the doctrine[40] because the context in which workers" rights can be violated is typically within a corporation. Moreover, violating these rights undoubtedly benefits

[40] See, among others, Agustina Sanllehí, J.R. Delitos contra los derechos de los trabajadores. In *Lecciones de Derecho penal económico y de la empresa. Parte general y especial*, directed by J.M. Silva Sánchez.Barcelona: Atelier, 2020, 415; Gil Nobajas, S. Protección penal del trabajador y responsabilidad penal de personas jurídicas. In *Direitos Humanos e Mediaçao*. Carviçais. Lema d'Origem, 2019, 83; Hortal Ibarra, J.C. Delitos contra los derechos de los trabajadores. In *Manual de Derecho penal económico y de la empresa. Parte general y especial*, directed by M. Corcoy Bidasolo y V. Gómez Martín (511-553). Valencia: Tirant lo Blanch, 2016.

the company, which is a requirement for the attribution of criminal liability to a legal person under the Spanish system, as mentioned above.

In summary, under Spanish law, companies cannot be held liable for criminal violations of workers" rights. There is an urgent need to reform the Criminal Code to ensure that criminal liability can be attributed to legal persons for this type of offences. It would be sufficient to insert a final paragraph to Art. 318 specifying this.

In addition to the above, further reform of the Criminal Code would be needed whereby it would expressly recognise that the parent company is responsible for what the subsidiary company does in terms of violations of workers" rights in the territory where it operates[41]. Under the current regulations, Spanish criminal law could not be applied to a subsidiary company whose registered office is in a different state and which has a different legal personality, as none of the principles for the application of Spanish criminal law on a territorial basis would be met, as will be discussed in the following section. To solve this, some authors[42] have proposed considering both parent and subsidiary as a single economic unit, as is already the case for the purposes of competition law penalties in the European Union. Ever since the Judgment of the Court of Justice of the European Union of 10 September 2009 was rendered (case C-97/08 for, Akzo Nobel and another v. Commission), where the subsidiary was wholly owned by its parent company, it has been possible to attribute liability to parent companies for infringements of antitrust rules committed by their subsidiaries. In other words, priority has been given to the financial situation rather than to the legal avenue to solve the problem.

Table 3. Offences attributable to a legal person under the Spanish Criminal Code

Art. 156 bis (trafficking in human organs),
Art. 177.7 bis (trafficking in human beings),
Art. 189 bis (child pornography),
Art. 197 quinquies (discovery and revelation of secrets),
Art. 251 bis (swindling),
Art. 258 ter (foiled executive proceeding),
Art. 261 bis (punishable insolvency),
Art. 264 quater (damages on informatics data and programs),
Art. 288 (offences against intellectual and industrial property, the market and consumers),
Art. 302.2 (money laundering),
Art. 304 bis (illegal funding of political parties),
Art. 310 bis (fraud),
Art. 318 bis.5 (offences against the rights of foreign citizens),
Art. 319.4 (offences against the organisation of the territory),
Art. 328 (environmental crime),
Art. 343.3 (offences related to nuclear energy and ionising radiations),
Art. 348.3 (offences of risk caused by explosives),
Art. 366 (offences against public health),
Art. 369 bis (drug trafficking),
Art. 386.5 (forgery of currency),
Art. 399 bis.1 (forgery of credit cards, debit cards and travellers" cheques),
Art. 427 bis (bribery),
Art. 430 (trafficking in influence),
Art. 435.5 (embezzlement),
Art. 510 bis (hate incitement),
Art. 580 bis (terrorisim)

Source: Spanish Criminal Code

[41] Pérez Cepeda, A.I. "Hacia el fin de la impunidad…", *op. cit*., 142. The criminal liability of parent companies for failure to prevent crimes committed by their subsidiaries is a topic gaining attention at the international level with respect to other areas such as anti-bribery policies. See Dell, G. *Exporting Corruption 2020: Assessing Enforcement of the OECD Anti-Bribery Convention*. Transparency International, 2020, 25-26.

[42] Nieto Martín, A. Derecho penal de la empresa y económico europeo e internacional. In *Derecho penal económico y de la empresa*, coauthors De la Mata Barranco, Dopico Gómez-Aller, Lascuraín Sánchez, Nieto Martín. Madrid: Dykinson, 2018, 82-83; Pérez Cepeda, A.I. "Hacia el fin de la impunidad…", *op. cit.*, 142, footnote 81.

5. The application of Spanish criminal law to offences committed by Spanish legal persons operating in other countries

The classic principle of application of a state"s criminal law is the principle of territoriality, which means that the courts of that state have jurisdiction to prosecute offences committed within its territory. Even when this principle was originally applied in modern liberal states it had some exceptions, such as, for example, crimes committed by a state"s national in another state (active personality principle). Additional principles were developed over time to address new situations such as transnational crimes (e.g., piracy) and crimes against the international community (e.g., genocide), in particular, the principle of universal jurisdiction.

In Spanish law, these matters are governed by Article 23 of the *Organic Law of the Judiciary* (hereinafter LOPJ)[43]. Under current regulations, even if violations of workers" rights were included in the list of offences for which a legal person can be held liable, it would not be possible to prosecute that legal person if the offence had been perpetrated in a different state, as is the case discussed in this paper regarding the imposition of forced labour on workers in a state other than Spain by Spanish companies. This is so because the principle of universal jurisdiction contained in Article 23.4 of the LOPJ is only applicable to a closed list of offences, which does not include violations of workers" rights.

In view of the above, in order for Spanish courts to be able to prosecute and eventually convict a Spanish company for violations of workers" rights perpetrated in a foreign territory, it would be necessary to extend the jurisdiction of Spanish courts[44]. Specifically, the legislative should amend Article 23.4 of the LOPJ that would incorporate the violations of workers" rights into this list of offences. Similarly to the provisions in paragraph m) of Article 23.4 of the LOPJ with respect to human trafficking, it should be noted that Spanish courts have jurisdiction to hear criminal cases related to offences committed by both Spaniards and non-Spaniards outside the national territory that could be classified as violations of workers" rights provided that "the proceedings are directed against a legal person, company, organisation, group or any other type of entity or group of persons whose headquarters or registered office are in Spain".

6. Conclusions

It can be concluded from the above that current Spanish legislation does not allow for criminal sanctions to be imposed on Spanish companies that engage in violations of workers" rights in other states. This means that these corporations go unscathed after committing serious human rights violations, such as the imposition of forced labour. This situation contradicts the supranational mandates that have been developed in recent years.

The lack of a supranational jurisdiction that could be responsible for addressing these serious human rights violations perpetrated by transnational corporations makes it necessary for states to take action in their domestic law. In the case of Spain, a number of legislative reforms would be necessary.

- Firstly, slavery and forced labour practices should be given an independent treatment in the Criminal Code, so as to enable the imposition of penalties that are proportional to the gravity of the offenders" crimes.
- Secondly, this type of offence should be expressly included in the list of offences that can be attributed to a legal person, since under Spanish criminal law, legal persons cannot be held liable for all the offences contained in the Criminal Code, but only for those expressly indicated.
- Thirdly, it would be necessary to consider that the Spanish parent company and its subsidiary form a single economic unit and therefore, the acts committed by the subsidiary abroad are attributable to the parent company, having fulfilled the rest of the requirements of Article 31bis of the Criminal Code.
- Finally, it would be necessary to extend the jurisdiction of the Spanish courts, regulated in the *Organic Law of the Judiciary*, to allow for violations of workers" rights committed by Spanish legal persons abroad to be prosecuted and criminal penalties imposed, as is the case for human trafficking crimes.

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[43] Passed on the 1st July 1985.
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IS THERE ANY CONNECTION BETWEEN THE COMMANDAMENTS GIVEN BY GOD AND THE CRIMINAL LAW?

Ruxandra-Elena BRÂNCUȘ (TECOI)*

Abstract

Religion and law are two intertwining fields that aim at the supreme good of man and justice, both branches having common principles that often end up intersecting. In fact, from my point of view, law and religion are two areas that complement each other because law helps us guide in real life here on earth and religion leads us to discover the ideal of eternal life. We will notice that, in terms of religion, the first laws were formed; the first punishments and that all these took place from here. Looking at what is written in the Holy Scripture (the Bible) which presents man in the image and likeness of God, creator of all seen and unseen things.

Keywords: *religion, punishment, criminal law, Bible, God and human*.

1. Religion references

The first man was Adam, whom he placed in the Garden of Eden to work and guard.

The Lord God commanded Adam: "You can eat from any tree in the garden, but from the tree of the knowledge of good and evil you must not eat, because on the day you eat, you will surely die."

Thus God places him in space (the Garden of Eden), and then gives him the first law, he presents his rights and obligations (to work and guard them) and at the same time he presents the consequences that can occur in case of disobedience (not to eat from the tree of the knowledge of good and evil), namely the death penalty (you will surely die), which is the first and the harshest punishment that religion introduces to us.

Adam infringed God"s command and, as a result of disobedience, all his rights (eternal life) were taken away and he served his sentence. Following the above, we can observe that the first punishment attested from a religious point of view was the capital punishment.

We thus consider that the first law and the first punishment were created by God.

These laws were considered just because they came from the divine, creative force of man who possesses the supreme good. The death penalty means killing a person for serious crimes, governed by law, crimes for which he has been found guilty.

This is the harshest form of repression.

2. The begins of criminal law

If we look at the world and the roots of criminal law, we will see that it emerged from the time of the Sumerians, what is known today as Iraq, when they compiled the oldest but also the best known set of criminal laws. The code was created around the years 2100-2050 BC and it seems that, ever since, man needed a distinction between what is good and evil in terms of the actions and not only to distinguish between criminal and civil law but some clear rules to be established, known and respected by everyone for the common good of the society at that time.

Thus, the criminal law regulated since then the cases that were directed against a person or against the state.

One of the first documents attesting to criminal law in Europe appears after the year 1066 when the duke of Normandy William the Conqueror has invaded England. The European legislation begins to judge offenders in a court room in the XVIIth century. Later, the English government came up with a new concept denoted as common law and it was covering the problems in the civil right and from the criminal right and theoretically this concept included the two rights systems.

This innovative system was to come to fruition, even to America, following Christopher Columbus" voyage in 1492 when Europe began to establish colonies in America as a result, so as a result of these colonies British law ruled North America until the outbreak of the American Revolution. At the end of the war, America became an independent nation that adopted its own constitution, the Constitution of the United States, under the Supreme Law of the country.

And forth, the American law system borrowed from the English legislation, the common right which rules America.

In Romania, the first penal code has appeared in 1864 on the 30th of October and was applied on the 1st of May in 1865, named as: (Cuza"s Code) and provided sanctions for the corrupt public workers which aside from imprisonment they were also losing their job for the rest of their lives. The penal code has also constituted one of the reforms of Alexandru Ioan Cuza.

In 1937 The Penal Code of Carol the 2nd is adopted up until 1969, this was a new penal code which brings a lot of new elements to the old existing one:

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- for the first time, education for underage minors is introduced

- wrongdoing is split up into three: crimes, offenses, and contraventions.

- another differentiation from the old system is that the punishments were more severe.

With the change of the governing regime and the transition to socialist Romania, a series of changes took place, including the appearance of a new penal code in 1969, which define the notion of "crime" for the first time in Romania (the act of social danger, committed with guilt).

Other novelty elements that have been introduced are:

- plurality of crimes

- causes that remove the criminal character of the deed

This penal code underwent numerous changes, especially after 1989, but remained in force until 2014.

The Criminal Code governs the laws in which the incriminated deeds are described, the commission of the deeds (the only basis of criminal liability) described by the code attracts criminal liability and the punishment of the person who committed the crime.

According to the current criminal code, criminal law sanctions are

- punishments;

- safety measures;

- educational measures.

Punishments according to the Romanian penal code are of several types depending on the severity of the restriction of rights. Punishments are classified as follows: the main punishments, the accessory punishments and the complementary punishments (banning the exercise of certain rights, military degradation, publication of the sentence decision, dissolution of the legal person, closure of some working points of the legal person, banning the participation in the public procurement procedures, the placement under judicial oversight, the posting or publication of the conviction decision).

In Romania, the death penalty had been abolished since the time of Alexandru Ioan Cuza in 1865[1], being the first European country to abolish this punishment, but, in 1945 during the Second World War the death penalty was reintroduced by specific decrees given by the regime.

The death penalty was abolished by law decree no. 6 of January 7th, 1990[2], abolition reconfirmed by the Romanian Constitution in 1991.

According to BBC NEWS[3], there are 56 countries that keep the law on the death penalty worldwide, 28 countries still have this law in force but no one has been executed for at least 10 years, 8 countries allow the death penalty only for serious crimes in exceptional circumstances, such as those committed in time of war and in 106 countries the law does not allow the death penalty.

About 60% of the world"s population lives in countries where capital punishment still exists, countries such as Iran, Saudi Arabia, Indonesia, Egypt, Algeria, Libya. Belarus is the only country in Europe that has not abolished the death penalty.

Since 1991, about 300 death sentences have been implemented according to MediaFax.

3. God"s law

Another very important piece of evidence regarding the connection between the institution of law and religion is the DECALOGUE.

After man fell into sin, God considered the need of certain rules that would govern human behavior, rules that have accompanied people from then until now, which determined some of them not to make any mistakes, to lead a righteous life and even to have moral support.

From a religious point of view, the observance of God"s commandments represented the guarantee of eternal life. They have had an overwhelming importance in the evolution of the society as I am convinced that in ancient times and for a very long time most people knew and were guided by the evangelical precepts as very few people knew the laws.

At the time, the only person who could guide them was the given priest because the majority of the population was illiterate, not being able to document themselves from a legislative point of view.

The 10 commandments were written by God on two stone tablets and they were given to Moses. Although numerous historical documents attest to the fact that at that time the Jews had not invented the alphabet, many religious and historical sources support the theory that the 10 such commandments were dictated by God himself and written by Moses. Moses was chosen by God to bring the Jews out of Egypt and take them to the Promised Land, since leaving Egypt, Moses faced a multitude of problems on the part of the Jews who did not follow the rules imposed by God suffering in this way and making superhuman efforts to bring them on the right path every time. Every time he wanted to convey the decisions that God made, he called him to a certain place and he listened to what God said.

The 10 commandments written by Moses are[4]:

1. Thou shalt have no other Gods before me (You shall have no other Gods before me);

[1] https://adevarul.ro/locale/iasi/codul-penal-drastic-cuza-romaniei-moderne-facut-curatenie-sistemul-public-judecatorii-corupti-primeau-inchisoare-viata-1_55e0179cf5eaafab2cff2e42/index.html, last consulted on 12 May 2021.

[2] M. Of. no. 4 from 8 January 1990.

[3] https://www.bbc.com/news/world-45835584, last consulted on 12 May 2021.

[4] See, for example, *https://ro.wikipedia.org/wiki/Cele_zece_porunci*, last consulted on 12 May 2021.

2. Thou shalt not make unto thee any graven image (You shall not make unto you any graven image);

3. Thou shalt not take the name of the Lord thy God in vain (You shall not take the name of the Lord thy God in vain);

4. Remember the Sabbath day and keep it holy;

5. Honour thy father and thy mother (Honour your father and your mother);

6. Thou shalt not kill (You shall not kill);

7. Thou shalt not commit adultery (You shall not commit adultery);

8. Thou shalt not steal (You shall not steal);

9. Thou shalt not bear false witness against thy neighbour (You shall not bear false witness against your neighbour):

10.Thou shalt not covet anything that is thy neighbour"s (You shall not covet anything that is your neighbour"s).

4. The connection between DECALOGUE and Criminal Law

We can see that some of the commandments in the Decalogue are found in the Criminal Code[5] and they describe exactly its main titles.

We find the commandment "You shall not kill" in the first title "Crimes against the person", chapter I "Crimes against life" all the crimes of this chapter refer to the person"s life, the most precious right that a man has, the right to life, also stipulated in the Romanian Constitution[6].

Looking at the religious side, life is considered to be given by God and only God is allowed to take it.

The crime of murder (art. 188 of (1) the murder of a person is punishable by imprisonment from 10 to 20 years and the prohibition of the exercise of certain rights.) It is one of the most severely punished crimes by the criminal code for all these crimes of murder, qualified murder ((1) The murder committed in any of the circumstances together: a) with premeditation; b) material of interest; c) to evade or to evade another from being held criminally liable or from the execution of a sentence; d) to facilitate or conceal the commission of another crime; e) by a person who has previously committed a crime of murder or an attempt at the crime of murder; f) on two or more people; g) on a pregnant woman;

h) By cruelty, it shall be punished by life imprisonment or imprisonment from 15 to 25 years and the prohibition of the exercise of certain rights.

(2) the attempt is punishable), the manslaughter (Art. 192: (1) The manslaughter of a person shall be punished by imprisonment from one to 5 years.

(2) The manslaughter as a result of the non-observance of the legal provisions or of the precautions for the exercise of a profession or trade or for the performance of a certain activity shall be punished with imprisonment from 2 to 7 years. When the violation of the legal provisions or of the precautions constitutes in itself an offense, the rules regarding the competition of offenses apply.

(3) If, by the committed deed the death of two or more persons was caused, the special limits of the punishment provided in par. (1) and par. (2) shall be increased by half.), Determination or facilitation of suicide, hitting or other acts of violence (Art.193: Hitting or other acts of violence (1) Hitting or any acts of violence causing physical suffering shall be punished by imprisonment from 3 months to two years or a fine.(2) The act of causing traumatic injuries or affecting the health of a person, the severity of which is assessed by days of medical care of not more than 90 days, shall be punished by imprisonment from 6 months to 5 years or a fine (3) The criminal action shall be initiated upon the prior complaint of the injured person.

The crime of murder is one of the most punishable offenses in the criminal code because all these crimes of murder: first degree murder, manslaughter, hitting or other acts of violence, personal injury, ill-treatment of minors, domestic violence all these crimes protect the physical integrity of a person.

In a brief conclusion of the first applied analysis regarding the similarity between the Criminal Code and the Decalogue, it is obvious that human life is a fundamental right protected since ancient times and coincidentally or not, the command given by God has come to be developed, analyzed and applied in all forms of life-threatening crimes and punished depending on the age of the injured person: children, pregnant women. In the case of these categories of people the punishments are much more severe reaching up to 30 years in a maximum security prison.

Analyzing further the commandments from the Decalogue, we find in "Title II" of "Crimes against property" the commandment number 7 "You shall not steal". This phrase includes all forms of crimes derived from it, such as: robbery, (Art. 228 of (1) Taking a movable property from the possession or detention of another, without his consent, in order to misappropriate it, is punishable by imprisonment from 6 months to 3 years or a fine.

(2) The deed also constitutes theft if the property belongs in whole or in part to the perpetrator, but at the time of committing the deed, the property was in the legitimate possession or detention of another person.

(3) Documents, electricity, as well as any other kind of energy that has economic value are considered movable property.

(Art. 229 Qualified theft (1) Theft committed in the following circumstances:

a) in a means of public transport;

[5] *http://legislatie.just.ro/Public/DetaliiDocument/109855*, last consulted on 12 May 2021.

[6] *https://www.constitutia.ro*, last consulted on 12 May 2021.

b) during the night;

c) by a disguised, masked or cross-dresser person

d) by burglary, climbing or by the unlawful use of a real key or a false key;

e) by decommissioning the alarm or surveillance system,

shall be punished by imprisonment from one to five years.

(2) If the theft was committed in the following circumstances:

a) on an asset that is part of the cultural heritage;

b) by trespassing or violation of professional headquarters;

c) by a person carrying a weapon,

the punishment is imprisonment from 2 to 7 years.

(3) Theft regarding the following categories of goods:

a) crude oil, gasoline, condensate, liquid ethane, gasoline, diesel, other petroleum products or natural gas from pipelines, warehouses, tanks or tank cars;

b) components of irrigation systems;

c) components of electrical networks;

d) a device or a signaling, alarming or alerting system in case of fire or other public emergency situations

e) a means of transport or any other means of intervention in case of fire, railway, road, naval or air accidents or in case of disaster;

f) safety and directing installations for railway, road, naval, air traffic and their components, as well as components of the related means of transport;

g) goods by which the safety of traffic and persons on public roads is endangered;

h) telecommunication, radio communication cables, lines, equipment and installations, as well as communication components, is punishable by imprisonment from 3 to 10 years.

Then, we can observe an element that includes both crimes against the person and those against the property, namely Chapter II:" Robbery and piracy".

Robbery is a complex crime that involves committing theft by violence or by keeping stolen property, the perpetrator having as a main purpose to commit theft. The violence and threats are only the means by which he achieves his purpose, which is why this crime is noted in the chapter that protects the person"s property and not in the chapter that protects the person"s life, because the difference between the two is the purpose for which, in the mind of the offender, it triggered both the intellectual and volitional act that led to the commission of the crime.

The legislator incorporated the two fundamental rights in the constitutive element of a single crime.

You shall not bear false witness against your neighbor. This commandment is generally valid for several branches of law not only the criminal but also the civil and administrative in all cases in which witnesses are heard (the act of the perpetrator who, in a criminal case, civil or in any other procedure in which witnesses are heard).

The false testimony is found in article 273, the difference between the commandment and the regulation in the code could be that it does not refer to any person but only to the human neighbor.

There is a risk that in the usual language this phrase will be misinterpreted, namely that there should be a certain degree of kinship between the perpetrator and the one against whom the false witness testifies, but God does not refer to a particular person but to any resemblance, because, before God we are all His sons. The Criminal Code also incriminates the determination of a person to testify falsely, as it extended the simple command to the one who tries to influence a person negatively and to determine him to lie, thus misleading the authorities.

The commandments in the Decalogue cover other areas of law such as family law, such as the commandment 7 " You shall not commit adultery" according to the dictionary definition, means the person who violates the proper limits of his morality. In this situation we find two institutions, that of law, which refers to Family Law, and in religion, the Institution of Marriage, the Sacrament of Marriage.

The sacrament of marriage, as we find in the Holy Scripture, represents first of all the spiritual union between man and woman (not only bodily) because before God the human soul and his good deeds matter, and this sacrament is fulfilled in the birth of babies. Both institutions want to protect the family to remind once again that the family primarily presupposes love according to religion and respect according to law, these two characteristics, that a family must have, help the peace and quiet of a home and the longevity of a family.

5. Conclusions

In conclusion of what is stated throughout this article, I believe that God has an essential role in human life, especially now in the modern world, when people are stress-tested, trials and many more temptations. We live in the century of speed and we find that everything happens with an almost imperceptible rapidity around us, so nowadays even more we must turn our attention to the perceptions given by God, because I am personally convinced that if man has with him The Decalogue and respects God"s word, he can face trials, he can live in communion with those around him and he can have a quiet life.

Before everything we read and helps us to develop intellectually, we must also lean towards the spiritual life and take care of our souls.

"LOVE MUST COME BEFORE REASON"

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TAX EVASION. A CRIME THAT REQUIRES A MATERIAL RESULT OR ONLY A STATE OF DANGER?

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Abstract

Although tax evasion has been incriminated as a crime in Romania for almost 100 years, in the doctrine and judicial practice there are still presented contradictory points of view regarding the requirement result as constituent element of crime. The present study aims to carry out an in-depth analysis that provides an answer to the question of whether the crime of tax evasion require a material result or only a state of danger.

The study is divided into three sections, starts with an overview of the concept of tax evasion, of the line between lawful and illegal evasion and the history of legislation regarding tax evasion.

The next section presents various concepts and theories about the material result or the state of danger as constituent elements of crime, presented in national and international doctrine. The section continues with a presentation of the consequences of the classification of offenses, by reference to the result they produce.

In the last part of the study is presented an analysis of all variants of tax evasion, based on the theories and concepts set out in previous sections, which concludes that the tax fraud, apparently a crime that require a material result, is in fact a crime that require only a state of danger.

Keywords: *tax evasion, tax fraud, white-collar crimes, crime result, history of legislation regarding tax evasion, theories regarding the result of crime, concept of tax evasion, types of tax evasion crime.*

1. General considerations on tax evasion

1.1. The concept of tax evasion

In Romania, one of the main causes for economic problems is the size of the underground economy, representing a significant percentage of the gross domestic product.

The large size of the underground economy can be explained by the weak reaction of the authorities, and the evasion of taxes is caused by the pressure of taxation and by the fluctuation of law in the field of taxation.

The word "evasion" comes from the Latin "evasio, -onis" and from the French word "évasion", referring to the act of avoidance or evasion.

In a broad sense, the concept of tax evasion involves evading the fulfilment of one"s tax obligations, and it has either legal or illegal forms.

According to the literature[1], "both forms represent components of tax evasion, the evasion punishable by law, the fraudulent evasion is the illicit tax evasion; the legal tax avoidance is only a way of exploiting some "loopholes" in the law. Theoretically, the delimitation of the two seems simple; in practice there is a thin line between the two, an area so-called "avoision" (avoidance + evasion), which means the ability of an individual to manage his business in the sense of minimising their taxes, but doing it in an unclear way, a way in which it is difficult to distinguish between tax evasion and tax avoidance".

The modality in which authorities understood to combat this phenomenon varied from fiscal amnesties to administrative penalties/sanctions, the repressive measures culminating in criminal penalties/sanctions with high punishment terms and the adoption of a strategy to combat tax evasion, a matter of national security, by C.S.A.T. Decision from 69/2010.[2]

1.2. History of tax evasion incriminations

The crime of tax fraud was incriminated for the first time in the form of a closed form crime[3] in Romania by Law no. 661/1923 for the unification of direct contributions and for the establishment of the global income tax, being defined as any evasion from the payment of the tax, and was punished with a fine and a corrective punishment from 6 months to one year. Subsequently, in the content of Law no. 88/1933 for the unification of direct contributions and for the establishment of the global income tax, the term tax evasion was used for the first time, and in chapter VI were regulated measures against tax evasion and

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[1] Olteanu Doina-Simona, Pascu Loredana-Mihaela, *Evaziunea fiscală şi corupţia – fenomene complexe ale societăţii româneşti*, WorkingPapes *ABC-ul lumii financiare*, nr. 5/2017 la adresa *http://www.fin.ase.ro/ABC/fisiere/ABC5_2017/18.pdf*.

[2] By CSAT Decision no. 69/2010 on preventing and combating tax evasion, *not published in the Official Gazette*, the Interinstitutional Working Group for preventing and combating tax evasion was set up at a strategic level.

[3] Acording to F. Streteanu, D. Nițu, *Drept penal. Partea generală*, vol. I, Ed. Universul Juridic, București, 2014, p. 282, in the case of closed form crimes, the legislator establishes a certain form, out of the possible actions likely to infringe the protected value, that the typical action must take, and in the case of free form crimes it is sufficient that the action be "causal" in relation to the expected result.

sanctions, which were divided into simple and aggravated administrative offences.

During the communist era, by Decree no. 202/1953 for the amendment of the Criminal Code of the Romanian People"s Republic, the non-payment of taxes or fees by those who have the possibility of payment, or evading such payment by concealing the excisable or taxable object or source, or destroying mandatory records were incriminated as tax offenses and punishable by correctional imprisonment for up to one year.

After the fall of the communist regime, the first regulation of tax evasion in the criminal area was made by Law no. 87/1994, when different forms of the crime were incriminated, respectively evading the payment of taxes, fees and contributions due to the state by not registering activities, by not declaring the taxable income, by concealing the taxable object or source, and by not registering the revenues in the accounting documents, or by registering expenses not based on taxable operations.

At present, Law no. 241/2005 is the seat in the field of combating and sanctioning tax evasion. The crime of tax evasion is regulated as a crime with alternative content, so that committing several different forms provided in the criminalisation norm does not generate concurrent offences and does not affect the unity of the crime.[4]

In order to carry out a scientific analysis of the immediate result in the case of the crime of tax evasion, it is necessary to first make an analysis of the immediate result of the crime requiring a material result and the crime requiring a state of danger / the crime of danger and the result crime.

2. Concepts and theories on the immediate result of crimes

2.1. Establishing the immediate result of the crime as a constitutive element

In the Italian criminal doctrine of the early 1970s there were two traditional views based on which the result/ prosecution of the crime was established. "According to the naturalistic view, the result/consequence is a natural effect of human behaviour, criminally relevant and linked to it through causation. Thus, the result/consequence is characterised by two elements: it is a modification of the external world and it is provided by the criminal law as a constitutive or aggravating element of the crime.

It follows that for a consequence of an action or inaction to be the immediate result, it must meet two conditions: it should change the external reality and it should be provided by the criminal law. The immediate result/consequence is a concept delimited by the action or inaction as an element of the crime, by delineating from the same temporally and spatially.

According to this view, the result/consequence does not exist in the case of any crime, but only in the case of those acts provided by the criminal law which have the ability to change the external reality, the change being susceptible to being perceived and evaluated. Starting from this assumption, the crimes can be classified as result crimes, in which case there is a result in the naturalistic sense, and pure conduct crimes in which case this result is missing.

The legal concept defines the result as an infringement of the interest protected by the criminal norm, materialised in the damage or endangerment of the protected social value. As the crime necessarily presupposes an infringement of the legal object, this distinction does not justify the distinction between conduct crimes and result crimes, because the result exists in the case of both categories of crimes"[5].

This same views have been maintained by the modern Italian criminal doctrine[6], but slightly nuanced. In the naturalistic view, the immediate result is the result or consequence of the action or inaction provided by the criminal norm. The change of the external world is: a) related to the action or inaction and to causation, but it is an entity different from the two from a logical and chronological point of view b) provided by the criminal law as a constitutive or aggravating element of the crime. The naturalistic view distinguishes between: 1) crimes of pure conduct, for which law requires the simple fulfilment of the action or inaction 2) material crimes, for the existence of which law requires that the action produce a determined change of the world. The first category includes most of the administrative penalties and offences/misdemeanours provided in the Italian Criminal Code, *tax evasion*, clandestine entry into military compounds, and the second category the most serious crimes, murder, bodily harm, blackmail, fraud.

According to the legal view, the immediate result is the harmful effect of the conduct, represents the damage of the interest protected by the criminal norm, and is logically linked to causation. The connection is a logical one and is not related to the temporal succession, if in the case of certain crimes the immediate result occurs at a certain time interval from the commission of the action or inaction, in the case of other crimes the damage of interests occurs simultaneously with the criminal action or inaction.

In the Romanian criminal doctrine, among the first authors who defined the generic content of the crime as being composed of an objective element, the consequences of the activity, the causation, was Mr.

[4] In this regard, see Decision no. 25/2017 by which the Supreme Court resolved in principle the legal issue "if the actions listed in art. 9 (b) and (c) of Law no. 241/2005 are distinct normative modalities for committing the crime of tax evasion or alternative variants of the material element of the single crime of tax evasion ".

[5] F. Antolisei, *Manuale di diritto penale*, Ed. Mvlta Pavcis, Milano, 1969, p. 229.

[6] F. Mantovani, *Diritto Penale*, Ed. CEDAM, Florenţa, 2015, p. 178.

Vintilă Dongoroz in 1939. The established author was the first to have a complex vision on the generic content of the crime and managed to structure it in three parts, introducing in the Romanian criminal doctrine *the concept of activity consequences.*

In the opinion of the established author[7], any crime involves *an evil*, and one of the constitutive elements of the crime is the consequence of the criminal activity. The result may consist of a state, which is the natural consequence of the dynamic process, i.e. the transfer of physical energy from one position to another, thus of the existence of physical activity itself, or of a result which is a substantial achievement of the dynamic process, ie a material transformation brought to the object on which the physical activity befell. The crimes where it is sufficient for the consequence to consist in a state are called formal crimes or crimes of attitude, while the offenses in which the consequence must consist in a result are called material crimes or result crimes. In order to differentiate, the author pursued aspects related to the way in which the criminal act was incriminated, respectively if the consequence consists in a state, it is not necessary to provide it in the content of the incrimination, and when the consequence consists in a result, the legislator must always indicate such a result, in an explicit or implicit manner.

The current Romanian criminal doctrine[8] has embraced the theory according to which the result of an act under the criminal law may consist of a material result, which is a perceptible change in reality or a state of danger for the value protected by the rule of incrimination, without a material consequence being caused. Based on this theory, the crimes were classified, according to the consequence produced, in result crimes and crimes of danger.

In the Romanian doctrine[9], the notions of material crime are usually used for result crimes, and formal crime for crime of danger. The use of these notions of material crime, formal crime respectively, is made in relation to the existence or non-existence of a material object as a constitutive element of the crime. If these terms were accepted, the theory according to which the result crime has always a material object would be accepted, and the crime of danger, having a formal character, has in no case a material object.

In reality, crimes of danger involving the existence of a material object have been identified, for example destruction and false signalling provided by Art. 332 (1) C.C.. and the disturbance of public order and tranquillity provided by Art.370 C.C. are crimes of danger - the immediate result consists in a state of danger for the safety of the railway traffic, the public order respectively, but they, however, have a material object. At the same time, there are result crimes which create a definite change in the outside world, but have no material object, as is the case of forgery[10].

Crimes of danger have been divided into crimes of abstract danger, when the state of danger for the protected value is presumed by the legislator, it being sufficient that the action or inaction provided by the criminalisation norm be committed, and crimes of concrete danger, when it is necessary that the state of danger provided by the incrimination norm effectively occur.

2.2. Consequences of classifying crimes as crimes of danger and result crimes

First of all, it is important that an offense fall into one of the two categories in order to determine when the offense is committed. In the case of result crimes, the crime is committed at the time of the actual change of reality, in the case of crimes of abstract danger, at the time of the action or inaction provided in the incrimination norm, and in the case of crimes of concrete danger, at the time of occurrence of the actual danger provided by the norm of incrimination.

Determining whether a crime is in the form of a committed crime or attempted crime is of particular significance, as there are consequences related to the sanctioning regime.

The moment of committing the crime is also relevant in order to determine the more favourable criminal law, the beginning of the prescription of criminal liability, the application of the criminal liability regime to the minor.

The inclusion of a crime in the category of crimes of danger or result crimes is also relevant with regard to the establishment of injured parties, passive subjects and with regard to the exercise of civil action.

In the opinion of some authors[11], the civil action cannot be exercised in the criminal procedure when the object of the case is a crime of danger.

We do not agree with this opinion, contradicted even by legal practice and we are of the opinion that civil action can be exercised in case of crimes of danger, for example threat, home invasion, blackmail, etc. In order for civil action to be exercised in criminal proceedings, it is not necessary for the crime brought before the court to produce a material result, but it is necessary for the damage to have been caused by committing the act provided by criminal law, even if the immediate result is a state of danger. Consequently, the state of danger produced by committing the action or inaction provided by the criminal law can cause moral damage, and even material damage in some cases.

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[7] V. Dongoroz, *Drept penal (reeditarea ediției din 1939)*, Ed. Asociația Română de Științe Penale, București, 2000, p. 178.
[8] F. Streteanu, D. Nițu, *op. cit.*, p. 294.
[9] M. Udroiu, *Sinteze de drept penal – Partea generală*, Ed.C.H. Beck, București 2020, p. 133.
[10] În același sens: F. Streteanu, D. Nițu, *op. cit.*, p. 294.
[11] A.Weisman, *Despre oportunitatea exercitării acțiunii civile în cadrul procesului penal, https://www.juridice.ro/119482/despre-oportunitatea-exercitarii-actiunii-civile-in-cadrul-procesului-penal.html.*

In order to answer the question whether the crime of tax evasion is a crime of danger or a result crime, we shall proceed to analyse the immediate result by reference to each alternative variant.

3. Analysis of the forms of tax evasion crime in relation to the immediate result

3.1. The crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005

The material element of the crime is represented by *the act of concealing the asset or the excisable or taxable source*. The action of concealment implies a concealment in the legal sense, which can take different forms, respectively the failure to register in accounting documents, drawing up false documents regarding the origin, ownership, or circulation of the asset. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In legal practice[12] an example of hiding the goods is represented by the act of ordering the company"s accountant to record in the accounting records as deductible expense the value of unstamped cigarettes that had to be destroyed upon the imposition of the obligation to stamp such goods.

The immediate result of the act is the creation of a state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the development of the action provided by the incrimination norm does not produce a determined material change of the external world, a state of danger regarding the full collection of tax obligations to the state budget being created instead. It is not relevant for the constitutive elements of the crime if, by concealing the asset or the taxable source, a damage to the state budget is caused. Given that the rule of criminalisation provides that actions must be taken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually occur, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

However, even if it is a crime of danger, the state will be able to become a civil party with the tax obligations it has to recover, because for the exercise of civil action, the requirement is that material or moral damage be caused by committing the crime, which damage shall be recovered as a result of incurring legal liability based on tort.

As a consequence, the crime of tax evasion provided by Art. 9 (a) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and is consumed/effective at the time of committing the act provided by the incrimination norm, but can produce a material result as, by the concealment of the excisable or taxable asset or source, material damages to the state may be caused, consisting in the tax obligations legally due and not collected.

However, the material damage is not a constituent element of the crime, the latter is consumed regardless of whether or not the damage is caused.

3.2. The crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005

The material element of the crime is represented by an inaction, respectively by the non-registration, in whole or in part, in the accounting documents or in other documents of the commercial operations performed, or of the revenues. The essential requirement attached to the material element is that the inaction be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place. The non-registration may consist in the non-preparation of supporting documents for the revenues or the non-registration of supporting documents in the accounting registers or in other supporting documents. In legal practice[13], a defendant was convicted for tax evasion because she did not record in the company"s registers the invoices with which she had bought certain products, and subsequently she did not record the revenues obtained from the sale of such products.

The immediate result of the act is represented by the state of danger regarding the collection of tax obligations to the state budget. Considering the naturalistic view, it can be concluded that the occurrence of the inaction provided by the incrimination norm does not produce a determined material change of the external world, a state of danger being created regarding the full collection to the state budget.

As a consequence, the crime of tax evasion provided by Art. 9 (b) of Law no. 241/2005 is a crime of abstract danger, the state of danger being presumed by the legislator, and is consumed at the time of committing the inaction provided by the incrimination norm. It is not relevant for the constitutive elements of the crime if the failure to register in the accounting documents of the financial operations causes a damage to the state budget. Given that criminalisation rule provides that the inaction must be undertaken in order to evade the fulfilment of tax obligations and it is not necessary for the evasion to actually take place, the immediate result is not influenced by causing material damage consisting of legally due and unpaid tax obligations to the state budget.

[12] C.S.J., secţia penală, decizia nr. 253/2003, nepublicată.
[13] C.Ap. Ploieşti, secţia penală, decizia nr. 610/2002, nepublicată.

However, even if it is a crime of danger, the state shall be entitled to become a civil party with the tax obligations it has to recover, because in order to exercise the civil action the requirement is that, by committing the crime, a material or moral damage is caused, which should be recovered by incurring legal liability based on tort, but the resulting outcome is not a constitutive element of the crime.

3.3. The crime of tax evasion provided by Art. 9 (c) of Law no. 241/2005

The material element of the crime is represented by the *act of recording in the accounting documents or in other legal documents some expenses that are not based on real operations, or of recording fictitious operations*. The registration of expenses that are not based on real operations means the preparation of false supporting documents for expenses not made, or recording fictitious operations in order to reduce tax obligations. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

A well-known modus operandi is recording fictitious invoices in the accounting records, or simulating commercial transactions by interposing shadow companies, with huge debts to the general consolidated budget and which include/involve formal Managing Directors and homeless persons as members, having a precarious material situation, recruited by those who actually control the companies. The Supreme Court pointed out that "recording expenses that are not based on real operations means the preparation of false supporting documents for supporting expenses, and based on such false supporting documents unreal expenses are also operated in other accounting documents, with the consequence of decreasing income and implicitly, the tax obligation to the state" [14].

With regard to retaining as concurrent offences the crime of tax evasion prov. by Art. 9 (c) of Law 241/2005 with the crime provided by Art. 43 of Law no. 82/1991, the relevant decision is Decision no. 4 of January 21, 2008, by which the appeal in the interest of the law declared by the General Prosecutor of Romania was admitted; it has been established that the act of omission, in whole or in part, or the recording in the accounting documents or other legal documents of commercial operations performed or of revenues, or the recording in the accounting documents or in other legal documents of the expenses not based on real operations, or the recording of other fictitious operations constitutes the complex crime of tax evasion, provided by in Art. 9 (1) (b) and (c) of Law no. 241/2005. The High Court of Cassation and Justice retained that the examination of the content of the legal texts by which the two crimes are currently criminalised thus shows that the social values protected by them are at least complementary and have a common final purpose, as long as by the provisions of Art. 9 (1) (b) and (c) of Law no. 241/2005 aims to ensure the establishment of real tax situations, which should ensure a correct collection of taxes, fees, contributions and other tax obligations incumbent on taxpayers, and by Art.43 of Law no. 82/1991 aims at preventing any acts likely to prevent the correct reflection in the accounting records of the data regarding the incomes, expenses, financial results, as well as of the elements that refer to the assets and liabilities in the balance sheet. The comparative analysis of the component elements of the tax evasion crimes, provided by Art. 9 (1) (b) and (c) of Law no. 241/2003 and intentionally false statement, provided by Art. 43 of Law no. 82/1991, imposes, therefore, the conclusion that all these elements overlap, in the sense that the acts referred to in the last text of the law are found in the two ways of circumventing the tax obligations incriminated in the first crime, of tax evasion. As a result, the omission, in whole or in part, of recording in the accounting documents or other legal documents of the commercial operations performed or of the revenues, or recording in the accounting documents or in other legal documents of expenses not based on real operations, or recording other fictitious operations constitutes the complex crime of tax evasion, provided by Art. 9 (1) (b) and (c) of Law no. 241/2005 [former Art. 13 and, then, Art. 11 (c) of Law no. 87/1994], the provisions of Art.43 (former Art.40 and then Art. 37) of the Accounting Law no. 82/1991, in conjunction with Art. 289 C.C. (1969), such activities being included in the constitutive content of the objective side of the tax evasion crime.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action provided by the incrimination norm, there is not a determined modification of the external world, but a state of abstract danger presumed by the legislator. Although following the recording of the expenses that are not based on real operations in the accounting documents or other legal documents, or the recording of other fictitious operations, a material damage to the state budget is caused by not collecting tax obligations, this result not being a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.4. The crime of tax evasion provided by Art. 9 (d) of Law no. 241/2005

The material element is alternate and may consist of three alternative actions of *alteration, destruction or concealment.* Destruction of accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage means their

[14] I.C.C.J., secţia penală, decizia penală nr. 1113/2005, publicată online https://legeaz.net/spete-penal-iccj-2005/decizia-1114-2005.

abolition in order to evade tax obligations. Alteration means degradation so that the data contained in the accounting documents, memories/records of electronic tax registers or cash registers can no longer be read. Concealment involves physical or legal shelter so that it cannot be found or identified by the competent authorities. The essential requirement attached to the material element is that the acts provided by the incrimination norm be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

This crime is a special variant of some destruction crimes provided by the Criminal Code and will not be retained as concurrent with them, being retained only the variant provided by tax evasion provided by special law, according to *lex specialis derogat legi generali*.

There are several opinions in the doctrine regarding the immediate prosecution of this crime. Some voices[15] consider that the immediate result consists in altering, destroying or concealing the accounting documents, memories/records of electronic tax registers or cash registers or other means of data storage, and from this point of view the crime is classified as a result crime. Other authors[16] consider that the immediate result is represented by the state of danger determined by the failure to ensure the full collection of tax obligations from taxpayers.

In this case, by carrying out the action provided by the norm of incrimination, the alteration destruction or concealment of the accounting documents or the means of data storage, two immediate results occur, a main and a secondary one.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by the commission of the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction or alteration of the accounting documents or storage means.

On the other hand, in addition to the state of danger, there is a result, a change in external reality, if the material element consists in the act of alteration or destruction.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (d) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

Even if, as a result of the alteration, destruction or concealment of the accounting documents or the means of storage, a material damage to the state budget is caused by not collecting the tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

3.5 The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005

The material element of the crime is represented by the action of execution of double accounting records, an official one which is presented to the control bodies, and the other an occult accounting which represents the real accounting. The organization of double accounting records means the preparation and execution of such records in parallel with the official ones. The essential requirement attached to the material element is that the action of execution of double accounting records be performed in order to evade the fulfilment of tax obligations, but is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that the action provided by the incrimination norm does not produce a determined modification of the external world, but a state of abstract danger presumed by the legislator. Even if, following the execution of double accounting records, a material damage to the state budget is caused by not collecting the legally due tax obligations, this result is not a constitutive element of the crime. Consequently, the crime may exist regardless of whether or not it causes damage to the state budget.

The crime of tax evasion provided by Art. 9 (e) of Law no. 241/2005 is a crime of danger, by reference to the immediate result produced.

3.6. The crime of tax evasion provided by Art. 9 (f) of Law no. 241/2005

The material element of the crime may consist either in a *fictitious or inaccurate declaration action regarding the main or secondary registered offices, or in an inaction of non-declaration*. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of the tax obligations, but it is not relevant for the fulfilment of the constitutive elements, if the evasion actually took place.

The relationship between this crime and that of false statements is a relationship from genus to species and cannot be retained as concurrent when committed in the same circumstance.

With regard to the immediate result of the crime, some authors[17] consider that the consequence of the illicit action is of a material nature, consisting in the perpetrator evading from the financial, tax or customs verifications.

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[15] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *Dreptul penal al afacerilor*, Ed. C.H. Beck, Bucureşti, 2016, p. 177.

[16] E.Crişan, R.V. Nemeş, N. Nolden, *Ghid de bune practici în domeniul combaterii infracţiunilor de evaziune fiscală*, Patru Ace, Bucureşti, 2015, la adresa *http://www.inm-lex.ro/fisiere/d_1443/Ghidul%20combatere%20infractiuni%20de%20evaziune%20fiscala.pdf*.

[17] Al. Boroi, M. Gorunescu, I.A. Barbu, B. Vîrjan, *op. cit*., p. 178.

We do not embrace this opinion, as a result is material in nature when it produces a change in external reality, while the act of evading financial, fiscal or customs checks does not have a material existence.

The immediate result in the case of this crime is the state of danger for the collection of tax obligations to the state budget. Considering the naturalistic view, it is observed that by the action or inaction provided by the incrimination norm, no determined modification of the external world is produced, but a state of abstract danger presumed by the legislator.

It is not relevant for the constitutive elements of the crime, if by the action of evading the fiscal, financial or customs verifications in the modalities provided by the incrimination norm, a prejudice to the state budget occurs.

In order to fulfil the constitutive elements of the crime from the point of view of the subjective and objective side, it is necessary that the evasion from financial, fiscal or customs verifications take place, and the actions or the inaction provided by the criminalisation norm must be undertaken in order to evade the fulfilment of tax obligations, and it is not necessary that the evasion actually took place, the immediate result is not influenced by causing a material damage consisting in the tax obligations legally due and unpaid to the state budget.

3.7. The crime of tax evasion provided by Art. 9 (g) of Law no. 241/2005

The material element of the crime is alternative and may consist in *the action of substitution, degradation or alienation of the seized goods in accordance with the provisions of the Fiscal Procedure Code and the Criminal Procedure Code*. Substitution means the replacement of the legally seized good with one that has similar characteristics. Degradation involves affecting the good so that it loses some of its characteristics. Alienation means the transfer of the ownership or possession over the good to another person. The essential requirement attached to the material element is that the action be carried out in order to evade the fulfilment of tax obligations, but it is not relevant for the fulfilment of the constitutive elements of the crime if the evasion actually took place.

In the present case, by carrying out the action provided by the norm of incrimination for degradation or alienation of the seized goods, two immediate results occur, one main and one secondary.

The main result consists in the state of danger for the collection of tax obligations to the state budget. The result is categorised as the main one, as the purpose of the norm is to prevent and combat tax evasion. The main "evil" produced by committing the crime is represented by the state of danger for the collection of tax obligations to the state budget and not by the destruction of the seized goods. On the other hand, when the material element consists in the action of destroying the seized goods in addition to the state of danger, there is also a result, a change of the external reality, and this is a secondary result.

As a consequence, the crime of tax evasion provided by Art. 9 (1) (g) of Law no. 241/2005 is a crime of danger, by reference to the main immediate result.

3.8. The aggravating variants provided by Art. 9 (2) and (3) of Law no. 241/2005

The legislator provides two aggravating variants of the crime of tax evasion, respectively in case by the acts provided in paragraph (1) there was a damage higher than Eur 100,000, the punishment terms are increased by 5 years, and if there was a damage exceeding Eur 500,000, the punishment terms are increased by 7 years.

In this case, there is no transformation of a crime of danger into a result crime.

The occurrence of a result can be both a constitutive element of and an aggravating element a crime. In the case of aggravated tax evasion, causing the damage is not the essence of the typicality of the crime, in case the damage is not caused, the crime is still typical, but the aggravated form is no longer retained.

Professor Antolisei stated that the result is characterised by two elements: it is a change in the outside world and is provided by criminal law as a constitutive or aggravating element of the crime.[18] In the aggravated tax evasion, causing a damage higher than the amount of Eur 100,000 or Eur 500,000 is a consequence of the crime which constitutes an aggravating element of the crime.

Causing a damage higher than the amount of Eur 100,000 or Eur 500,000 does not influence the typicality of the act, the immediate result as a constitutive element of the aggravating crime representing the state of danger for the collection of tax obligations to the state budget.

We consider that causing a damage exceeding the amount of Eur 100,000 or Eur 500,000 represents an aggravating element of the crime of tax evasion, not a constitutive element of the aggravated variant, since it does not have an autonomous form.

In order to establish whether causing the damage is a constitutive element of the aggravated autonomous crime or a circumstantial element of the aggravating form, it is necessary to establish in advance whether Art. 9 (2) or (3) of Law no. 241/2005 regulates two autonomous crimes or an aggravated form of the basic variant regulated by Art. 9 (1) of Law no. 241/2005.

In the process of criminalising certain acts of conduct, the legislator regulates the content of the crime objectively and subjectively and provides the applicable punishments. A crime can have a standard, basic variant and mitigating and aggravated variants,

[18] F. Antolisei, *Manuale di diritto penale*, Ed. Mvlta Pavcis, Milano, 1969, p. 229.

which do not represent autonomous crimes, depending on the basic variant.

The norm provided in Art. 9 (1) of Law no. 241/2005, which incriminates the crime of tax evasion in its basic form is a complete norm, being composed of disposition as well as sanction and includes all the objective and subjective conditions that must be met cumulatively for the act to constitute a crime.

Unlike the provisions of Art. 9 (1), the text of Art. 9 (2) and (3) of Law no. 241/2005 does not provide typical conditions and does not draw a line of conduct, but only provides an aggravating circumstantial element, namely causing damage in excess of the amount of Eur 100,000 or Eur 500,000.

By the regulation modality, the provisions of Art. 9 (2) and (3) do not define a standard, independent crime, since the structure of the norm does not describe a distinct act, with its own configuration, but refers to the provisions and punishments contained in Art. 9 (1) of Law no. 241/2005, which regulates the crime of tax evasion in its basic version.

In addition, other arguments supporting the thesis that Art. 9 (2) and (3) of Law no. 241/2005 does not regulate autonomous crimes would be that the texts of law do not provide an alternative material element to the basic variant, do not protect different values, and Art. 9 (2) and (3) is in conjunction with Art. 9 (1) of Law no. 241/2005, not the other way around.

As a consequence, the norms contained in Art. 9 (2) and (3) do not regulate autonomous crimes, the mentioned articles of law do not incriminate any reprehensible act, and the references in paragraphs (2) and (3) to the provisions criminalising tax evasion in standard form make them dependent on it.

Also, the variants provided in Art. 9 (2) and (3) cannot be considered causes for the increase of the punishment, as they also provide for an aggravating circumstantial element, respectively causing a damage superior to the amount of Eur 100,000, Eur 500,000 respectively.

Consequently, considering that Art. 9 (2) and (3) of Law no. 241/2005 regulates aggravating variants of the crime of tax evasion, causing damage is not a constitutive element of the crime, but an aggravating circumstantial element.

4. Causes of reduction of punishments and impunity regulated by Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for preventing and combating tax evasion

On April 1, 2021, Law no. 55/2021 on the amendment and completion of Law no. 241/2005 for the prevention and combating of tax evasion was published in the Official Gazette, which regulates two special causes of reduction of punishments and a cause of impunity.

The main legislative amendments concerned chapter III of Law 241/2005 "*Causes of reduction of punishment, prohibitions and revocations*", the other amendments having an accessory character and being necessary for the correlation of the legal provisions. A mandatory cause of reduction of punishment, an optional cause of reduction of punishment, and a cause of impunity were regulated.

The compulsory cause of reduction of the punishment regulated by the legislator in paragraph (1) the final thesis of Art. 10 of Law no. 241/2005, implies the application by the court of the penalty consisting of a fine, when by committing the crime of tax evasion a damage of up to Eur 50,000 was caused, which was covered before the court ruled a decision of conviction.

The legislator regulated three conditions that must be met cumulatively for the mandatory application of the penalty of fine, respectively it is necessary that the damage caused by committing the crime be up to Eur 50,000, the damage be fully recovered before the final conviction, and the perpetrator should not have committed a tax evasion offense for which he has benefited from this special cause of reduction within 5 years from the commission of the act. The process of judicial individualisation will consist only in the court establishing the number of fine-days and the amount corresponding to a fine-day.

The second cause for reduction of sentences, optional, assumes that the court has the option to apply either the fine or imprisonment.

The legislator regulated three conditions that must be met cumulatively for the court to be able to apply the penalty of the fine, respectively it is necessary that by committing the crime there was a damage of up to Eur 100,000, the damage must be fully recovered before ruling the final conviction decision, and the perpetrator has not committed an offense incriminated by Law no. 241/2005 for which you have benefited from this special cause of reduction within 5 years from the commission of the act.

In order to establish the damage caused, only the tax obligations will be taken into account, and not the interests or penalties.

In paragraph (1) of Art. 10 of Law no. 241/2005 which regulates the special causes for reduction of punishments, the legislator used the phrase "*damage caused*", resulting without a doubt the intention to refer only to the actual damage caused by non-payment of tax obligations, without taking into account interest and penalties. On the contrary, in paragraph (11) of Art.10 of Law no. 241/2005, the seat of the case of impunity, the legislator expressly mentioned that the damage caused by committing the act must be recovered, increased by 20% of the calculation basis, to which interests and penalties are added.

Consequently, from the theological and grammatical interpretation of the text of the law, it results that for the application of the fine punishment it is necessary to recover the damage actually caused by

committing the crime, without taking into account the interests and penalties.

When the cause of the special optional reduction is present, the individualisation process takes place in two stages. In a first stage, the court determines the type of the main punishment, either the prison sentence or the fine, and in the second stage it establishes the duration / amount of the punishment.

Regarding the application of the more favourable criminal law, the causes of reduction and impunity are applied retroactively only for crimes under trial, but do not apply in criminal proceedings in which a final conviction decision was pronounced prior to the entry into force of Law no. 55/2021.

However, the special case of reduction of sentence shall also take effect after the final judgment of the case, when the offense of tax evasion for which a conviction has already been ruled and a prison sentence has been applied, has caused damage to up to Eur 50,000, fully covered during the criminal investigation or trial.

In this sense, pursuant to Art. 6 (3) of the Criminal Code, regulating the application of the more favourable criminal law after the final judgment of the case, the applied prison sentence shall be replaced by a fine, which shall not exceed the maximum provided in the new law. In view of the term executed from the prison sentence, the execution of the fine will be eliminated in whole or in part.

The amendments to Law 241/2005 regulated also a special cause of impunity, which operates regardless of the amount of damage caused by committing the crime. In order to benefit from the cause of impunity, it is necessary to fully recover the damage caused by committing the act, increased by 20% of the calculation base to which the interests and penalties are added. If only one of the participants covered the damage, the cause of impunity will benefit all participants, even if they did not contribute to the damage coverage.

The legislator regulated only one condition to operate the special case of impunity, respectively the damage caused by committing the act should be fully covered before the final conviction, increased by 20% of the calculation basis, plus interest and penalties.

It is irrelevant if the perpetrator previously benefited from this special cause of impunity, as the legislator stipulates that only the special causes of reduction of the punishment regulated by paragraph (1) of Art.10 of Law 241/2005 do not apply if the perpetrator has committed another crime of tax evasion for which he benefited from the cause of reduction. This condition is not valid for the cause of impunity, as provided in paragraph (11) of Art.10.

Through this cause of impunity, the legislator regulated a form of civil sanction[19], so that the one who affected the integrity of the public budget will have to pay the damage actually suffered by the state budget, increased by 20%, to which interest and penalties shall be paid. This increase is a form of civil punishment which punishes deviation from the rules of law. Thus, given the nature of the violated social relations, namely those involved in fiscal finance, the legislator has a wide margin of appreciation in identifying the most appropriate solutions both in combating the evasion phenomenon and in recovering the damages suffered.

Even if, following the constitutionality examination, the constitutional court rejected the criticisms of intrinsic and extrinsic constitutionality invoked regarding the provisions of Law 55/2021, we cannot refrain from noting that the regulation of special cases of reduction of punishments and impunity can give rise to discriminatory situations. By way of example, an offender who has committed the crime of tax evasion by causing damage of EUR 100,001 and who does not objectively have the material means to cover the damage caused, shall be punished by imprisonment from 7 years to 13 years. However, another perpetrator who committed a tax evasion offense causing damage of EUR 10,000,000 and covering the damage caused by committing the act, increased by 20% of the calculation basis, to which the interest and penalties are added, will not be punished.

Given that the two crimes infringe on the same social values, creditworthiness and financial possibilities of the perpetrators, there are no objective justifications for applying such a different penalty treatment.

5. Conclusions

Following the analysis carried out in the previous sections, we can conclude that the crime of tax evasion, apparently a result crime, in all alternative forms is a crime of danger, a conclusion reached also by the Italian doctrinaires who categorize the crime of „*evazione fiscale*" as one of danger.

In order to meet the elements of typicality in terms of the subjective and objective side in the case of all alternative variants, it is necessary that the actions or inactions provided by the criminalisation rule be committed in order to evade the fulfilment of tax obligations. It is not the essence of typicality if the evasion is actually carried out, but it is necessary that the actions be committed for the purpose of evasion.

In certain forms of alternative variants, the development of the action provided by the incrimination norm may have two immediate results, a main one consisting in the state of danger for the collection of tax obligations to the state budget and a secondary one consisting in the destruction or alteration of accounting documents or storage means, or the degradation of seized assets.

By committing the crime of tax evasion, a material damage can be caused, consisting in the non-payment of the legal tax obligations due to the state

[19] CCR, decizia nr. 101/2021 (publicată în M. Of. nr. 295 din 24 martie 2021), paragraf 107.

budget, but the crime is consumed independently of the causing of damage.

The causing of damage can be a criterion of judicial or legal individualization of the punishment, and in some cases, if higher than the amount of Eur 100,000 or Eur 500,000, it is an aggravating circumstantial element.

Given the way in which the legislator described the verbum regens of the crime of tax evasion, not specifying in the content of the crime that it is necessary to cause material damage, we can conclude that the crime of tax evasion is a crime of danger, unlike the tax crime regulated by Decree no. 202/1953 for the modification of the Criminal Code of the Romanian People"s Republic whose material element consisted in the non-payment of taxes or fees by those who had the possibility of payment, and which automatically presupposed causing a patrimonial damage.

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THE PROSECUTOR"S DISPOSALS AT THE HEARING IN A CRIMINAL PROCESS

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Abstract

This paper examines the participation of a public prosecutor to a hearing, as the representative of the Public Ministry, as well as the manner in which he/she exercises his/her judicial attributions. We have found that the judicial actions carried out by the prosecutor can be conditioned or unconditioned and that a clear distinction between them and the prosecutor"s conclusions has to be made. It was therefore concluded that under no circumstances the prosecutor"s conclusions can be assimilated to the disposals that he/she can enforce.

Keywords: *the participation of the prosecutor at the hearing, the disposal act of the prosecutor, the prosecutor"s conclusions.*

1. Argumentation

With this study we wish to highlight the specific activities of the prosecutor and the forms they can take. The need for such an approach issued from the confusion that can be made by the practitioners between the prosecutor"s disposal acts and the conclusions that he/she draws during the hearings.

Thus, for example, through the judgment no. 10/03.07.2020 pronounced by the preliminary chamber judge within Sălaj Tribunal, final due to the failure to initiate a remedy, it was noted that the prosecutor from the Prosecutor"s Office attached to the Sălaj Tribunal has communicated to the judge, within the 5 days deadline stipulated by art. 345 par. (2) of the Criminal Procedure Code, that he/she maintains the order to proceed to trial according to the indictment issued. It was also held that the prosecutor had issued an order for the remedy of the irregularities found by the preliminary chamber judge, an order which was checked by the chief prosecutor from the Prosecutor"s Office attached to the Sălaj Tribunal.

At the hearing established by the judge, where the debates were resumed within the preliminary chamber procedure, the prosecutor has formulated conclusions saying that there still was an inconsistency between the facts and the *de jure* situation, given that the number of the material acts described in the *de facto* situation was not the same as the number of material acts found in the chapter „*de jure*" of the indictment. Under these circumstances, the prosecutor estimated that the object and the limits of the trial were not properly established; therefore the case had to be sent back to the prosecutor"s office.

Following the prosecutor"s conclusions, the preliminary chamber judge ordered the case to be sent back to the prosecutor"s office, according to art. 346 par. (3) lett. c) of the Criminal Procedure Code, estimating that the prosecutor had shown in his conclusions that he/she no longer maintained the order to proceed to trial and that he/she orally asked for the case to be sent back to the prosecutor.

2. The legal attributions of the prosecutor analysed from the perspective of the principles concerning the activity and the organisation of the Public Ministry

According to art. 131 and 132 from the Romanian Constitution, within its judicial activity, the Public Ministry represents the general interests of the society and protects the rule of law as well as the citizens" rights and freedoms. The Public Ministry also exercises its powers through prosecutors organised in prosecutor"s offices, who perform their activities according to the principles of lawfulness, impartiality and the hierarchical control, under the authority of the Minister of Justice.

The prosecutor"s attributions are stipulated by art. 63 in Law no. 304/2004, part of them being circumscribed to the procedural function of prosecution. Thus, the prosecutors conduct the criminal proceedings, they lead and supervise the activity of the criminal investigation bodies, they submit the cases to the criminal courts and they participate to the hearings within the trial.

The principles concerning the organisation of the Public Ministry and the prosecutors" activity relevant for this study are the subordination principle and that of the hierarchical control, as well as the principle of the consistent action. Furthermore, it should not be ignored the fact that the prosecutor is independent in ordering the solutions and the prosecutor"s conclusions presented to the court cannot be censured by the hierarchically superior prosecutor *(la plume est serve, mais la parole est libre).*

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The hierarchical control principle stems from the hierarchical subordination principle so that these two principles must be analysed together.

Thus, the hierarchical subordination principles materialized in the fact that the prosecutors in every office are subordinated to the chief of that office, while the chief on his turn is subordinated to the chief of the hierarchically superior office. This principle is materialized through the hierarchically superior prosecutor"s right to issue mandatory directions to the subordinated prosecutors. Therefore, being in this position, the hierarchically superior prosecutor verifies *ex officio* or upon request, both the merits and the lawfulness of the decisions of the subordinated prosecutors, and when he/she finds them unfounded or unlawful he/she invalidates them providing reasons and he/she orders them to be redone.

Concerning the unitary direction of the Public Ministry, we note that all prosecutors act in the name of the Public Ministry exercising its powers as stipulated by the law, and the acts issued by the prosecutors have the legal effects of an act or measure issued under the power of the Public Ministry. This principle is materialized in the possibility of transferring the work of a prosecutor to another, of replacing a prosecutor working in the judicial sector with another prosecutor who would further participate to the hearings, in the possibility of performing the criminal proceedings acts in the same case by several prosecutors etc.

In exercising the judicial attributions, the prosecutor uses a series of material and procedural acts materialized in orders and acts through which they are fulfilled. The number and the content of the prosecutor"s acts are different according to each procedural stage, and, as natural, most of them are regulated for the criminal investigation stage. We say it is natural because these procedural means are regulated with a view to ensuring the exercise of the judicial function attributed by law to the judicial body, with the purpose of solving the case according to the law and truth.

In the activity performed in front of the court, the prosecutor exercises an active role for the finding of the truth and observing the legal rules, his/her participation to the court"s hearing being materialized through applications and conclusions, as well as raising exceptions.

Although these legal provisions are found in art. 363 of the Criminal Procedure Code, in the chapter concerning the general dispositions applicable in the trial stage, we estimate that they must be applied *tale quale* whenever the judicial activity involves the exercise of the jurisdiction function by the judge or the court.

3. The judicial means available to the prosecutor

The semantic difference material act –procedural act stems indirectly from the provisions in art. 200 of the Criminal Procedure Code[1]. Thus, material acts are the initiation of the criminal proceedings, the taking of preventive measures[2], the approval of evidence etc., the procedural acts being: listening a witness, the conduct of on crime scene investigation, the seizing of objects[3] etc.

From all this it follows that the material act means the acts through which the judicial bodies, the parties and the main actors in the trial, as well as other participants in the trial manifest their will, under the circumstances and forms stipulated by the law, concerning the initiation and evolution of the criminal trial. Therefore, the material act can be defined as the constitutive part of the criminal trial, stipulated by the law, by which the competent judicial body and the authorized person dispose directly, in the exercise of the procedural functions, of the conduct of the criminal trial in order to achieve the purpose of the criminal trial[4].

The procedural act, on the other hand, is the activity performed by the judicial bodies, the parties and the main actors in the trial, as well as other participants in the trial, through which a material act or measure is fulfilled or which registers the fulfilment and records the content of a material act or measure, or of a procedural act[5].

As shown, most of the prosecutor"s material and procedural acts are regulated for the criminal investigation stage because this is the only stage involving the solving of the case by the prosecutor. For the next stages of the criminal proceedings, the preliminary chamber procedure, the trial and the enforcement of the criminal decisions, the responsibility of solving the case does not lie with the prosecutor but with the judicial body, so that it is natural that the procedural means should be given to the judicial body called to give a solution – the judge or the court.

In the conduct of the judicial procedures, the Public Ministry is represented by the prosecutor who has the possibility to file applications, raise exceptions and submit conclusions. These are supplemented by the clarifications that the prosecutor can make in front of the court, such as the clarification of the appeal reasons

[1] A. Zarafiu, Procedură penală. Partea generală. Partea specială, CH Beck Publishing House, Bucharest, 2015, p. 279.

[2] The taking of material measures (for example, the taking of preventive measures, the taking of precautionary measures) is a *characterized* material act.

[3] The activity of presenting the already approved evidence, with all that it involves, the evidentiary procedures, the documents where they are recorded etc., are procedural acts performed within this activity.

[4] Gr. Theodoru, I.-P. Chiș, *Tratat de Drept procesual penal*, 4th edition, Hamangiu Publishing House, Bucharest, 2020, p. 565-566.

[5] *Idem.*

described in writing and which must be presented in front of the judicial review court[6].

However, closely related to the document instituting the proceedings and the evidence adduced during the criminal investigation, the law regulates certain disposal acts available to the prosecutor, both in the preliminary chamber procedure and in the trial stage or in the stage of the enforcement of criminal decisions.

Thus, for example, in the preliminary chamber procedure, when the preliminary chamber judge invalidates the criminal investigation acts or dismisses certain pieces of evidence, the prosecutor has the possibility to dispose of the solution of sending the case to trial by asking for the case to be sent back to the prosecutor"s office. The motivation of this legal solution is that following the invalidation of certain criminal investigation acts and after the exclusion of certain pieces of evidence adduced by the prosecutor, the representative of the Public Ministry must be granted the right to change his/her position towards the solution pronounced. The law establishes that the prosecutor who pronounced the solution of sending to trial has the right to rethink the solution either positively, by maintaining the sending to trial, or negatively, by asking for the case to be sent back to the prosecutor"s office.

Once received the answer of the prosecutor in the case, the preliminary chamber judge is not able to censor it. Thus, if there is a request for the case to be sent back to the prosecutor"s office, the judge will give the solution accordingly, otherwise the judge would substitute himself/herself to the prosecutor and would exercise de facto the prosecution function, a function absolutely incompatible with the jurisdiction function[7].On the contrary, if the prosecutor states that he/she maintains the sending to trial, the preliminary chamber judge is forced to pronounce the commencement of the trial[8].

For the trial stage, the prosecutor can waive the evidence he/she proposed, disposing of them. In this hypothesis, given that the principle of finding the truth in the criminal trial has been kept by the new legislator, the judge shall order for the evidence not to be adduced if he/she deems that it is no longer necessary for the finding of the truth in the case. In this case, it can be noted that the manifestation of will from the prosecutor is conditioned on the court"s finding of the uselessness of adducing the waived evidence.

As we have shown, for the next stages of the criminal trial, the legislator has sporadically regulated the disposal acts available to the prosecutor. In the judicial contexts implying the exercise of the jurisdiction function, the prosecutor"s participation to the hearing is often materialized through the conclusions he/she formulates.

The conclusions formulated in front of the jurisdiction bodies both by the prosecutor and by the rest of the participants to trial represent the statements and the views expressed during the hearing concerning the solution of the case submitted to trial. Essentially, the conclusions represent the result of the interpretation of the legal provisions, when the matter discussed is a question of law, or the interpretation of the evidence when the merits of the trial are discussed etc.

4. Instead of conclusions

We estimate that it is clearly visible which is our point of view on the object of this study.

Thus, starting from the working hypothesis, we estimate, along other authors, that in the situation where the preliminary chamber judge asks the prosecutor to express his/her will concerning the order of sending to trial in the direction of maintaining it or to the contrary, in that of withdrawing the document instituting the proceedings, only the prosecutor who issued the indictment or the replacing prosecutor can dispose of his own document instituting the proceedings[9]. Also, having regard to the effects of the negative disposal act, namely the sending back of the case to the prosecutor"s office, we estimate that the answer can be formulated by the prosecutor only in writing and shall be submitted to the preliminary chamber judge through the notice signed by the chief of the prosecutor"s office, obviously after his/her taking note of the manifestation of will of the subordinated prosecutor. We think that this should be the natural circuit of the document signed by the prosecutor of the case, because the withdrawal of the document instituting proceedings interferes with the initial verification of the indictment made by the chief of the prosecutor"s office.

Between these coordinates, it is obvious that during the hearing, the prosecutor is not entitled to decide the withdrawal of the document instituting the proceedings, as the preliminary chamber judge from the Sălaj Tribunal wrongly held, the prosecutor of the case being the only one able to make this assessment. However, this does not mean that the prosecutor has no other option besides the one expressed by the prosecutor in the case, an opinion he/she is of course, free to present to the judge.

We estimate however, that the principle of absolute independence of the prosecutor present at the hearing, as to the conclusions he/she can formulate must be interpreted in relation to the principle of consistent action, so that the prosecutor present at the

[6] ICCJ (High Court of Cassation and Justice), Criminal Section, dec.no.204/2019, unpublished.

[7] I.-P. Chiș, C. Voicu, Admisibilitatea contestației formulate de procurorul care nu a răspuns în termenul de 5 zile cu privire la menținerea trimiterii în judecată sau a solicitat expres restituirea cauzei la parchet, in „Dreptul" no. 5/2020, p. 159-168.

[8] I. Kuglay, in M.Udroiu, Codul de procedură penală. Comentariu pe articole, 3rd edition, C.H. Beck Publishing House, Bucharest, 2020, p. 1854.

[9] I. Kuglay, op.cit., p. 1842.

hearing should inform the hierarchically superior prosecutor about his/her intention to formulate conclusions in a different direction than the one expressed in writing by the prosecutor"s office. Otherwise, the principle of consistent action following from the representation of the same general interest by all prosecutors in the Public Ministry would be undermined, the inconsistency of the prosecutors placing in doubt both the credibility of the judicial body and the rigor of the activity where it was expressed.

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ENFORCEMENT OF PUNISHMENT, MEASURES AND SANCTIONS IN THE UNITED KINGDOM – ENGLAND AND WALES

Cosmin Iulian CREŢU[*]

Abstract

As early as the 1970s, alternative measures to imprisonment began to be considered at EU level. This article analyzes the types of sentences and their enforcement in the United Kingdom – England and Wales, with emphasis on the particularities of the enforcement of the prison sentence and on alternatives to the prison sentence, as provided for in the relevant legislation of these states.

Keywords: *alternative measures to imprisonment, types of sentences, enforcement in the United Kingdom, enforcement of the prison sentence, alternatives to the prison sentence.*

1. Introduction

The issue of penitentiaries as institutions that produce crime by their very existence has been discussed at large in doctrine, in congresses of criminal law and criminology, constantly in the working groups of the Council of Europe for the elaboration of Recommendations in the European criminal and criminal enforcement field[1].

Thus, since the 1970s, alternative measures to imprisonment began to be considered at the level of the European Union, the first normative act in which these ideas materialized being a resolution adopted by the Council of Europe in 1965, namely the Resolution (65) 1 on suspended sentences, probation and other alternatives to imprisonment, followed by a resolution adopted by the Council in 1976, namely Resolution (76) 10 on certain alternative measures to imprisonment.

The first piece of legislation that provided a complete set of rules on the application and implementation of community sanctions was Recommendation R (92) 16 to Member States on the European Regulation on community sanctions and measures, adopted by the Committee of Ministers under Article 15 b of the Statute of the Council of Europe on 19 October 1992, on the occasion of the 482nd meeting of the Delegations of Ministers.

Through this paper we set out to investigate the types of sentences and their manner of enforcement in the legal system in the UK – England and Wales, focusing on the particularities of the manner of enforcing the prison sentence and on the alternatives to imprisonment, as provided for in the relevant legislation of these States.

2. Penalties, measures and sanctions applicable to individuals

All criminal law systems have a common commitment to acquitting the innocent and punishing the guilty. This common commitment gives them a single unifying goal that focuses on the institution of punishment. Without punishment and the institution meant to establish and execute the punishment, there is no criminal law[2].

In the United Kingdom, pursuant to the provisions of Criminal Justice Act 2003, the Magistrates" Court and the Crown Court can pass a range of sentences which we list in decreasing order of severity[3]:

a) custody – immediate/suspended;
b) community sentence;
c) fine/compensation order;
d) conditional or absolute discharge.

In order to determine an appropriate punishment for an individual over the age of 18, according to Section 142 of the Criminal Justice Act 2003, the court must take into account the purposes of sentencing, respectively:

a) The punishment of offenders;
b) The reduction of crime (including its reduction by deterrence);
c) The reform and rehabilitation of offenders;
d) The protection of the public; and
e) The making of reparation by offenders to persons affected by their offences.

Furthermore, in order to determine the appropriate punishment, the court must take into account the principle pursuant to which the punishment should not be harsher than what is necessary in relation to the seriousness of the crime committed. Thus, pursuant to Section 143 par. (1) of the Criminal Justice

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[1] Ioan Chiş, Alexandru Bogdan Chiş, Executarea sanctiunilor penale, Universul Juridic Publisher, Bucharest, 2015, page 189.
[2] George P. Fletcher, Basic Concepts of Criminal Law, Oxford University Press Publisher, New York, 1998, page 25.
[3] Martin Hannibal, Lisa Mountford, Criminal litigation 2019-2020, Oxford University Press Publisher, Oxford, 2019, page 394.

Act 2003, the court shall determine the seriousness of the offence in relation to two essential aspects, respectively (i) the offender"s culpability in committing the offence and (ii) any harm which the offence caused, was intended to cause or might foreseeably have caused.

Sections 143-146 of the Criminal Justice Act 2003 comprise a number of aggravating factors that the court must take into account when determining the appropriate punishment. Thus, the court will hold an aggravating factor in case of previous convictions of the defendant that it considers relevant in relation to the nature of the crimes committed and the time elapsed from the date of their commission until present day. The commission of the crime during the period when the offender was released on bail, as well as the commission of the crime on grounds of race, religion, sexual orientation or disability are also aggravating factors that must be considered by the court when establishing the punishment.

Moreover, Section 144 par. (1) of the Criminal Justice Act 2003 provides a special case of reducing the punishment limits in case of concluding a guilty plea agreement with the offender.

In this respect, in order to determine the punishment to be applied to the offender who pleaded guilty, the court must take into account (i) the status of the proceedings in case of the offence in respect of which the offender has indicated his intention to plead guilty; and (ii) the circumstances in which this intention was manifested.

In case of a guilty plea agreement concluded with the offender, the punishment limits for the offence committed by the offender shall be reduced by one third. This reduction of the punishment limits is not expressly provided in the Criminal Justice Act 2003, but it is found in the Sentencing Council for England and Wales"s Guideline on the "Reduction in Sentence for a Guilty Plea".

The sentencing guidelines issued by the Sentencing Council for England and Wales, the Crown Court and the Magistrates" Court are binding on the courts and include guidance on the aspects that must be considered by the court and which may influence the punishment following to be applied. These guidelines provide different levels of punishment established depending on the damage caused to the injured party and the levels of guilt of the offender. The purpose of these guides is to ensure a consistent practice in England and Wales[4].

Discharge

A discharge may be ordered in case of minor offences, when the court finds that, in relation to the circumstances of the case, including the type of offence committed and the person of the offender, no punishment is required. If the court finds that the offender"s experience of appearing before the court during the trial is sufficient to correct him, the court may order an absolute discharge. Thus, in this case no punishment is applied to the offender, but his deed remains recorded in his criminal record.

However, if the court finds that, although the offence is of a lesser serious nature, the offender"s experience of appearing before the court during the trial is not sufficient to correct him, the court may order a conditional discharge, which entails discharge under the condition that the offender does not commit another offence for a period not exceeding three years as of the date of the ruling.

In case of perpetrating a new offence within the period for which the conditional discharge was ordered, the court may revoke this measure and try the offender both for the offence that was the subject of the conditional discharge and for the new offence committed within the said period.

Fine

In the legal system of England and Wales, the fine is the most common type of punishment in court decisions, being incidental to minor offences such as road traffic offences or theft. The amount of the fine is determined by the court depending on the seriousness of the offence.

Thus, pursuant to Section 164 par. (1) of the Criminal Justice Act 2003, before determining the amount of the fine to be imposed on the offender who is an individual, the court must inquire into his financial circumstances. The amount of the fine fixed by the court must reflect the seriousness of the offence [Section 164 par. (2) of the Criminal Justice Act 2003].

When fixing the amount of the fine to be imposed on the offender (whether an individual or legal entity), the court must take into account the circumstances of the case including, among others, the financial circumstances of the offender so far as they are known to the court [Section 164 par. (3) of the Criminal Justice Act 2003].

In this respect, before sentencing the offender to pay a fine, the court may issue a financial circumstance order in respect of him, which entails the obligation of the offender to make available to the court, within a certain period, a statement of his financial status.

A fine must not exceed the limit provided by law for the crime committed, limit that is established on levels. The maximum value is:

Level 1 (£250)
Level 2 (£ 500)
Level 3 (£ 1,000)
Level 4 (£ 2,500)

3. Custodial sentence

The custodial sentence is the harshest punishment under the law system from England and Wales and applies if the offence is "so serious that neither a fine

[4] See https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines/.

alone nor a community sentence can be justified for the offence" (Section 152 par. (2) of the Criminal Justice Act 2003). However, the court may order a custodial sentence if (i) the offender fails to express his willingness to comply with a requirement which is proposed by the court to be included in a community order and which requires an expression of such willingness (ii) the offender fails to comply with a pre-sentence drug testing order (Section 152 par. (3) of the Criminal Justice Act 2003).

In respect of the length of the custodial sentence, the court must opt for the shortest term in relation to the seriousness of the offence or offences committed (Section 153 par. (2) of the Criminal Justice Act).

However, this obligation shall not apply to sentences fixed by law or to indefinite sentences or to extended sentences provided by Sections 224- 229 of the Criminal Justice Act 2003.

Enforcement of the custodial sentence

Enforcement of the custodial sentence differs depending on the period for which it was ordered, the relevant provisions on this matter being found in Sections 237-268 of the Criminal Justice Act 2003.

Thus, in case of custodial sentences for a period of less than 12 months, half of this period is served in custody, while for the other half the offender is on unconditional license in the community.

On the other hand, in case of custodial sentences for a period of 12 months or more, except for dangerous offenders and those sentenced to an extended sentence, the offender shall serve half of that period in custody, and for the other half the offender is served on license in the community, subject to obligations recommended by the court. The probation service is not bound by the obligations recommended by the court through the sentence, and may establish other obligations or obligations in addition to those recommended by the court.

Breach of the obligations imposed by the probation service during the conditional licence will lead to the revocation of the conditional licence and to serving the remaining difference in custody. Revocation may also occur when the offender commits a new offence during the period of unconditional or conditional licence in the community. In this situation as well, the offender is to serve the difference in custody.

Supervision of offenders subject to custodial sentences for less than 2 years

Pursuant to Section 256AA of the Criminal Justice Act 2003, in case of custodial sentences for a period between one day and 2 years, offenders shall be subject to a period of post-sentence supervision. This period shall run from the time when the offender has served his sentence and shall end on the expiry of the period of 12 months as of the moment of his unconditional or conditional license in the community.

Thus, the offender will serve half of the sentence in custody and the other half in the community, and will be under supervision from the time the sentence is completed within the community as a result of his unconditional or conditional license and until the expiry of the term of 12 months from the moment of his license within the community. For example, in case of a 10 months custodial sentence, the offender will serve 5 months in custody, 5 months in the community and will be in post-sentence supervision for a period of 7 months.

Pursuant to Section 256AB of the Criminal Justice Act 2003, the offender may be subject to the following obligations during the period of post-sentence supervision:

- to be of good behaviour and not to behave in a way which undermines the purpose of the supervision period;
- not to commit any offence;
- to keep in touch with the supervisor in accordance with instructions given by the latter;
- to receive visits from the supervisor in accordance with instructions given by the latter;
- to reside permanently at an address approved by the supervisor and to obtain the prior permission of the supervisor for any stay of one or more nights at a different address;
- not to undertake work, or a particular type of work, unless it is approved by the supervisor and to notify the supervisor in advance of any proposal to undertake work or a particular type of work;
- not to travel outside the British Islands, except with the prior permission of the supervisor or in order to comply with a legal obligation (whether or not arising under the law of any part of the British Islands);
- to participate in activities in accordance with any instructions given by the supervisor;
- to take a drug test;
- to take a drug appointment.

If the offender fails to comply with the obligations imposed during the period of post-sentence supervision, the court may issue a summons or even a bench warrant for the offender. If the court finds that the offender has breached the obligations imposed in bad faith, it may order the offender (i) to serve a maximum of 14 days in custody, (ii) to pay a fine which may not exceed level 3 from the standard grid; or (iii) to an unpaid work requirement or to a curfew requirement.

Suspended sentence

Regimes for enforcing the suspended sentence around the world vary widely, but they can be broadly divided into two categories depending on the obligations that accompany the orders. Some versions only require people to refrain from committing new crimes and therefore have the same effect on all those convicted for the same period of time. Others allow courts to impose a number of obligations tailor-made for the specific risks and needs of the offender. The

current order in respect of the suspended sentence in England falls into the second category[5].

The relevant provisions regarding the suspended sentence can be found in Sections 181-195 of the Criminal Justice Act 2003. Thus, the court may opt for this type of punishment when sentencing a defendant to a prison sentence for a period between 14 days and 2 years, in case of deeds falling within the jurisdiction of the Crown Court, respectively between 14 days and 6 months, in case of deeds falling within the jurisdiction of the Magistrates"Court. The enforcement of the prison sentence can be suspended for a maximum of 2 years, a period that constitutes a supervision period for the convicted person. During the supervision period, the court may impose one or more of the following obligations on the convicted person:

- an unpaid work requirement;
- a rehabilitation activity requirement;
- a programme requirement;
- a prohibited activity requirement;
- a curfew requirement;
- an exclusion requirement;
- a residence requirement;
- a foreign travel prohibition requirement;
- a mental health treatment requirement;
- a drug rehabilitation requirement;
- an alcohol treatment requirement;
- an alcohol abstinence and monitoring requirement;
- attendance centre requirement.

If, during the supervision period, the convicted person fails to comply with the obligations imposed by the court or commits a new offence, regardless of whether for this crime the court follows to apply a prison sentence or not, pursuant to the provisions of Schedule 12 paragraph 8 of the Criminal Justice Act 2003, the court may revoke the suspension and (i) order that the suspended sentence is to take effect with its original term, (ii) order that the sentence is to take effect for a shorter term, (iii) order the offender to pay a fine of an amount not exceeding £2,500, (iv) amend the content of the community obligations initially established or the period for which they were imposed, (v) extend the period of supervision initially ordered.

4. Alternatives to imprisonment – community sentences

The use of probation in the United Kingdom can be traced back to 1840 when a Birmingham judge, Matthew Davenport Hill, drew up a register of probation counselors suitable for reforming juvenile offenders[6]. In 1841 Hill, a judge in Birmingham, in view of his experience in the courts of Warwickshire, began releasing minors into the care of persons who had undertaken to act as tutors. The practice of releasing people to prove their good intentions seems to form the center of the emerging idea of probation in both America and Britain between 1820 and the end of the nineteenth century[7].

The hopes of the Home Office for an independent probation body were met by the creation of the National Association of Probation Officers (NAPO) in 1912, at the suggestion of Sydney Edridge (deceased in 1934), Croydon Police officer and president of the association. The purpose of this association was to make progress in probation work, to facilitate contact between probation counselors and to stimulate thinking about the reintegration of offenders[8].

As the name suggests, a community sentence is served in the community. Courts are encouraged to use community-based sentences as alternatives to custody[9]. A community sentence combines some form of punishment with activities carried out in the community. It may include one or more of the 13 obligations for the offender. This could consist of up to 300 hours of unpaid work, for example removing graffiti or cleaning overcrowded areas[10].

Pursuant to Section 148 of the Criminal Justice Act 2003, a court must not pass a community sentence on an offender unless it is of the opinion that the offence, or the combination of the offence and one or more offences associated with it, was serious enough to warrant such a sentence. It cannot be ordered in case of an offence not punishable by imprisonment [Section150A of the Criminal Justice Act].

4.1. Obligations that may be imposed on the offender in the event of applying of a community sentence

Section 177 of the Criminal Justice Act 2003 provides that, when the court sentences a person over the age of 18, it may issue a community order imposing one or more obligations on the offender. The community order may be issued for a maximum period of 3 years and must provide an end date up until when the offender must observe all the obligations imposed. The following obligations may be imposed by the community order issued by the court:

- an unpaid work requirement;
- a rehabilitation activity requirement;
- a programme requirement;
- a prohibited activity requirement;

[5] Keir Irwin-Rogers, Julian V Roberts, Swimming against the Tide: The Suspended Sentence Order in England and Wales, 2000-2017, Law and Contemporary Problems Journal, volume 82, 2019, page 137.

[6] Phil Fennell, Christopher Harding, Criminal Justice in Europe: A Comparative Study, Clarendon Press Publisher, Oxford, page 24.

[7] Peter Raynor, Maurice Vanstone, Understanding Community Penalties: Probation, Policy, and Social Change, Open University Press Publisher, Philadelphia, 2002, page13.

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[10] Sentencing Council for England and Wales, "Community sentences", Sentencing Council for England and Wales for 2020, available at https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/community-sentences/.

- a curfew requirement;
- an exclusion requirement;
- a residence requirement;
- a foreign travel prohibition requirement;
- a mental health treatment requirement;
- a drug rehabilitation requirement;
- an alcohol treatment requirement;
- an alcohol abstinence and monitoring requirement;
- an attendance centre requirement.

Moreover, in case of a curfew requirement and an exclusion requirement, the court must also impose an electronic monitoring requirement. In the following, we will make a brief presentation of the content of each of the obligations that may be imposed through the community order issued by the court.

4.2. An unpaid work requirement

This obligation is provided by Section 199 of the Criminal Justice Act 2003 and involves performance of 40 to 300 hours of unpaid work, under the supervision of a probation officer. The court can only impose this obligation if it considers that the offender is a suitable person to perform this type of work. Work is usually done in 8-hour shifts on weekends, but if the person is not employed, the work is done during normal working hours. The type of work varies depending on the locality and the probation service that deals with the program. Regular projects include cleaning public spaces, painting buildings or cleaning graffitis[11].

4.3. A rehabilitation activity requirement

This obligation is provided by Section 200A of the Criminal Justice Act 2003. The court must specify in the community order the maximum number of days on which the probation officer may order the offender to take part in various activities for his rehabilitation. The probation officer may order the offender to take part in specific activities or travel to a specific location and to follow the instructions given by the person leading that location. Activities may include restorative justice activities, (i) in which the offender and one or more injured parties may participate, (ii) aimed at making the offender aware of the impact that his criminal activity has had on the injured party; or (iii) which enable injured parties to discuss about the offence and the impact it has caused.

4.4. A programme requirement

This obligation is provided by Section 202 of the Criminal Justice Act 2003 and involves the offender"s participation in an activity programme accredited by the Secretary of State. Programmes fall into four categories: general offending, violence, sexual offending and domestic violence. These must be recommended by a probation officer at the point of sentence[12]. The aims of these programmes are to:

- make offenders accept responsibility for their offences;
- avoid further offending;
- attempt to resolve any difficulties linked to offending behaviour, for example homelessness, marital or relationship breakdown, unemployment, illiteracy, addiction[13].

4.5. A prohibited activity requirement

This obligation is provided by Section 203 of the Criminal Justice Act 2003. The court may prohibit the offender, by order, from taking part in certain prohibited activities on the days mentioned therein. The purpose of this obligation is to prevent the commission of other offences such as those committed by the offender. Possibilities include prohibiting the defendant from visiting a particular place, for example nightclubs, or undertaking a particular activity such as driving, drinking alcohol or attending football matches[14].

4.6. A curfew requirement

This obligation is provided by Section 204 of the Criminal Justice Act 2003. The person to whom this obligation applies must not leave a particular location or locations, specified in the court order, for a certain period of time or periods of time between 2 and 16 hours a day. The maximum period for which the curfew requirement can be imposed is 12 months. The order can be enforced with electronic tagging. Tags can only be issued if there is a monitoring system for curfew in their area[15]. A tag is attached to the offender"s wrist or ankle and is linked to a monitoring machine installed in the place where the offender is living. The machine is linked via a telephone line to a monitoring centre. Monitoring centre staff are made immediately aware if the curfew is broken[16].

4.7. An exclusion requirement

This obligation is provided by Section 205 of the Criminal Justice Act 2003. The person is prohibited from entering a certain location and for a certain period of time, mentioned in the order issued by the court. This obligation may be imposed for a maximum period of 2 years. The order may provide for the prohibition to operate in connection with the location and for the period specified therein, or it may provide that the

[11] Catherine Heard, Community sentences since 2000: How they work – and why they have not cut prisoner numbers, Centre for Crime and Justice Studies, London, 2015, page 13.
[12] Catherine Heard, Community sentences since 2000: How they work – and why they have not cut prisoner numbers, Centre for Crime and Justice Studies, London, 2015, page 14.
[13] Martin Hannibal, Lisa Mountford, Criminal litigation 2019-2020, Oxford University Press Publisher, Oxford, 2019, page 422.
[14] Martin Hannibal, Lisa Mountford, Criminal litigation 2019-2020, Oxford University Press Publisher, Oxford, 2019, page 422.
[15] Catherine Heard, Community sentences since 2000: How they work – and why they have not cut prisoner numbers, Centre for Crime and Justice Studies, London, 2015, page 14.
[16] Martin Hannibal, Lisa Mountford, Criminal litigation 2019-2020, Oxford University Press Publisher, Oxford, 2019, page 422.

prohibition shall operate in connection with the locations and for different periods.

4.8. A residence requirement

Through this obligation provided by Section 206 of the Criminal Justice Act 2003, the offender is required to reside in a certain location and for a certain period of time specified in the court order. Before issuing the community order imposing this obligation, the court must take into account the surroundings of the place where the offender is to live. On the recommendation of a probation officer, one may establish that the offender will reside in a hotel or other institution.

4.9. A foreign travel prohibition requirement

Through this obligation provided by Section 206A of the Criminal Justice Act 2003, the offender may be prohibited from traveling (i) to any other country or territory outside the British Islands mentioned in the court order, (ii) to any other country or territory outside the British Islands, except for a country or territory specified in the court order, or (iii) in any other country or territory outside the British Islands. This ban may be imposed for a maximum period of 12 months.

4.10. A mental health treatment requirement

This obligation is provided by Section 207 of the Criminal Justice Act 2003 and requires that the offender be treated by a doctor or psychologist in order to improve his or her health. It can only be imposed if the court is convinced that the offender is suffering from a mental illness and that he needs treatment, and the offender agrees to take part in such treatment.

4.11. A drug rehabilitation requirement

This obligation is provided by Section 209 of the Criminal Justice Act 2003. The offender will participate in a detox program to reduce or eliminate his or her drug addiction. The order will involve frequent drug testing and a high level of contact and supervision coupled with a regular monthly review by the courts[17].

This obligation can only be imposed if (i) the court is satisfied that the offender is addicted to drugs and needs treatment, (ii) has been recommended by a probation officer and (iii) the offender has given his or her consent to take part in such a detox program.

4.12. An alcohol treatment requirement

This obligation is provided by Section 212 of the Criminal Justice Act 2003. The offender will receive treatment to reduce or eliminate his alcohol dependence. The treatment period cannot exceed six months

The period of treatment must last at least six months[18].

This obligation can only be imposed if the court is convinced that the offender is addicted to alcohol and that he needs treatment, and the offender agrees to follow such treatment.

4.13. An alcohol abstinence and monitoring requirement

The alcohol abstinence and monitoring obligation provided by Section 212A of the Criminal Justice Act 2003 may be imposed for a maximum period of 120 days. The court may require the offender to either (i) refrain from consuming alcoholic beverages or (ii) not to consume alcohol so that at any time he does not have a higher blood alcohol value than that established by the order issued by the court.

This obligation may be imposed only if (i) the offender"s consumption of alcohol is a constituent element of the offence committed by him or the court is satisfied that such alcohol consumption was a contributing factor to the offence, (ii) the court is satisfied that the offender is not addicted to alcohol, (iii) the court does not impose an obligation on the offender to undergo treatment for alcohol addiction, and (iv) the court has been informed by the Secretary of State that the elements necessary to monitor the offender are available in the area where this obligation is to be fulfilled.

4.14. An attendance centre requirement

This type of obligation provided by Section 214 of the Criminal Justice Act 2003 can only be imposed on offenders under the age of 25. At an attendance centre, practical activities, including sport, can be run to occupy offenders for a certain number of hours to keep them out of trouble. This is often on Saturdays as attendance centres were originally set up for football-related offenders[19]. The centres must include social education and life-skills training to: increase employability; maintain physical and mental health (including being aware of the effects of alcohol and drugs); have successful relationships (including respect for parents/partners; parenting skills and social skills); and deal effectively with high risk situations (including first aid, risks of carrying weapons and "gang culture")[20].

The court may oblige the offender to take part in activities in a training centre for a number of hours between 12 and 36. However, the offender may not be obliged to take part in activities in a training centre for

[17] Martin Hannibal, Lisa Mountford, Criminal litigation 2019-2020, Oxford University Press Publisher, Oxford, 2019, page 423.
[18] Explanatory Note to Section 212 of the Criminal Justice Act 2003.
[19] Explanatory Note to Section 214 of the Criminal Justice Act 2003.
[20] Catherine Heard, Community sentences since 2000: How they work – and why they have not cut prisoner numbers, Centre for Crime and Justice Studies, London, 2015, page 14.

more than once a day or more than three hours on the same day.

The obligation to take part in activities within a training centre can only be imposed if there is a training centre easily accessible to the offender. The first appointment for participation in activities within the training centre will be made by the probation officer and will be communicated to the offender by the latter, and subsequent appointments will be made by the responsible person within the centre.

4.15. Breach of the community order and its consequences

Part II of Schedule 8 to the Criminal Justice Act 2003 provides the situation when the community order issued by the court is breached.

Thus, a breach of the community order occurs when, without a reasonable excuse, the offender fails to comply with the obligations imposed. In the event of a breach of the community order, the responsible officer is required to issue a warning to the offender. However, the warning may not be applied if the offender has received a warning for a breach of the community order within the previous twelve months or the responsible officer refers the matter to an enforcement officer. In these two situations, the enforcement procedure against the offender will begin, being referred to the court in this regard.

The warning must contain a description of the circumstances of the breach of the community order and inform the offender that the breach is unacceptable and that a further breach of the community order within the next 12 months will bring him before the court. According to the Explanatory Note to Schedule 8 to the Criminal Justice Act 2003, if the offender fails again to comply, within a 12 month period and without reasonable excuse, the responsible officer must start enforcement proceedings. The responsible officer institutes proceedings by laying an information before a magistrates" court or the Crown Court, depending on the order.

If the court is satisfied that the defendant breached, without reasonable excuse, any of the obligations contained in the community order under paragraph 9 of Schedule 8 to the Criminal Justice Act 2003, the court may:

- amend the terms of the community order by imposing more onerous requirements;
- order the offender to pay a fine of an amount not exceeding £ 2,500;
- revoke the community order and retry the case;
- if the crime is not punishable by imprisonment, but the offender knowingly and persistently breached the community order, the court may revoke the community order and impose a sentence of imprisonment up to 51 weeks.

4.16. Revocation of the community order

Part III of Schedule 8 to the Criminal Justice Act 2003 provides the situation of revocation of the community order issued by the court.

Thus, the offender or the responsible officer may request the revocation of the community order, taking into account the circumstances that have occurred since its issuance. According to paragraph 13 par. (3) of Schedule 8 to the Criminal Justice Act 2003, the circumstances in which a community order may be revoked include the case where the offender has made progress or has satisfactorily responded to supervision or treatment.

If the court finds that the request is grounded, it may (i) revoke the community order or (ii) replace the obligations under the community order with other less onerous obligations. The latter option involves the revocation of the community order and the issuance of a new community order in which the newly established obligations of the court will be found.

An example for the situation when the court opts only for the revocation of the community order would be when the offender has become very ill and is unable to complete the requirements[21]. On the other hand, the amendment of obligations comprised in the community order may occur, for example, if the offender or his responsible officer wanted to apply for a community order with different requirements, for example due to the good progress of the offender[22].

4.17. Amendment of obligations comprised in the community order

Part IV of Schedule 8 to the Criminal Justice Act 2003 provides the situations when the amendment of the content of the obligations comprised in the community order issued by the court may occur.

Paragraph 16 provides the situation when the content of the obligations comprised in the community order is amended on the grounds that the offender has changed residence. Thus, the court may amend the community order by replacing the jurisdiction relating to the original order with the jurisdiction relating to the change of the offender"s residence. The amendment of the community order becomes mandatory for the court if the request for a change of the offender"s residence is made by the responsible officer.

The court will not be able to amend a community order containing obligations that can only be complied with if the offender continues to reside in the original jurisdiction. For example, the court will not be able to amend a community order containing an obligation to participate in an accredited program unless the accredited program is also available in the jurisdiction relating to the change of the offender"s residence.

However, the court may cancel those obligations which cannot be complied with by the offender or may replace them with other obligations which may be

[21] Explanatory Note to Schedule 8 to the Criminal Justice Act 2003.
[22] Explanatory Note to Schedule 8 to the Criminal Justice Act 2003.

complied with in the event that the offender no longer resides in the original jurisdiction.

Pursuant to the provisions of paragraph 17, the offender or the responsible officer may request the court to amend the obligations contained in a community order not only when the offender changes residence.

Thus, the court may order the cancelation of any obligation contained in the Community order or may replace an obligation contained in the community order with another obligation of the same type. The court may not however add a new obligation or replace an obligation contained in the community order with a different obligation. The competent court may cancel or adjust an obligation, for example to change the hours when the offender must not leave a particular location or may replace one activity with another. It can also impose electronic monitoring onto any requirement of the order[23].

However, without the offender"s consent, the court may not amend an order imposing an obligation (i) a mental health treatment requirement, (ii) a drug rehabilitation requirement or (iii) an alcohol treatment requirement.

If the offender fails to give his consent, the court may revoke the community order and retry his case. If the court proceeds to retrial, it must take into account the extent to which the offender has complied with the obligations imposed by the community order, and may also sentence the offender to imprisonment, if necessary.

Paragraphs 18-20 of Schedule 8 to the Criminal Justice Act 2003 provide the possibility for the court to amend the community order under the following conditions:

- in case of a community order imposing a mental health treatment requirement, a drug rehabilitation requirement or an alcohol treatment requirement, when the medical practitioner considers that (i) the treatment of the offender should be extended beyond the period specified in the community order, (ii) the offender needs different treatment, (iii) the offender is not susceptible to treatment, or (iv) the offender does not require further treatment;
- in case of a community order imposing a drug rehabilitation requirement, with periodic review, the responsible officer may request the court that subsequent reviews be made without a hearing instead of at a review hearing, or vice versa;
- the competent court may, upon the request of the offender or a probation officer, amend a Community order by extending the period for which it was issued by a maximum of six months – this possibility does not exist in the case of a community order whose term has been extended;
- in case of a community order imposing an unpaid work requirement, upon the request of the offender or the responsible officer, the court may extend the period for which the order was issued beyond the 12-month limit provided by Section 200 of the Criminal Justice Act 2003, if, in relation to the circumstances that have occurred since its issuance, the court is of the opinion that this measure is in the interest of justice.

According to a report published in the British Journal of Community Justice[24], part of the obligations that may be ordered by the courts are very rarely used; the alcohol treatment requirement, mental health treatment requirement, the residence requirement, the exclusion requirement, the prohibited activity requirement and the attendance centre requirement are all in this situation. The unpaid work requirement and the curfew requirement began to be used more often, and the supervision and the programme requirement have decreased since 2005.

The probation officers interviewed during this study expressed confidence in the two community orders. They would have embraced the opportunity to use the programmed alcohol treatment requirement, mental health treatment requirement, but these options were often not available. With regard to the enforcement of community orders, certain probation officers were of the opinion that committing a new offence while subject to a suspended sentence should always lead to the application of a custodial sentence. Others expressed the wish to be able to punish breaches of obligations imposed by applying fines. The probation officers interviewed expressed concern about permanent organizational and legislative changes.

5. Conclusions

Recommendation R (92) 16 to Member States on the European Regulation on Community sanctions and measures was the first piece of legislation that provided a complete set of rules on the application and implementation of community sanctions, although alternative measures to imprisonment began to be considered at EU level as early as the 1970s.

The law system in the United Kingdom provides community sentences as alternatives to imprisonment and the courts in the United Kingdom are encouraged to use community-based sentences as alternatives to custody, the use of probation in the United Kingdom being traced back to 1840.

Although the community sentence may include one or more of 13 obligations for the offender, part of these obligations are very rarely used in practice, while others have shown a decrease in usage.

[23] Explanatory Note to Schedule 8 to the Criminal Justice Act 2003.

[24] Jane Dominey, Community Order and the Suspended Sentence Order-Three Years On, British Journal of Community Justice, volume 7, 2009, page 87.

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BUSINESS EMAIL COMPROMISE FROM THE CRIMINAL LAW PERSPECTIVE

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Abstract

With nearly 85% of worldwide organizations being hit at least once, the Phishing attack has become one of the most significant cybercrime vectors that affect the business environment annually, with great loss in terms of money, assets, financial and personal data, confidential information and intellectual property rights. Hackers evolved both in sophistication and persistence of the methods they use in performing these attacks, while 97% of the users are still unable to roughly or properly recognize a simple phishing email. Amongst different types of Phishing, the Business Email Compromise variant represents one of the most employed tool by attackers for hacking human minds, and manipulate victims into performing various actions that eventually cause them loss. Most of the national legislations already have legal provisions to cope with this kind of menace, but the trend is to treat such scam as cyber-related offence or crime, based on the simple reason that it is performed by information technology means. While the judicial practice in this scenario is often ripped off by different interpretations of the existing legal provisions available, this material tries to come up with the most suitable criminal indictment solutions for this fraud, highlighting both technical and legal aspects that may help judges, prosecutors, lawyers, law enforcement agents and other legal practitioners in properly solving their cases.

Keywords: *business email compromise, fraud, scam, phishing, social engineering, criminal law, cybercrime, IT law, CEO fraud*

1. The concept of Phishing

Phishing has risen as a unique threat in the cyber environment, a menace that succeeds to bind together technology, psychology, sociology and communication skills, in exploiting the weakest link of the human defense and personal security: the mind.

Acting as a Social Engineering (SE) attack, Phishing is far more dangerous when directed to target a specific destination (individual, business, organization) – thus known as Spear Phishing.

Phishing itself is not intended to harm a computer system or data, as it hasn"t a malicious payload. Instead, it lures the victim to access its dangerous hyper-connections (known as "links") inserted in "to-good-to-be-true" email messages. Technically, the links are crafted to drive the user"s browsers to certain web pages (usually fake or in control of the offender). The human exploit is then realized as soon as the user is deceived and agrees to perform the offender"s will.

The COVID-19 pandemic offered a good opportunity to different bad actors (scammers, fraudsters, hackers) to target individuals and businesses alike, especially in the "work-from-home" scenarios.

Statistics of 2020[1] show that nearly 85% of the businesses have been hit by Phishing, while 97% of the Internet users do not have the capacity to recognize such an attack. On a regular basis, 30% of Phishing emails are opened by the users, and 12% of them further click on the links provided in the messages. Every month, 1.5 million new Phishing websites are created and used by fraudsters.

One particular thing is of a special attention: 96% of all targeted attacks are intended for intelligence-gathering[2]. Intelligence that is further used by the offenders in a reconnaissance activity with the intent to target a particular individual or business with the final aim to cause them loss of money or property. Such derived attack often comes as a scam, a swindle or a fraud, and it is known as Business Email Compromise (BEC).

According to government agencies[3], Business Email Compromise or Email Account Compromise (EAC) poses as a sophisticated scam targeting both large/medium/small businesses and sometimes individuals, frequently carried-out by an intruder breaking-in and taking-over an email account or just by spoofing an email address in order to determine an individual target to undertake financial transactions or transfers to bogus bank account or wire recipients.

While back in 2013, BEC scam was performed by simply creating a "just-like-the-original" fake email address (account) or by spoofing a genuine email address mostly belonging to a high rank official with a financial organization, a company or an organization (ex. CEO, CFO etc.), with the request of wire money transfer to be made to fraudulent locations, this kind of fraud evolved in the years after, both in technicity and

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[1] https://securityboulevard.com/2020/12/staggering-phishing-statistics-in-2020/.
[2] Ibidem.
[3] https://www.fbi.gov/contact-us/field-offices/anchorage/news/press-releases/fbi-releases-2020-internet-crime-report.

sophistication, posing a far greater danger to businesses that regularly conduct electronic (wire) banking transactions, money transfer and payments.

In its 2020 IC3 Report[4], the FBI warns about a new trend in BEC/EAC scams, where has been observed an increase of using Identity Theft at a larger scale and (illegally obtained) funds being converted into cryptocurrencies.

Holding the 9th position in the 2020 top US Cyber Crime by Type, BEC/EAC has reached the Number 1 position in terms of financial loss, with a figure of nearly 1.9 billion USD (with 1.7 billion USD in 2019), a strong indicator of the criminal potential these scams reached to.

The industry alike, especially financial companies see BEC and EAC as a damaging form of cybercrime, capable of producing loss worth billions of USD a year, especially during the COVID-19 pandemic, when two factors contributed the most in escalation of the scams: new work-from-home business model and the increasing number of new foreign clients/suppliers/partners etc.

The experts warn that no industry is risk-free against BEC/EAC. In 2020, 93% of these attacks hit energy and infrastructure sector, while the overall rise reached 75% of the tracked business[5].

Banking sector has its own big concern about BEC/EAC, as recent statistics[6] show that 86% of the bank employees and representatives think that business email compromise and account takeover fraud are the greatest risks to their business. In response to that menace, 37% of the bank respondents intend to invest significantly in check fraud technology in the next 12 months.

At this level of industry, BEC/EAC are often perceived as "cyberattacks designed to gain access to critical business information or to extract money through email-based frauds", where the emails are just an attempt to convince an employee to reveal "critical business or financial information or process a payment request" that would never be done otherwise[7].

For all that, the companies admit that BEC/EAC may be something more complex than a simple email spoofing, especially when they are confronted with sophisticated "account takeover" attacks – with the attacker using intrusion tactics, techniques and procedures (TTP), such as (Spear) Phishing and Reconnaissance. While inside an email account, the attacker may find very useful information, like personal data of the victim"s contacts (vectors for new BEC/EAC attacks), calendar events, as well as the content of the electronic correspondence which is of a great importance when the attacker need to study the victim"s profile (as an employee or a boss), especially the payment habits or financial recurrences (both business and personal).

The success of an BEC/EAC attack rely on both technical aspects and human (victim) behavior.

According to cyber-security specialists at CSO Online[8] the technical flaws in confronting BEC/EAC may include:

- Desktop email client and web interface (e.g. Gmail, Yahoo) not synchronized and run the same version;
- Not establishing multi-factor authentication (MFA) for business email accounts;
- Not forbidding "automatic forwarding" of emails to external addresses;
- Not properly monitoring email Exchange servers for changes;
- Not often reviewing the use of legacy email protocols (IMAP, POP3);
- Not logging the changes to mailbox login and settings for at least 90 days;
- Not enabling security features to block malicious emails.

While the human (mis)behavior consists of:

- Not being attentive (aware) of "last-minute" change of email address of domain name of the contacts the employee often exchanges messages with;
- Not checking the misspelling in email address (often, the attackers switch the letters like "O" or "I" with figures like "0" and "1", or just eliminate certain letters of figures);
- Not adding banners in inbox to messages received outside the organization;
- Not reporting suspicious payment requests;
- Not setting-up alerts for suspicious behavior in exchanging messages with other contacts.

Despite the use of (even highly) sophisticated tactics, techniques and procedures, BEC/EAC scams, usually known as CEO Frauds or Man-in-the Email scams, ultimately target individuals in a way that succeed to manipulate them and determine (or persuade) to perform different actions that otherwise they probably would have not done.

So, they appear to be more like social engineering (SE) type "confidence tricks", than real computer fraud, while in both scenarios the aim is the money, as more and more specialists tent to admit[9].

In such way, dealing mostly with human (brain) hacking, and not computer hacking, the legal system has fallen apart in identifying the most appropriate way to bring down to justice and press charges against the perpetrators.

But, what is really there, from the criminal law perspective?

[4] Issued on April 9, 2021.
[5] https://securityboulevard.com/2021/02/business-email-compromise-is-on-the-rise-again/.
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2. Doctrine views on scam/fraud

When it comes to law enforcement, it is of a great importance to define the terms, and rely on the most appropriate meaning in order to get the best from a variety of possible criminal charges.

Either is about Advance Fee Schemes or BEC/EAC, Business Fraud, Charity and Disaster Fraud, Credit Card Fraud, Elder Fraud, Identity Theft, Internet Fraud, Investment Fraud, Nigerian Letter (or "419 Scam") Fraud, Letter of Credit Fraud, Money Mules, Non-delivery of Merchandise, Ponzi Schemes, Pyramid Schemes, Romance Schemes or Sextortion, they all have one thing in common: human hacking (brain hacking) or human manipulation.

National criminal legislations usually drive on slippery slopes when about to differentiate among the above-mentioned illegal activities, and thus don"t make strong and clear difference between scam and fraud.

In the English-speaking countries" law, the term "fraud" is rather a concept, although not a crime in itself, it exists at the core of a variety of criminal statutes[10]. According to author Ellen S. Podgor, "one finds generic statutes, such as mail fraud or conspiracy to defraud being applied to an ever-increasing spectrum of fraudulent conduct", while "in contrast, other fraud statutes, such as computer fraud and bank fraud present limited applications that permit their use only with specific conduct".

Other English Law based authors[11] defined fraud as "an intentional or deliberate misrepresentation of the truth for the purpose of inducing another, in reliance on it, to part with a thing of value or to surrender a legal right". Fraud, then, appears to be "a deceit which, whether perpetrated by words, conduct or silence, is designed to cause another to act upon it to his or her legal injury".

"Fraud", as well as "fraudulent" are terms united by a common sense: deceit[12], and both has the meaning of a conduct with a purpose to deceive in order to get hold of something. That is why in some legislation (ex. UK) "fraud" is the short name for the crime of "fraud by false representation".

"Scam", however, has the meaning of a fraudulent business scheme, a stratagem for a gain or a swindle[13]. But in any case it involves human manipulation through deceiving.

Although there seems to be little or no difference between "fraud" and "scam", the general perception is that "scam" always involves money, whereas "fraud" may incur more other losses (apart from money).

Fraud is a term also used in the rest of the world criminal legislation, depicting various instances of criminal activity where deceit is often used to manipulate a person or to evade (bypass) state regulations for a personal gain.

More or less, the crimes having fraud as a drive, are usually gathered under the same title (or section) within the nations" criminal codes, such as "crimes against property".

3. Doctrine views on computer-fraud

Based on the legal provisions of the Council of Europe "Budapest" Cybercrime Convention of 2001[14], most of the European countries created, modified, or updated their own criminal laws including different crimes against confidentiality and integrity of data and computer systems, as well as the so-called "computer-related crimes" (computer-related forgery and computer-related fraud).

Article 8 of the CoE Convention on Cybercrime provides Member States with a model for criminalization of a behavior against the trust and the property by the means of computer data and computer systems, as follows:

"Computer-related fraud – Each member state shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the causing of a loss of property to another person by:

- any input, alteration, deletion, or suppression of computer data,
- any interference with the functioning of a computer system,

with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or another person".

Currently, the CoE Convention on Cybercrime has been ratified by 47 members of the Council of Europe and adopted by another 31 non-European countries, with most of its legal provisions being implemented into national criminal legislation on cybercrime.

And thus, having a rising trend in technology and with a new (or reshaped) criminal provision in place, a new form of fraud offence emerged – the computer-related fraud, usually with slightly harsh punishment with imprisonment (comparing to different other types of fraud or scams).

Analyzing the legal provision promoted in Article 8 by the CoE Convention on Cybercrime, one can notice that there is no mention of the "deceiving a person", "misleading" or "turning a person of doing something".

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[10] Podgor Ellen S., *Criminal Fraud*, American University Law Review 48, no. 4 April 1999: 729-768.

[11] Edward J. Dewitt Et Al., *Federal Jury Practice and Instructions*, 16.8, 4th edition, 1992.

[12] „The act of misleading another through intentionally false statements or fraudulent actions" (according to https://legal-dictionary.thefreedictionary.com/deception).

[13] scam. (n.d.) *American Heritage® Dictionary of the English Language, Fifth Edition*. (2011). Retrieved April 10 2021 from https://www.thefreedictionary.com/scam.

[14] Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680081561.

It is all about interfering with (or acting upon) computer data and computer systems, with "fraudulent or dishonest intent" of (just) the perpetrator on its way to procuring an economic benefit, while causing a loss of a property (that includes other values, such as money) to a person (the victim).

In some criminal legislations (in Romania, for example), the computer-related fraud was long time considered as a special provision, thus being preferred by the law enforcement, prosecutors and judges to be used in pressing criminal charges against individuals suspected for the commission of various scams especially on the online markets, like eBay, Amazon and so.

Even the cases of BEC/EAC are usually being "solved" by referring to computer-related fraud as the best option for a criminal charge, merely due to an increased penalty and the scope for a better prevention against this kind of misconduct.

4. Business Email Compromise at the crossroads between traditional fraud and computer-fraud

As we have showed, BEC/EAC is a type of scam or fraud that implies different tactics, techniques and procedures, with the use of computer data and systems or other means of electronic communications.

But, apart from using computer systems and data (mostly email messages), BEC/EAC is more about the perpetrator taking advantage of multiple bad habits of the victims in using electronic means of communication, and the manipulation of their behavior in order to give up sensitive information (personal, confidential etc.) and, more important, to perform certain acts that eventually result in loss of money or property (for the benefit of the fraudster/scammer)[15].

Although it may look like the same, fraud and computer-related fraud are two individual offences with different approach from the national criminal legislations.

The common things that seem to bind them are:

- they both target property (in general) and money (in particular) of another (individual or organization)
- they both produce or intend to produce loss
- they both use tactics, techniques and procedures from the cyberspace (email, short messages, instant chat, computers, smartphones etc.)

The differences are somehow essential.

The first difference consists of who/what the perpetrator (fraudster) is acting upon:

a) in the case of a simple fraud (scam/swindle – for example BEC/EAC), the criminal actor uses deceit as his principal weapon against the victim. Deceit is successful if the offender and the victim don"t actually meet in person, but communicate via email (or other means). Deceit works especially when the factual data (the misrepresentation) presented by the offender contains enough "truth" that determine the consciousness of the victim to lay down the psychological barriers, to enter in a "comfort status" in the relationship with the ideas provided by offender and finally to get into the "trust status" thus accepting the offender data input as "worth to be followed". And, this is the moment when fraudster takes advantage of the victim"s "trust status" and further conduct manipulation against her.

b) in the case of a computer-related fraud, the offender creates, modifies, deletes or suppresses computer data, and even interferes with the functioning of a computer system in order to cause loss (of property or money), thus no relying on the victim"s behavior and not trying to manipulate her at all. The victim simply does not have any role in being defrauded or losing her property or money.

In the BEC/EAC scams, the funds are consciously authorized or handed-over to the offender by the victim herself, while in the computer-related fraud scenarios, the victim is not participating at all, and just finds out, discovers or is noticed about the result of the fraud/scam: loss of her property.

Such conclusions are also shared by other authors. In one opinion[16], computer data and computer systems are the target of the offender in the case of computer-related fraud, whereas in the case of simple fraud (scam/swindle), they are just means by which the offender is deceiving the victim.

In the simple fraud (scam, swindle), if the offender relies on false computer data (through input, alteration, deletion or suppression of data – resulting in non-authentic data with the aim to be considered to legal purposes) in order to create a misrepresentation of the truth and manipulate the victim, along with the crime of fraud, a computer-related forgery crime should also be considered as a valid criminal indictment.

Another perspective[17] that we embrace is that, in the legal relationship between the traditional fraud (scam, swindle) and the computer-related fraud, there is no possibility of a legal concurrence of offences. This is merely a conflict of legal provisions, that usually requests the legal practitioners to choose the one that is the most applicable for a given scenario.

5. Conclusions

For all that we have said and demonstrated in this paper, we came to the conclusion that in the case of traditional fraud, performed by the means of electronic

[15] See also Andrew Marshall Hardy, head of fraud risk for CCIB in article *The high cost of business email compromise fraud*, available at https://www.sc.com/en/feature/the-high-cost-of-business-email-compromise-bec-fraud/

[16] George Zlati, *Treatise on Cybercrime*, vol. I, Solomon Publishing, 2020, p. 454.

[17] Idem, p. 453.

communications or computer data (e.g. BEC/EAC scam, swindle), the following offences shall be considered (given the tactics, techniques and procedures, as well as the technology used):

- illegal access to a computer system (with regard to the email account of the victim, that the offender breaks-in)
- unauthorized transfer of computer data (if the offender gets data – personal, financial, confidential – out of the email account)
- computer-related forgery (if the offender interferes with computer data thus resulting unauthentic information to be used in deceiving the victim prior to manipulate her to surrender the property or money)
- traditional fraud (scam, swindle) by the means of electronic communications or computer data

all together in a legal concurrence of offences.

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EXECUTION OF CUSTODIAL AND NON-CUSTODIAL EDUCATIONAL MEASURES IN LIGHT OF LAWS 253/2013 AND 254/2013

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Abstract

With the new education policy for juveniles committing criminal offenses, it is necessary to analyze the rules for implementing non-custodial and custodial measures, as well as changes in their replacement or extension. Analysis of transient situations. The regime of execution of the educational custodial and non-custodial measure in the case of a minor at the date of committing the criminal act, of age at the date of committing the crime.

Keywords: *principles, purpose, execution regime, educational centers, detention centers, probation services.*

1. Theoretical highlights

According to the new Criminal Code adopted by Law 286/2009[1], juveniles who commit crimes and are criminally liable are subject to non-custodial or custodial educational measures. There is a rethinking of the sanctioning treatment applicable to juvenile offenders, based on their social reintegration, as opposed to the old criminal law, according to which punishments could be applied to minors if it was considered that an educational measure is not sufficient to correct the minor"s behavior.

The new criminal policy adopted by the Romanian legislator took into account the international regulations[2] on the sanctioning of minors who commit criminal acts, aiming, in particular, at their recovery, social reintegration, in order to prevent other criminal acts.

Thus, non-custodial or custodial educational measures are applied to juveniles who commit criminal acts and are criminally liable, depending on the provisions of the law. Thus, according to art. 114 para. 1 of the Criminal Code, a non-custodial educational measure shall be taken against the minor who, at the date of the crime, was between 14 and 18 years old. It is thus found that the rule regarding the sanctioning of minors who commit criminal acts is the application of a non-custodial educational measure.

Exceptionally, in accordance with the provisions of art. 114 para. 2 of the Criminal Code, juveniles who commit criminal acts may be applied custodial educational measures in the following cases:

a) if he has committed another crime, for which an educational measure has been applied that has been executed or whose execution has started before the commission of the crime for which he is tried;

b) when the punishment provided by law for the crime committed is imprisonment of 7 years or more or life imprisonment.

Therefore, against the minor who commits a criminal act and is criminally liable, and previously he has not committed another crime for which another educational measure has been applied, and the punishment for the crime committed is less than 7 years, the court is obliged to take a non-custodial educational measure.

Compared to the express provisions of art. 114 para. 1 of the Criminal Code, it is found that custodial or non-custodial educational measures may also be ordered if, at the date of the judgment, the offender had turned the age of 18, as the date of the crime is important.

The non-custodial educational measures are, according to art. 115 para. 1 item 1 Criminal Code: civic training, supervision, weekend recording and daily assistance.

The custodial educational measures are, according to art. 115 para. 1 item 2 Criminal Code: hospitalization in an educational center and admission in a detention center.

The choice of the educational measure to be ordered against the minor who committed a crime and who is criminally liable[3] is made under the conditions of art. 114, according to the criteria of judicial individualization provided by art. 74 Criminal Code. The court, in order to evaluate the minor according to these criteria, will request the probation service to draw

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[1] Published in the Official Journal 510 of 24 July 2009.

[2] UN Convention on the Rights of the Child of November 20, 1989, ratified by Romania by Law 18 of 28 September 1990 (Official Journal 314 of 13 June 2001); Beijing Rules, adopted in Milan in 1995, on the Administration of Juvenile Justice; Ryad Principles of 1990 on the Prevention of Juvenile Delinquency; United Nations rules on the protection of minors deprived of liberty, adopted by the UN General Assembly by Resolution 45113 of 14 December 1990.

[3] Article 113 para. 2 of the Criminal Code, stipulates that the minor who is between 14 and 16 years old is criminally liable only if it is proved that he committed the deed with discernment, and according to para. 3, the minor who has turned 16 is criminally liable according to the law.

up a report, which will include reasoned proposals regarding the nature and duration of the social reintegration programs that the minor should follow, as well as other obligations that may be imposed on him by the court[4].

After the trial of the case, the non-custodial or custodial educational measure is executed in accordance with the provisions of art. 511, art. 514 and art. 515 Code of Criminal Procedure

2. Execution of non-custodial educational measures

The headquarters of the matter is Title IV of Law 253/2013 on the execution of sentences, educational measures and other non-custodial measures ordered by the judiciary during criminal proceedings.

According to the provisions of art. 63 of Law 253/2013, the non-custodial educational measures are executed in the community, during their execution ensuring the maintenance and strengthening of the minor"s ties with the family and the community, the free development of the minor"s personality, as well as his involvement in the programs carried out for the purpose of his training in the spirit of responsibility and respect for the rights and freedoms of others. It is therefore established that it is intended that the minor to whom a non-custodial educational measure has been applied should not be removed from the family environment.

Specifically, the manner of execution of non-custodial educational measures is established according to the age, personality, health condition, family and social status of the minor.

The central role in the organization, supervision and control of the execution of non-custodial educational measures belongs to the probation services.

In accordance with the provisions of art. 65 of Law 253/2013, after the finality of the decision by which a non-custodial educational measure was taken, the judge delegated with the execution sets a deadline, orders the bringing of the minor and the summoning of the legal representative, the representative of the probation services for the execution of the measure taken and the persons designated under their supervision.

2.1. Execution of the educational measure of the civic training stage

The execution of this educational measure provided by art. 117 Criminal Code aims to support the minor to understand the legal and social consequences to which he is exposed in case of crimes and to make him responsible for his future behavior.

The civic training internship consists of a program organized in the form of continuous or regular sessions, conducted over a period of no more than 4 months, and includes one or more modules of a theoretical or applied nature, adapted to the age and personality of the minor and taking into account, as far as possible, of the nature of the crime committed, for 8 hours per month of civic training[5], under the supervision of the probation counselor within the probation services in whose constituency the minor resides.

2.2. Execution of the educational measure of supervision

According to the provisions of art. 118 Criminal Code, the educational measure of supervision consists in controlling and guiding the minor in his daily program, for a period between two and six months, under the coordination of the probation services, to ensure participation in school or vocational training and prevention activities or getting in touch with certain people who could affect the process of correcting it.

The purpose of this educational measure is for the minor to participate in school activities, vocational training courses, prevention of activities and not to get in touch with certain people who could influence the process of correcting him[6].

The main role in the execution of this educational measure belongs to the parents of the minor, to the adopters or to the guardian. If these persons are unable to provide for effective supervision, the court will order the entrustment of the supervision of the minor, for the same period of time, to a trusted person, preferably a close relative, at his request. If this person is no longer able to exercise supervision, the judge delegated with the execution, in consultation with the probation counselor, shall appoint another person to exercise supervision.

The probation counselor exercises control over the execution of the educational measure and the performance of the duties by the person exercising supervision.

The minor"s parents, guardian or foster parent shall verify that he or she is complying with his or her obligations under his or her family, school or professional status.

If the court ordered in the content of the educational measure of supervision the participation of the minor in a school or vocational training course, and the minor is not enrolled in such a form of education, the probation counselor within the probation service in whose constituency resides the minor decides, on the

[4] Article 113 para. 2 of the Criminal Code, stipulates that the minor who is between 14 and 16 years old is criminally liable only if it is proved that he committed the deed with discernment, and according to para. 3, the minor who turned 16 is criminally liable according to the law.

[5] Law 253/2013, art. 66 para. 5.

[6] Art. 67 para. 1 of Law 253/2013.

basis of the initial assessment, the course to be taken and the institution in the community where it is to take place. The supervision and control of this obligation is carried out by the competent probation service.

The enforcement of the educational measure of supervision is done by the judge delegated with execution, who will set a deadline for when it is ordered to bring the minor, call the legal representative, the representative of the probation service, as well as the persons designated with supervision[7], and the exercise of the supervision starts within 30 days as of this time.

2.3. Execution of the educational measure of recording at the end of the week

The educational measure of recording at the end of the week is provided by art. 119 of the Criminal Code and consists in the obligation of the minor not to leave the home on Saturdays and Sundays, for a period between 4 and 12 weeks, unless, during this term, he has the obligation to participate in certain programs or carry out certain activities imposed by the court.

The purpose of this educational measure is to avoid the contact of the minor with certain persons or his presence in certain places that would predispose him to the manifestation of a criminal behavior.

Under this educational measure, the minor is forbidden to leave the home from 0.00 on Saturday until 12.00 p.m. on Sunday and is executed during consecutive weekends. As an exception, the court or the judge delegated with enforcement may establish another order, at the proposal of the probation counselor. Supervision of compliance with this obligation rests with the adult with whom the minor lives or with another adult designated by the court.

The probation counselor in the probation service in whose constituency the minor or the person designated by him or her in a community institution resides, exercises control over the execution of this educational measure and control over the performance of the duties by the person exercising supervision. To this end, the minor who lives alone or, as the case may be, the adult with whom he lives or appointed by the court has the obligation to allow the person designated with control of execution and supervision to make scheduled or unannounced visits to the minor"s home, on days when the minor must be in that space according to the court decision.

The educational measure of recording at the end of the week is executed under the conditions of art. 511 Code of criminal procedure, within maximum 15 days as of presentation of the minor and of the person designated with supervision before the judge delegated with the execution.

2.4. Execution of the educational measure of daily assistance

Daily assistance is the non-custodial educational measure provided by art. 120 of the Criminal Code and consists in the obligation of the minor to respect a program established by the probation service, which contains the schedule and conditions of deployment of activities, as well as the prohibitions imposed on the minor, for a period between 3 and 6 months. The supervision of the execution of this educational measure is done under the coordination of the probation service.

The execution of the educational measure of daily assistance is regulated by the provisions of art. 69 of Law 253/2013.

The supervision of the execution of this educational measure is carried out by the probation counselor or, as the case may be, by the person designated by his decision, within a community institution.

The parents, guardian or other person in whose care is the minor set together with the probation counselor the daily program that the minor shall observe and the activities that he must carry out. In case of disagreement, the program shall be established by the judge delegated with the execution, by reasoned decision, after hearing the concerned parties. The conclusion of the judge is not subject to any appeal.

The minor"s program will include school training activities, vocational training, obligations and prohibitions imposed during the execution of the measure and will take into account his identified needs, his social and professional status. At the same time, the program aims at the harmonious development of the minor"s personality, by involving him in activities that imply social relationships, organizing leisure and capitalizing on his skills.

The arrangement of the daily program is made within maximum 30 days from the time of the minor"s presentation before the judge delegated with the execution, under the conditions of art. 511 Code of criminal procedure, and daily assistance begins no later than 5 days after the establishment of the program.

When the daily assistance measure replaced a custodial educational measure, the establishment of the daily program shall be made no later than 15 days after the release.

3. Execution of custodial educational measures

According to the principle of legality, the execution of custodial educational measures is carried out in accordance with the provisions of the Criminal Code, the Code of Criminal Procedure and Law 254/2013.

Custodial educational measures shall be enforced only on the basis of a final judgment.

The principle of respect for dignity, the prohibition of torture, inhuman or degrading treatment

[7] Art. 511 Code of criminal procedure.

or the submission to ill-treatment shall also govern the enforcement of custodial educational measures.

The purpose of custodial educational measures is the reintegration into society of internees and their accountability, in order to take their own actions and prevent new crimes.

The essential difference between the purpose of punishment and the purpose of educational measures is represented by the multitude of activities established by the "Educational Project of the Center", which promotes through progressive accumulations and a regime with fewer constraints, the preparation of the minor for his return to the community from which he left, with a balanced physical and mental health, with a more developed sense of responsibility, with skills and competencies that will help him find a place in society and stop committing criminal acts[8]**.**

In the statement of reasons that accompanied the draft of the new Criminal Code, it is shown that the waiver of punishments in the case of minors and the execution - in most cases - of such educational measures of custody in specialized institutions, provides the premises for obtaining optimal results in education and the social reintegration of minors. The existence of specialized institutions allows the organization of educational and professional training programs appropriate to the age of these criminals, the contact of minors with major criminals during execution is avoided, etc.

The provisions of the Recommendation (2008) 11 of the Committee of Ministers state in principle that the deprivation of liberty of a juvenile delinquent shall be deemed as a last resort measure and shall be applied for a short period of time. In full agreement with the European provisions, the Romanian legislator establishes through the provisions of art. 114 of the Criminal Code, that the custodial educational measures have an exceptional character that can be applied only in compliance with special conditions. The seat of the matter of custodial educational measures is represented by Chapter III of Title IV of the Criminal Code, which regulates them in ascending order according to their severity, namely admission in an educational center and admission in a detention center.

By the provisions of art.124 Criminal Code a custodial educational measure is regulated with an educational-preventive effect that may be ordered against minors with deviant behavior who, through their actions or inactions, commit criminal acts of increased gravity. Also, as highlighted in the literature, admission in an educational center may be imposed on juvenile offenders when it is considered that non-custodial educational measures cannot lead to their re-education.

According to art. 124 of the Criminal Code, the educational measure consists in the admission of the minor in an institution specialized in the recovery of minors, where he will follow a program of school training and professional training according to his skills, as well as social reintegration programs. The admission is ordered for a period between one and 3 years [art. 124 para. (2) Criminal Code]. The educational center is the institution specialized in the social recovery of the admitted persons, where they attend school training and professional training programs, according to their skills, as well as other activities and programs meant for social reintegration.

The educational measure of admission in a detention center, regulated by art. 125 of the Criminal Code, consists in the admission of the minor in an institution specialized in the recovery of minors, with guard and supervision, where he will attend intensive programs of social reintegration, as well as school training and vocational training programs according to his skills. This educational measure is ordered for a period between 2 and 5 years, unless the penalty provided by law is imprisonment for more than 20 years or life imprisonment, when admission is taken for a period between 5 and 15 years.

Thus, admission in a detention center is a measure with an educational-preventive effect that may be ordered as a last resort when it is deemed to commit acts of excessive gravity. The distinction between the educational center and the detention center lies in the surveillance and guard regime and the intensive social reintegration programs.

The execution of custodial educational measures is regulated by Title V of Law 254/2013.

Detention measures are carried out in educational centers or detention centers.

During the execution of the custodial educational measures, the maintenance and development of the inmate"s ties with the family and the community is ensured, as well as the performance of some recovery measures adapted to his psychosomatic needs and personal development needs[9].

The educational centers and the detention centers are institutions specialized in the social recovery of the admitted persons, which are established by a decision of the Government, have legal personality and are subordinated to the National Administration of Penitentiaries.

Every person admitted in an educational center or detention center has the right to education, according to his needs and skills, as well as to an adequate professional training.

During the execution of the educational measures, the person against whom the measure was applied is provided, in an institution specialized in the recovery of minors, with the possibility to attend both school and professional training programs, as well as social reintegration programs.

Educational and detention centers have adequate spaces for accommodation, food preparation and

[8] Regulation for the application of Law 254/2013, art. 287.
[9] Art. 137 of Law 254/2013.

serving, school training and vocational training activities, social and psychological assistance, educational, moral-religious, cultural, sports, recreational activities, for providing assistance and medical treatments and for receiving visits.

The educational and detention centers have specialized staff for educational, moral-religious, cultural, sports, recreational activities, specific psychological and social assistance, medical staff, security, supervision and accompanying.

The Ministry of National Education, through the county school inspectorates, provides specialized personnel for school training activities in educational and detention centers.

The activity of social recovery of the admitted person is organized and carried out based on **an educational project** and a **recovery intervention plan**.

The educational project structures the organization and development of educational, psychological assistance and social assistance to inmates, according to individual needs and pursues with priority the following objectives: ensuring a climate conducive to personal development, providing usefulness for admission, reducing psychological and social vulnerability and the assimilation of knowledge and the formation of skills necessary for social reintegration[10].

Based on the Educational Project, for each admitted minor a "Recovery Intervention Plan" is made in which the educator responsible for the case is established, the customized activities to be carried out individually with each minor, the formulation of proposals for measures for the positive evolution of the person internally from an educational, psychological and social point of view[11].

The recovery intervention plan establishes the duration and the regime of execution of the educational measure, the activities and programs of school training and professional, educational, cultural, moral-religious, psychological and social assistance in which the inmate is included, after due consultation.

Regarding the **regime of execution**, it is distinct depending on the educational measure, respectively admission in an educational center or admission in a detention center.

In the educational centers, the regime of execution is common to all the admitted persons, individualizing themselves from the point of view of the recovery approaches meant for them, in order to respond to the needs of physical and mental development. Thus, the persons admitted in this regime are accommodated together, may move unaccompanied in spaces inside the center, carry out school training and vocational training, educational, cultural, moral-religious, specific social and psychological assistance and provide work, in groups, both inside the center and outside the box, without supervision.

Instead, the regime of execution of the measurement of admission in a detention center is based on the progressive and regressive systems, the admitted persons being entitled to move from one regime to another, subject to the conditions provided by law and good conduct.

Within the educational center, the execution regime is established by the educational council, which is set up at the level of each center.

With regard to detention centers, the enforcement regime, which may be opened or closed, shall be established by the commission for the establishment, individualization and change of the enforcement regime set up at the level of each center.

The closed regime applies to the admitted person for a period longer than 3 years[12] .

Persons admitted in this regime are usually accommodated together, carry out school training and vocational training, educational, cultural, moral-religious, specific social and psychological assistance and perform work, in groups, inside the center, under supervision.

The open regime applies to admitted persons for a period of less than 3 years. Within this regime, the admitted persons are accommodated jointly, they may move unaccompanied in areas inside the center established by the internal regulations, carry out specific school training and professional, educational, cultural, moral-religious, psychological and social assistance activities and performs work in spaces inside the center, which remain open during the day.

Educational, psychological and social assistance enables the admitted person the opportunity to acquire skills that lead to the adoption of a constructive, autonomous and responsible behavior in the community, with the aim of reintegration and social responsibility.

The reception of the convicted person in an educational and detention center is made based on the final court decision. Within 3 days from the reception in the center, the family or the legal representative are informed in writing about the possibilities of visiting and about the ways to support the social reintegration process carried out in the center. After being admitted to the center, the admitted person is kept in quarantine and under observation for 21 days.

In addition to the rights that a convicted adult has in the penitentiary, in the case of the juvenile detainee, special emphasis is placed on ensuring education, according to his needs and abilities.

The admitted person is obliged to complete his / her compulsory general education. Minors should be provided with 8 hours of sleep a day. The right to an intimate visit is granted only to the married person or who has the legal right to marry.

[10] Law 254/213, art. 142.
[11] Ioan Chiș, *Execution of criminal sanctions*, Bucharest, Universul Juridic Publishing House, 2015, page 605.
[12] Law 254/2013, art. 149.

During the execution of the educational measure, the admitted person can work only with the approval of the doctor from the center, but work is not allowed during the night.

The money obtained from the work performed is distributed as follows: 50% belongs to the inmate who can use 90% of them during the execution and 10% are recorded in his name at the State Treasury, to be collected at the time of release. The remaining 50% goes to the center"s administration.

Unlike the convicted adult, the minor can conclude an insurance contract regarding the contribution to the state social insurance budget for the income from the work performed, the contribution being covered from the 90% obtained during the execution of the measure.

The admitted person can also obtain income from the capitalization of the works carried out within the occupational workshops. The income thus obtained reverts entirely to the admitted person, after deducting the expenses necessary to carry out the works.

Regarding the rewards, the admitted person benefits from them if they show interest in the educational process, for the active participation in the organizational activities in the center and if they have an adequate behavior towards the other people in the center.

For admitted minors there is a number of specific rewards, such as: sending to camps or trips organized by the center or in collaboration with other institutions; agreeing for a maximum of 24 hours in the locality where the center is located; agreeing at the weekend for a maximum of 48 hours in the place of residence, family appointments, during school holidays, for 15 days, but not more than 45 days per year; consent for humanitarian reasons for a maximum of 10 days.

The humanitarian reasons for which consent can be given are: the death of a close relative or a person with whom the minor has strong emotional ties, solving social and medical problems, supporting the family or in case of disaster.

The obligations and interdictions, the disciplinary violations of the admitted minors are the same as for the convicted adults.

For admitted minors, in addition to the first 4 disciplinary sanctions applicable to the convicted person of age[13] the sanction of separation from the team can be applied for 4 hours a day, but not more than 5 consecutive days.

The execution of the educational measure of hospitalization in an educational center is done in accordance with the provisions of art. 514 Code of criminal procedure, and the execution of the measure of admission in a detention center is done according to art. 515 of the same code.

4. Conclusions

As mentioned in the preamble to this paper, the system of sanctioning juveniles who commit criminal acts was rethought by the national legislature, which eliminated the penalties, based on international regulations, pursuing the new criminal policy, in particular, their recovery, their social reintegration, in order to prevent the commission of other criminal acts.

However, I deem that the non-custodial educational measures as regulated by the legislator have not taken into account minors who commit criminal acts and who do not have parents, do not have a home, are not institutionalized ("street children") and against whom these measures have no practical effectiveness.

This conclusion follows from the economy of the provisions of art. 63 of Law 253/2013, according to which the non-custodial educational measures are executed in the community, during their execution ensuring the maintenance and strengthening of the minor"s ties with the family and the community, the free development of the minor"s personality, as well as his involvement in programs for training in a spirit of responsibility and respect for the rights and freedoms of others.

De lege ferenda, non-custodial educational measures should be rethought so as to take into account the situation of no family, homeless and uninstitutionalized minors.

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- Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings;
- Regulation for the application of Law no. 254/2013.

[13] Law no. 254/2013, art. 174 para. 1: a) the warning; b) suspension of the right to participate in cultural, artistic and sports activities, for a period not exceeding one month; c) suspension of the right to participate in work, for a period of maximum one month; d) suspension of the right to receive and buy goods, except for those necessary for individual hygiene and exercise of the right to defense, petition, correspondence and medical care, for a period not exceeding two months.

CONSIDERATIONS ON YOUNG PRISONERS – BETWEEN SOCIAL REINTEGRATION AND RECIDIVISM

Cristina DUMITRAN*

Abstract

The article presents some consideration on the efficiency of the social reintegration policies of young detainees, as part of the multidimensional evaluation process. Even though there have been elaborated policies for reducing the causes which generate criminality and relapse, their efficiency has not been evaluated until now, the only mean through which this has been done being the statistical one. Contrary to the expectancies, statistically, the relapse rate of Romania is constant in recent years. In the analysis, recidivists and non-recidivists" convicts aged from 16 to 29 who fit the NEET criteria (Not in Education, Employment or Training) have been taken into account. The article highlights the social problems encountered by those who have gone through imprisonment and those who have benefited from social services and social reintegration programmes ran in the penitentiary and from post-incarceration services. The conclusion is that Romania has the means of reducing the relapse, but they are not well enough lawfully integrated in a coherent and constant process.

Keywords: *youth, social reintegration policies, criminality, recidivism.*

1. Introduction

Crime and increasing the recidivism rate in particular, are one of the most acute problems of the 21st century. With the evolution of society (economic, cultural, industrial, technological, etc.) and with the positive effects transposed in terms of progress, inevitably appear the negative effects, among which are the increase of crime, the decrease of the security degree of citizens, the decrease of the authority of social control institutions, the appearance of a subculture of crime. Even though there have been developing policies to reducing the causes which generate crime and recidivism, their efficiency has not been evaluated until now, the only mean through which this is the statistical one. Contrary to the expectancies, statistically, the relapse rate of Romania is constant in recent years.

There is recidivism when, after the final Coupled with the statistical situation of age related crimes, it is noted that currently, in the custody of the penitentiary system:

- 1,07% are minors aged between 14 to 18 (236 minors, being 17 less now than in 2019);
- 3,44% are young people aged between 18 to 21 (759 young people, 90 less than in 2019) – according to the age delimitation from the low on the execution of sentence no.. 254/2013[1];
- 23,61% are adults aged between 21 and 30 (5198 inmates, compared to 5515 in the custody of the penitentiary system in 2019); - 32,82% are adults aged between 31 and 40 (7224 detainees, increasing by 588 compared to 2019).

Linking the state of recidivism with present ages, it is inferred that the share of recidivists is found among people aged in the two groups: 21-30 years old and 31-40 years old. Thus, the probability of producing the first deed was at a young age, as defined in the Law no. 350/2006– Youth Law, art. 2.

Taking into account only the statistical data, it appears that the young people we refer to (18-29 years old), they once again lived the experience of incarceration and the same time they also benefited from the social services, from the educational programs and approaches of social reintegration carried out in the penitentiary and from the services specific to the post-detention period. The reality that these young people have relapsed in an increased percentage, raises issues of reflection on the effectiveness of strategies and policies for the social reintegration of detainees, making it necessary to critically analyze and rethink policies.

The research was limited to this age group not only from the perspective of its importance as a category for the future of any society, but also, because from a legal point of view, with the implementation of the new Criminal Code in 2012, legal frameworks of same facts have changed and the research would no longer be relevant.

Additionally, it was taken into account, as a reference to the current situation - the year 2019, when the law of the compensatory appeal (how is knows in public space)[2] was abrogated by Law no. 240/2019, because the effects it produced in the period 2017-2019 are still felt today. decision of a sentence of imprisonment of more than one year and until rehabilitation or the fulfillment of the rehabilitation term, the convict again commits an intentional or

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[1] According to the art. 42, Law no. 254/2013, "young people are convicted persons under the age of 21".

[2] Law no. 169/2017 - law of the compensatory appeal, for the amending and completion of Law no. 254/2013 regarding the enforcement of punishments and freedom-privative measures laid out by judiciary bodies during the criminal cause.

outdated offence, for which the law provides for imprisonment of one year or more.

Society"s perception over the phenomenon of recidivism is an indicator of the failure of the justice system, which endangers security and public order. Studies have shown that the onset of delinquency occurs, in most cases, in early adolescence.

According to the statistical data provided by the database of the National Administration of Penitentiaries, the structure of detainees by to the criminal category, is as follows: of the 22,010 detainees (increasing by 6,06% compared to 2019):

- 37,75% are recidivists (slightly lower by 1,2% compared to 2019) and
- 27,05% non-recidivists with a criminal record (increasing by 2,2% compared to 2019).

In the Criminal Code, crimes during the period of the minor are not considered as recidivism. In this way, about the 27,05% non-recidivists with a criminal record can be considered to have committed crimes during the period of the minor or deeds for which they received the suspension of the sentence and supervision.

In this context, it was initiated a specific analyze within the Project co-funded from Human Capital Operational Program 2014-2020, POCU/380/6/13/125031 - "Support for doctoral candidates and post-doctoral researchers: *DECIDE - Development through entrepreneurial education and innovative doctoral and post-doctoral research*".

2. Content

According to the art. 3, Law no. 254/2013 *"(1) The purpose of the execution of sentences and educational measures constraining liberty is to prevent the appearance of new crimes.(2) The execution of sentences and educational measures depriving of liberty is aimed at forming a correct attitude towards the rule of law, towards the rules of social coexistence and towards work, in order to reintegrate detainees or interned persons into society*[3] *"*.

Preparation for the release of detainee begins on the first day of detention. Therefore, the chances of its inclusion in society depend on the quality of social reintegration services provided in the prison.

In the specialized literature, the phrase *social reintegration* means restoring the person to a state of functional balance before conviction[4].

If we take into account the factors that generate crime:

- poverty,
- low level of education,
- lack of a qualification and a job,
- lack of shelter,
- the entourage,
- genetic factors, etc[5],

the social reintegration of the detainee in the pre-detention environmental condition is not exactly optimal, but will be used by virtue of generalizing its meaning and assimilating it with the process of social inclusion, which "represents the set of multidimensional measures and actions in the fields of social protection, employment, housing, education, health, information-communication, mobility, security, justice and culture, aimed at combating social exclusion and ensuring the active participation of people in all economic aspects, social, cultural and political aspects of society". The social and criminal approaches and policies that are carried out with the detainees in detention to achieve this goal, were set out in the diary of the previous edition of the conference. However, although Romania has made progress in involving all parties responsible for reducing crime, few successful stories have been reported.

For example, the keystone was in the period 2017-2019, when, following Law no. 169/2027, the prison population reached unique negative levels in history. Thus, if in 2013 the number of detainees was 33,424, in 2019 there were months when their number was 18,900 detainees. The decrease in the number of detainees is not directly correlated with the decrease in the number of crimes and the reduction of crime.

According to Law no. 169/2017, it is stated that when calculating the executed punishment, regardless of the regime of executing the punishment, it should be taken into consideration, as a compensatory measure, the execution of punishment in improper conditions, a case in which, for every 30 days of detention in improper conditions, even if these are not consecutive days, 6 more days are added and considered executed.

Releases from prison as a form of compensation for poor detention have generated much controversy, including from human rights organizations: "*Both full-term release, much too hasty as a result of the enforcement of the compensatory appellate law, and the conditional release of convicts who had not proven themselves rehabilitated or ready to be reinserted, an excess stimulated by the lack of sufficient detention space, do nothing but encourage the criminal phenomenon. The availability of this release option induces the idea that offenders might easily escape after committing a crime, no matter how serious the crime may be. Thus, they end up committing new crimes, in fact more and more serious crimes, having more new victims as a result of these crimes, and finally, returning to prison after their much sooner release, without the chance to be fully rehabilitated and socially reinserted. Accordingly, it is quite likely*

[3] Law no. 254/19.07.2013 on the execution of penalties and the custodial measures ordered by judicial bodies during the criminal trial, Official Gazette of Romania no. 514/14.08.2013.

[4] According Social Assistance Law no. 292/2011, art. 6, alin dd), the *process of social integration* represents the interaction between the individual or group and the social environment, through which a functional balance of parties is achieved.

[5] C. Dâmboeanu, "*Fenomenul recidivei în România*". Calitatea vieții, XXII, nr. 3, București 2011, p. 295-312.

that prisons will be overcrowded as a direct result of hasty early release".

By applying Law no 169/2017, there were many situations in which detainees were released prematurely, without having achieved the objectives set at the beginning of the sentence. These objectives were specifically focused on the process of re-education, change and building new values. Thus, they did not have the necessary resources for integration into society. In this case, we are talking about integration into a society in which each individual complies with the rules and contributes to collective well-being through his actions.

According to the enforcement law, each detainee is assessed during detention, in order to identify intervention needs and vulnerabilities. Depending on the results obtained, an individualized plan of measures shall be drawn up.

These are prioritized according to risk, in the three areas: educational, psychological and social domain. The steps are staggered in time, throughout the execution of the sentence. In this way, if the detainee goes through all the steps in the years he spends in the prison, it is assumed that at the end of the sentence, the risks of recidivism are diminished.

So, from the 14,000 inmates who benefited from early release based on the enforcement of this law, more than 900 of them returned behind bars for committing serious violent offences - murders, rapes and robberies, in the same period: 2018-2019.

The vicious circle appears: no completed studies, no qualifications, no prospect of a job that will ensure a decent living, without developed skills and abilities, without a work education (discipline), stigmatized by society, sometimes without a family or its support, the only chance for released prisoner is to return to the environment in which he started his criminal career and obtained material benefits easily.

An analysis of the educational level of inmates revealed serious problems[6]:

- 3,49% have completed higher education studies;
- 0,64% have post highschool;
- 8,62% have attended highschool (9-12 school years);
- 10,44% have a qualification in a profession (92,1% of them being in the age group 30-60 years, so that only 7,9% of detainees under 30 years old have a qualification);
- 62,66% of them did not have a job upon arrest, while only 22% were involved in different domains of activity.

Some young detainees allege that they did not work during their detention, although they wanted to do it.

According to the enforcement law, "work" in the penitentiary is a right, not an obligation. Being a right that they can access or not, the specialists show that statistically, over 50% of detainees eligible to work in prison, refuse, understanding that legally, they have the right to accept or not this activity. Thus, those who are individualized in the maximum safety or closed regime, where the freedom of movement/exit from the rooms is restricted, appreciate work as a way to overcome these limits. When they reach semi-open or open regimes, where freedom of movement is increased, interest in work decreases in direct proportion. They consider it degrading to work, follow a schedule and have discipline in this regard and claim that they have never done so before. From this point we can talk about the" subculture" of prison, about models, values and interests that are specific to this environment.

As a benchmark for understanding the perpetuated stances through patterns of detainees, we show that:

- 59,68% did not complete the gymnasium cycle, being in the I-VIII classes segment (out of the 13151 detainees in this situation, 4323 are under 30 years old, representing 72,57% of the young detainees);
- 6,74% are illiterate.

The statistical radiograph shows the low interest of young people in school and qualifications, sine-qua-non conditions in accessing a satisfactory job and increasing employment opportunities.

35% of those released prematurely under Law 169/2017, were enrolled in penitentiary school (primary and secondary school) but did not finish. Studies on samples of detainees show that those who had the highest chances of re-integration into society are those who benefited from social capital: family, friends, well-meaning people, who offered them support and employment, work.

On the other hand[7], specialists highlighted the difficulties that young liberated people face: stigmatization (society was not prepared to repress them and give them "*a second chance*"), low education level, disinterest, background, lack of material resources necessary for subsistence until the moment of employment, the lack of a domicile and the necessary documents for the employment file.

The specialist said that the chances of re-integration increase if: the detainee has a qualification, wants to change himself, has the capacity for self-control, has a middle age, is physically and mentally healthy, maintains contact with the family, is not recidivist, has a previous work experience, worked in detention and has a permanent residence.

In this context, the chances of reintegration are difficult to predict.

One of the most recent directions of analysis of recidivism is that of "the criminal career" that begins in youth, develops and consolidates in detention and

[6] Statistical situation at 01.03.2021, effectively detaine: 22,010.

[7] Țica, Gabriel, "*Recidivism și excluziune socială*", Editura Universității din Oradea, Oradea, 2016, p. 201-2014.

provides a dynamic picture of an individual"s criminal activity by analyzing its trajectories, frequency, duration, stability over time and, finally, its cessation. Also in this context, it is talking about *"self-fulfilling prophecy*" who is a concept in the social sciences, which defines the situation in which someone expects, based on a hypothesis or an intuition, an event, usually negative, changes their behaviour depending on his/her beliefs, the result is that the "prophecy" is fulfilled. Thus, if the detainee does not believe in the possibility of reintegration into society, this will happen, regardless of the favorable context that would be created.

3. Conclusions

In fact, the reality is that it is not known exactly who are those offenders which will relapse and what are the factors that cause them to repeatedly deviate from the law.

In the prison system, a tool to assess the risk of recidivism of detainees has been implemented, but in present it is not relevant for making decision on psychological, educational and social interventions or for conditional release.

The minimum package of social reintegration programs held in prisons for periods of 3-6 months" maximum and does not ensure person-centrated intervention and change.

Another aspect that raises issues in addition to the duration of intervention, is related to the moment when the detainee is included in the program. Thus, if the detainee has to execute a sentence of 7 years for rape and in the first year is included in the program for sex offenders (which has 24 sessions – 6 months), by the end of the 7 years, it loses its efficiency.

On the other hand, the detainees claim that the social reintegration programs don"t help them at all, the only reason they participate is to get credits, rewards and early release, the motivation being extrinsic.

In conditional release commissions, the detainee"s presence at these programs and activities is taken into account, but the progress he has made as a result of his participation is not evaluated. One of the questions that should be asked would be "what change has occurred since the program?"

Released, in most cases, the detainee has the same problems as before imprisonment, but exacerbated, with a network of friends formed in the prison and, eventually, with consolidated skills and knowledge for practicing new crimes.

The lack of unified database for institutions, in which these elements are centralized, is the main obstacle in achieving an overview of individuals, predicting the risk of recidivism and assessing the effectiveness of how criminal and social policies respond to crime.

Given the above elements and statistical data on juvenile delinquency, we can appreciate that the purpose of the execution of the prison sentence is only partially achieved: preventing new crimes (during detention). The achievement a correct attitude towards law and order and social reintegration of ex-offenders remains a goal.

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CRIMINAL INTERVENTION AND RISKS OF CURRENT SOCIETY: MANIFESTATIONS AND PROBLEMS OF PUNITIVE EXPANSION IN NEW AND TRADITIONAL AREAS OF CRIMINALITY

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Abstract

The exchange of global economic flows and the high degree of development of technological processes have turned globalisation and technical progress into the current pillars of our society. The advantages and opportunities they offer are twofold, since they can both improve the quality of life and serve as an opportunity for unlawful and, specifically, criminal conduct.

The concept of risk has consequently assumed a leading role in shaping the social model of advanced modernity. At the same time, it has given rise, as a normative reaction, to a demand for security on the part of citizens, which in the sphere of Criminal Law is manifested in an expansive tendency in its scope of intervention.

However, the risks we are currently facing have different origins and characteristics, so that the expansive response of Criminal Law is neither unified, nor does it pose the same problems. Thus, based on the characteristics of today"s society and the risks that threaten it, this paper is based on the differentiation of the expansive currents of Criminal Law developed on the basis of new preventive needs. Specifically, it is possible to identify two punitive trends: one, whose function is to respond to new forms of criminality arising in the light of technical and scientific progress; the other, which affects and intensifies criminal intervention in traditional areas of delinquency, linked to marginalisation and social exclusion. Having set out this framework, we will analyse some of the main manifestations of both currents in the Spanish Criminal Code and the problems of legitimisation and attribution of criminal responsibility that they raise.

Keywords: *Criminal Law, social model, risks, punitive intervention, Criminal Policy*.

1. Introduction

This paper addresses the protection that Criminal Law currently grants to society. Its objective is to analyse the political-criminal discourse that has developed on the current social bases and present some of the problems posed by the penal regulation that has given recognition to this Criminal Policy since the adoption of the Spanish Criminal Code in 1995 and the successive reforms that have been expanding its content[1]. Criminal Law is attributed a crime-preventive purpose to protect society. It is, in essence, an instance of social control that establishes its mechanisms for controlling social conflicts. However, it differs from other instances of social control (family, education, social networks, etc.) due to its high degree of formalisation. Criminal offence is a conduct that expresses intolerable social harm and, consequently, requires the most severe state response in terms of affecting the rights and freedoms of citizens, fundamentally personal freedom.

Historically, Criminal Law has found its main object of protection in interests of an individual nature, derived from its development within the framework of the Liberal State of the 19th century (life, health, physical integrity, property, honour...). This has conditioned both the criminal policy of its time and the nature and structure of the offences whose commission harms or endangers these legal interests. However, if Criminal Law fulfils a social protection function, it is easy to deduce that it is the specific model of society that will define the scope of protection for the maintenance of peaceful coexistence. Obviously, the characteristics that define the societies of post-industrial countries are very different from those on which classical Criminal Law was based at that time. We are witnessing an unprecedented economic, technological, political, cultural, and social revolution that has put existing legal mechanisms to the test in the face of new realities and, in particular, in the face of the conflicts that arise in this remodelled society. However, as the characteristics of the current social model give rise to new areas of protection, there are growing doubts as to whether criminal intervention is still compatible with the principles that legitimise it.

Within the framework of these considerations, this paper will start with the main defining features of the post-industrial social model and the factors that contribute to the formation and entrenchment of the public"s perception of insecurity or fear. This will lay the necessary foundations for analysing how they have been translated into a political-criminal discourse differentiated according to the origin of the risk and its specific characteristics, which has conditioned Spanish criminal legislative policy too. Some of the examples

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[1] This paper is one of the results of the research project "Hacia un modelo de justicia social: alternativas político-político criminales" ("Towards a model of social justice: criminal policy alternatives"), granted by the Ministry of Science, Innovation and Universities of the Government of Spain, refence RTI2018-095155-A-C22.

in which this Criminal Policy is manifested will allow us to expose the main problems faced by Criminal Law in the 21st century. In doing so, this work contributes to the open debate in the specialized doctrine on the legitimacy of criminal expansion in each case, and its compatibility with the indispensable principles and guarantees of any criminal intervention.

2. Some keys to understanding today"s society

2.1. Risk society, knowledge society and exclusion society

As stated in the introduction, it is not possible to understand the Criminal Policy that has guided the reforms of the Spanish Criminal Code over the last 25 years without considering the social scenario in which it has developed. This is the result of the profound changes that have shaped the way we understand and relate to the world.

Briefly, the exchange of global economic flows and the development of technological processes have enabled the development of weightless and intangible activities characteristic of the global economy[2]. This produces both benefits and opportunities, as well as generating risks, new or more potentially damaging than those known in the past. Consequently, we live in a "risk society", where the processes of globalisation and technological progress affect the way we understand interpersonal relationships and the physical-spatial space in which they unfold[3].

Derived from above, today"s society is also set up as a "knowledge society", due to the leading role that new information and communication technologies play in it. ICTs are fundamental tools for social development that aspire to the global democratisation of knowledge. A paradigm of this is the Internet, the global network, where space and physical barriers disappear, and access to information is instantaneous, despite the physical distance between the event or sender of the information and its receiver. We live in the physical world, but also in the virtual world, which is as real as the physical world[4].

There is another facet of the current social model, which defines it as a society of exclusion or a "two-tier society"[5]. The positive effects of the opening up of economic networks, favoured by new technological channels, have a well-defined geographical scope. But they maintain, or even aggravate, social inequalities between countries and within their borders. The outbreak of the 2008 economic crisis is a good example of what the global economic order based on the rules of neoliberalism has led to and what it has meant in social terms. Today, the health crisis caused by Covid-19 has also shown that those who are suffering the most from the economic and health consequences are the most disadvantaged groups, as well as the poorest countries in terms of access to vaccines.

2.2. The birth of the insecurity society or fear community

The social scenario that has just been synthetically described is the basis for understanding another defining feature of the social system of our time. Economic development and technological progress are giving rise to risks that may even threaten the whole of humanity. They are latent risks, since it is difficult to specify when they will be translated into concrete damage, their magnitude and place of production, as they are not subject to physical limits[6]. It is also complex to establish a direct relationship between the victim and the origin of the damage, given the complexity of the production and management processes, as well as the exact mechanism and cause of the damage. Given these factors, the citizen acquires the impression of invisibility in the face of the danger, its agent and the extent of its repercussions[7].

Thus, the "community of fear"[8] or the "society of felt insecurity"[9] emerges. Obviously, the insecurity that a society manifests depends on the extent to which it is at the mercy of these "modern" risks. But it is also profoundly conditioned by citizens" subjective perception of risk, which influences what they are willing to tolerate[10]. What factors contribute to the formation and entrenchment of the social sense of insecurity?

First, the knowledge and information society contains a paradox of its own. The generation of

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[2] Colina Ramírez, E.I. Sobre la legitimidad del Derecho penal en la sociedad del riesgo. Barcelona: J.M. Bosch, 2014, 52.

[3] Beck, U. La sociedad del riesgo. Hacia una nueva modernidad. Barcelona-Buenos Aires-Mexico: Paidos, 1998, 25. Beck understands risk in a realistic or objective sense, i.e. assessed according to objective parameters of scientific knowledge.

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[6] See Silva Sánchez, J.M. La expansión del Derecho penal. Aspectos de Política criminal en las sociedades postindustriales. Montevideo – Buenos Aires: BdeF, 2006, 27; Mendoza Buergo, B. "Gestión del riesgo y política criminal de seguridad en la sociedad de riesgo". In La seguridad en la sociedad del riesgo. Un debate abierto. Edited by C. Da Agra, J. Domínguez, P. Hebberecht & A. Recasens. Barcelona: Atelier, 2003, 69.

[7] The invisible nature of risk in the technological society is one of the theses Beck puts forward to explain his theoretical model of the "community of fear". In this sense, see La sociedad del riesgo…, op. cit., 28 y 59.

[8] Beck, U. *La sociedad del riesgo*…, op. cit., 56.

[9] Silva Sánchez, J.M. *La expansión del Derecho penal*…, op. cit., 32.

[10] Colina Ramírez, E.I. *Sobre la legitimidad del Derecho penal*…, op. cit., 36.

scientific knowledge, subject to strict rules of testing and verification, gives rise to new areas of ignorance and potential risks[11]. Knowledge offers security, but also uncertainty. On the other hand, the danger of the introduction of false or insufficiently verified news or information into the global network has devastating effects on citizens" perception of risk. Today"s society is a society of information and communication, but this does not determine either the quality or the veracity of its content.

Second, changes in everyday life occur at a dizzying speed, leaving the individual with little time, and sometimes capacity, to adapt and assimilate them. This heightens the sense of fear about the repercussions on their professional work, private life, or leisure time[12].

Thirdly, the media play a very important role in shaping people"s perception of reality. The proliferation of programmes that magnify the dangers we have to live with and the sensationalist way of dealing with the news widen the gap between objective risk and people"s subjective feeling of fear.

Fourth, economic power groups have a strong influence on the generation and dissemination of information through their control of the media. For their part, political parties also contribute to shaping public opinion, since the discourse of the power groups is ascribed to a certain political ideology. But political parties are also recipients of public opinion. The demand for security appeals to the political power for quick and apparently effective action, which is introduced into the political agenda of all parties as a fundamental electoral weapon.

The variables analysed are key to establishing the equation between risks and citizens" perception of security/insecurity, as we have seen. However, the social significance of the risks derived from globalisation and technological progress, on the one hand, and the existence of social inequalities and exclusion, on the other, is quite different. And it could be said that some of the influencing variables described above would have a greater impact on the latter social aspect. In the latter case, we are dealing with the citizen"s fear of being a direct victim of crime, in the framework of a political, economic, and social context that is already very agitated by essential issues (employment, access to health care, social benefits, housing, etc.). It is not the insecurity generated by the secondary or collateral consequences of technical, scientific or financial progress, but the insecurity that arises as a direct result of these processes in the generation and stratification of poverty and marginalisation. The risk arises from the "other" who is not the same as us, because he or she is a non-included in the system. The fog surrounding the perpetrator/victim and cause/harm relationship in a complex web of tasks, functions and chains of responsibility clears to make way for a face-to-face between the citizen and this visible and easily identifiable "other". And so, the citizen is less willing to tolerate these dangers with which he or she has to live.

It is enough to review the selection of daily news items to see which ones capture the attention of the media and, in their role of shaping public opinion, of the public. They are particularly violent and bloody, with an excessive use of drama, morbidity, and even bad taste[13]. This emphasises the apparent seriousness of the situation and the need to act forcefully in the face of it. To a greater or lesser degree, the citizen internalises the language of communication, which introduces value judgements from the moment a news item is selected[14]. The importance of the role of information in this area lies in instilling in citizens a certain perception of the phenomenon of crime, modulating their attitude towards it[15], regardless of its real incidence according to seriously elaborated statistics[16]. Moreover, it consolidates the impression that the apparent increase in crime is caused by someone different or alien to the majority of citizens[17], especially immigrants, drug addicts, the unemployed, beggars, the socially maladjusted, the mentally ill, etc., who are socially identified as the culprits of public fear. The above discourse is once again used by the power groups and political parties to support their political action programmes, in the same terms as mentioned above. Security is demanded and consequently security is offered, a balm for social fear and the key to political success.

3. Risk, security, and Criminal Policy

On the basis of the social mosaic presented, an analysis will be made of the political-criminal trends that have been the basis of the reforms of the Spanish Criminal Code since its promulgation in 1995. It is possible to identify two main trends: one, oriented

[11] See Mendoza Buergo, B.: "Gestión del riesgo y política criminal…", op. cit., 68.

[12] Similar to this, noting the increasing difficulty of adapting to societies that are constantly accelerating, Silva Sánchez, J.M. *La expansión del Derecho penal*…, op. cit., 32.

[13] See Soto Navarro, S. "La influencia de los medios en la percepción social de la delincuencia". *Revista de Ciencia Penal y Criminología*, 07-09 (2005): 12-15 (http://criminet.ugr.es/recp).

[14] Fuentes Osorio, J. "Los medios de comunicación y el Derecho Penal". *Revista Electrónica de Ciencia Penal y Criminología*, 07-16 (2005): 5 (http://criminet.ugr.es/recp).

[15] Hassemer, W. *Persona, mundo y responsabilidad. Bases para una teoría de la imputación en Derecho Penal*, Valencia: Tirant lo Blanch, 1999,19.

[16] See the research by Benito Sánchez, D. *Evidencia empírica y populismo punitivo. El diseño de la política criminal*. Barcelona: J.B. Bosch, 2020, *passim*.

[17] Fuentes Osorio, J. "Los medios de comunicación…", op. cit.,17.

towards the "modern" risks of today"s society; the other, focused on the punishment of poverty and marginality.

3.1. The expansion of "modern" criminal law in the face of risk society

The binomial of risks derived from progress/citizen insecurity has brought the implementation of preventive policies by the State into the social and political landscape. Obviously, the greater the distortion between objective risk and subjective feeling of insecurity, the greater the demand by citizens for public action to avoid the actual harm of a possible threat. Even ahead of the birth of the threat of harm itself. A "preventive State" or a "vigilant State"[18] appears, which anticipates the danger in order to prevent it from arising[19].

In the field of Criminal Law, previous public policies have given rise to the so-called phenomenon of the "expansion of Criminal Law". In fact, this phenomenon spills over into other areas of criminal intervention, but here the approach is as follows: economic and technical development produces new areas of risk that affect new interests of protection or interests that were previously protected but are threatened by new forms of aggression. It is justified, then, that Criminal Law should review its contents and adapt them to the circumstances of a world that is very different from that of barely half a century ago.

According to the above, several areas of criminal expansion can be identified in relation to the "modern" risks of the globalised and technified society[20].

A first group focuses on the phenomenon of the globalisation of criminality in the commission of crimes. Here the "risk" lies primarily in the transnational or aterritorial nature of its commission, as well as in the greater material resources offered by the organisation for the perpetration of the offence. In addition to the increased penalties for certain offences when committed within the framework of a criminal organisation, the main manifestations of this group of expansion are, in my opinion, two: the criminalisation of the offences of belonging to an organisation and criminal group (Articles 570 bis and 570 ter, respectively), and the provision for the criminal liability of legal persons (Article 31 bis) and other groups without legal personality (Article 129).

A second group brings together a catalogue of offences in which very different legal interests are protected. However, they share common elements: a) in general, the collective or supra-individual nature of the protected legal interests and its protection against conduct that endangers them, without the need to actually harm them; b) the subsidiary nature of criminal protection compared to the protection offered by other legal sectors; c) the gradual assumption in criminal typification of the administrative mode of management, i.e., preventing conduct that only cumulatively generates damage[21]. A large part of the content of economic Criminal Law belongs to this heterogeneous group. Among others, offences relating to the market and consumers (Articles 278 to 288 of the Criminal Code), corporate offences (Articles 290 to 297), environmental protection (Articles 325 to 331), offences relating to the protection of flora and fauna (Articles 332 to 227), or urban planning offences (Articles 319 and 320).

A third group of offences incriminate the dangers arising from technical and scientific progress: genetic manipulations (Articles 159 to 162), use of nuclear energy and ionising radiation (Articles 341 to 345) and some offences against public health (Articles 364 and 365). In addition to these offences affecting health and/or the very existence of mankind, cybercrime can also be included in this group[22]. In a broad sense, it covers a wide range of situations of criminal relevance. In some cases, due to the fact that the use of computers or ICTs offers a new channel for committing traditional offences (fraud, coercion, threats, disclosure of secrets, harassment, child pornography, crimes against intellectual property, terrorism, hate speech, etc.) in which different legal interests are protected, mostly of individual nature (property, personal freedom, sexual freedom, privacy, etc.). In other cases, what is incriminated is a new criminogenic reality, in which Criminal Law assumes the protective role of the computer resource itself. An example of this are the offences of computer damage (Article 264) and denial of service (Article 264 bis). Also, the offences of hacking, computer intrusion or interception of data (Articles 197 bis and 197 ter), in which a new type of legal interest is protected, namely computer freedom.

Many of the incriminations representative of the modernisation of Criminal Law that have been highlighted have their origin in an international normative instrument that seeks the approximation of national criminal laws. Initially, the attempts by states to seek a common response to common problems are to be welcomed. But it also opens up the debate as to whether the expansion of criminal law into new areas or areas that have traditionally been alien to it is not affecting the foundations of its own legitimacy. Added to this are the specific substantive and procedural problems particularly posed by the crimes that guide

[18] Silva Sánchez, J.M., *La expansión del Derecho Penal*…, op. cit., 138-139.

[19] Mendoza Buergo, B. "Gestión del riesgo y política criminal…", op. cit. 75.

[20] It is not possible to draw a clear dividing line in each case, but the initial systematisation proposed by Mendoza Buergo is followed here (*El Derecho Penal en la sociedad del riesgo*, Madrid: Civitas, 2001, 41-42), complemented by this paper´s author with provisions introduced in the Spanish Criminal Code following successive reforms.

[21] Martínez-Buján Pérez, C. *Derecho Penal Económico y de la empresa. Parte General*. 5ª edición. Valencia: Tirant lo Blanch, 2016, 88.

[22] Cybercrime also fits into the two previous groups, since the use of ITC´s can serve as channel or instrument for the commission of the offence.

"modern" Criminal Law, such as that relating to the determination of the applicable Criminal Law when it is not possible to apply the principle of territoriality in the face of borderless crime.

In accordance with the principle of proportionality, criminal intervention is legitimised to the extent that it is an *ultima ratio* response for the protection of legal interests. According to this principle, the criminal protection afforded to legal interests of a collective nature, far from the individual referent on which liberal Criminal Law was built, raises the question of whether genuine criminal legal interests are really being protected, or on the contrary certain institutional functions traditionally protected by Administrative Law[23]. This is where the discourse on the legitimacy of a large part of economic and business Criminal Law comes into play. In addition to this, precisely, the subsidiary nature of criminal intervention and the coexistence of sanction regimes, with the consequent possibility of incurring in a *bis in idem* or a double sanction prohibited for the same conduct in the criminal and administrative spheres.

Even recognising the need to protect social realities of collective nature previously outside the scope of Criminal Law (environment, reasonable use of land...), the equalisation of the penalties to which the legislator sometimes resorts to punish situations with different effects on the protected legal interest is questionable. Thus, for example, certain conducts affecting the environment are punished with the same penalty whether they cause actual damage or "may cause damage" (Articles 325.1 and 326.2, 326 bis). This can only be understood from the perspective of the precautionary principle that guides Administrative Law, which has a wider scope of application than criminal prevention. There are also cases in which the same penalty is applied to the completion of the offence and to certain preparatory acts for the subsequent commission of the offence, such as the protection of computer freedom (Article 197 ter), computer-related damage (Article 264 ter), child grooming (Article 183 bis) or the counterfeiting of non-cash means of payment (Article 400), among others. On the other hand, the criminalisation technique followed in some cases clashes with the rule of law, in particular with the mandate of clarity or specificity of criminal legislation, due to the frequent use of normative elements or blank criminal laws, which require a strict standard of constitutionality to be met.

3.2. The expansionist punitive trend in the face of social exclusion and marginalisation

Criminality that has its origins in poverty and, on a larger scale, in social marginalisation, is not new. What is really "new" in relation to the apparent "risks" generated by the exclusion society is the current way of perceiving and understanding this criminality, in accordance with the influencing factors outlined previously. Security is demanded and security is offered. And what is the better way to achieve both objectives than through the criminal justice system, the State"s most repressive instrument. The current political-criminal trends in citizen security in Spain and other countries, focused mainly on the popular vote, fit into this context.

The content of these political-criminal guidelines is a faithful reflection of the "law and order" and "zero tolerance" policies that began in the United States in the early 1990s and rapidly spread to other countries[24]. The basis of these policies lies in the gradual destruction of the welfare State following post-industrial and neoliberal postulates. Thus, the progressive widening of the economic inequality gap and the social insecurity it generates find their counterpoint in the criminalisation (or rather, re-criminalisation) of poverty and marginalisation. The priority action of the public authorities therefore consists of repressing the disturbances of the "populace" through a policy of uncompromisingly dealing with the delinquency that disturbs the tranquillity of the middle and upper classes, since the latter make up the bulk of the electoral body.

This drift towards a progressive hardening of the criminal response in traditional areas of delinquency linked to poverty and social exclusion can be clearly seen in the successive reforms of the 1995 Spanish Criminal Code. The common element in all of them is the introduction of legal provisions that seek to isolate the offender from society for as long as possible. Examples of this are: (a) the introduction of revisable permanent imprisonment (2015 reform); (b) the reduction of the minimum limit of the custodial sentence from six months to three months (2003 reform), despite the null preventive effectiveness they exert; (c) the incorporation of the aggravating circumstance of qualified recidivism, which allows the sentence to be increased by one degree regardless of the concurrence of another or other aggravating circumstances (2003 reform); d) the provision of a regime of aggravating penalties for habitual and repeated offences (2003 and 2010 reforms), and subsequently for minor offences of minor theft and minor theft of use of motor vehicles or mopeds (2015 reform).

Apart from these legal provisions, the policy of law and order and zero tolerance can also be seen in the abolition of misdemeanours that took place with the 2015 reform. The LO 1/2015, of 30 March, repealed Book III of the Criminal Code, where misdemeanours were defined. The suppression was apparently justified

[23] Silva Sánchez, J.M. *La expansión del Derecho Penal*…, op. cit.,123, 138-141.

[24] See, mainly, Wacquant, L. *Las cárceles de la miseria*. Buenos Aires: Manantial, 2000,101-156. See also Wacquant, L. "La tormenta global de la ley y el orden: sobre neoliberalismo y castigo". In *Teoría social, marginalidad urbana y Estado penal. Aproximaciones al trabajo de Loïc Wacquant*. Edited by I. González Sánchez (203-228). Madrid: Dykinson, 2012.

by the legislator for reasons of minimum intervention, but in reality it has produced a generalised hardening of the criminal response, particularly in relation to small-scale property crime[25]. The 2015 reform has consolidated a particularly repressive and detailed regulation of minor theft, the prototype of petty crime, increasing the penalty for petty minor theft[26] (heir to the old misdemeanour) and incorporating new aggravations of the penalty that have also increased the penalty. The same fate has befallen street vending, in the context of offences against intellectual and industrial property. Moreover, in this case, the legislator has displayed a deficient legislative technique. In consideration of the characteristics of the perpetrator and the small amount of profit obtained, an alternative penalty is provided for to the attenuated or mitigated criminal offence (one to six months" fine or community service of thirty-one to sixty days). However, depending on the penalty imposed, the offence will be minor or less serious according to the classification established in Article 33 of the Spanish Criminal Code, with the substantive and procedural consequences resulting from it[27].

The political-criminal ideology that underlies the previous regulation has long opened up a heated debate in the specialised doctrine as to whether the legislative reforms of the last two decades have given rise to a Criminal Law focused on fighting against another who is not a citizen, but an enemy. Thus, there is talk of a Criminal Law of the enemy, which is largely rejected by the specialised doctrine. From the set of legal provisions that have been highlighted above, one can observe an intensification of the use of custodial sentences with a primary purpose of neutralising the offender, sometimes with neo-retributionist roots according to the (subjective) general opinion of the citizen. This calls into question whether this type of penal regulation is compatible with the resocialising orientation of custodial sentences in Article 25.2 of the Spanish Constitution.

Furthermore, these legal provisions go down the dangerous path of forgetting the *ultima ratio* nature of *Ius Puniendi* and the criterion of proportionality that legitimises it. Solving the problem of social differences caused by the global society by re-criminalising poverty does not seem to be the right way to go, and appropriate preventive social policies should be adopted for this purpose. The Spanish criminal legislator has distanced itself from this idea, since the progressive dismantling of the Welfare State has been accompanied, in an inversely proportional relationship, by an extensive and intensive punitive interventionism that does not produce dissuasive or resocialising effects. What it does produce is a placebo effect on the citizen, since it conveys the impression that something is being done to solve the structural problem behind the discourse of citizen security, above all because of the electoral advantage it offers.

4. Conclusions

This paper concludes that the Criminal Policy of a given historical moment can only be understood from the social foundations on which it is developed. In this sense, it has been analysed that the risks arising from the social fabric of post-industrial countries do not have the same meaning and characteristics. Nor do the set of factors that condition the citizen"s perception of insecurity have the same impact. Thus, the aim of this paper has been to show the double face of citizen insecurity and the risks that have caused it.

First, the risks that have genuinely driven the development of a "modern" Criminal Law are those deriving directly from the productive processes of economic globalisation and technological progress. This is the area in which Criminal Law has taken on a necessary extensive role, not without difficulties and problems that arise when it comes to making the protective function of Criminal Law compatible in the light of a society that is different from the one on which classical Criminal Law was based. The compatibility of criminal incrimination with the principles of legality, proportionality and culpability that determine the canon of constitutionality of criminal intervention is one of the fundamental challenges facing specialised doctrine and the work of judicial bodies.

Secondly, social threats rooted in marginalisation and social exclusion have emerged as a perverse effect of the above processes. However, they do not represent new risks for Criminal Law. What is new in the political-criminal discourse that responds to them is the gradual hardening of repression in this area, with an extension and intensification of custodial sentences. This punitive interventionism is dominated by "more of what is already known", with a clearly neutralising purpose, to the detriment of the aspiration of re-socialisation proclaimed in Article 25.2 of the Spanish Constitution. This is not the modernisation of Criminal Law to which we should aspire, that is difficult to fit into the framework of a Social and Democratic State under the Rule of Law such as Spain.

[25] See Faraldo Cabana, P. Los delitos leves. Causas y consecuencias de la desaparición de las faltas. Valencia: Tirant lo Blanch, 2016, passim.

[26] Article 234.2 punishes with the upper half of the penalty of the minor offence in cases that are usually committed in clothes shops or supermarkets: "when in the commission of the act the alarm or security devices installed on the stolen goods have been neutralised, eliminated or rendered useless by any means".

[27] Martínez Escamilla, M. "La venta ambulante en los delitos contra la propiedad intelectual e industrial", InDret-Revista para el análisis del Derecho, 1 (2018), 11.

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BRIEF REMARKS ON THE IMPORTANCE OF THE MATERIAL OBJECT IN A CRIMINAL OFFENCE

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Abstract:

In preparing this particular research, we aimed to put under scrutiny the concept of the material object by analysing it in special given situations, in connection to the criminal offences that are most frequently encountered in practice, and thus to underscore the importance of this concept as a factor in the evolution of the legal framework. The challenges that appear to be inherent when categorising criminal offences into conduct crimes and result crimes do not constitute a novelty in the works of legal scholars, and even less so in practice, but in order to submit them to a proper analysis, it proves imperative that we possess a good grasp of the material object of the criminal offence, in order to establish the perpetrator"s level of criminal intent, as well as the manner in which criminal liability can be triggered.

Keywords: *conduct crime, result crime, blackmail, bribery, abandonment, pre-existing material object.*

1. Theoretical perspectives on the material object of a criminal offence

One of the key elements that need to be analysed when we consider specific provisions of the criminal law is the material object of the criminal offence. Several definitions for this concept have been so far proposed, inevitably affording it an increased level of importance in the process of examining criminal regulations.

The material object of a criminal offence can be defined as the „material entity (either an object or a thing of any sort, an animal, the body of a person) towards which the overt act of criminal conduct is directed, its physical energy, thus menacing to bring material harm to it or effectively causing such harm"[1] or it can be regarded as a „thing, asset or any other social value or commodity (subject to monetary valuation or not) upon which the criminally prohibited action or omission falls directly or it is thus effected and in relation to which the socially harmful effects of the criminal conduct become manifest" [2].

None the less, the material object needs not be mistaken for the instruments by which the offence was perpetrated or even less so for the fruits of the crime[3]. A relevant example in this respect is the crime of tampering with official documents, regulated under section 320 of the Romanian Criminal Code. Every time an official document is subject to an act of forgery, regardless of the manner in which the active subject chooses to perform such forgery, it would be wrong to claim that the resulting document represents the material object of the offence, according to the opinions[4] of certain scholars. Other writers[5] fine-tuned this vision in regard to the crime of tampering with official documents, claiming that, in principle, this offence does not involve a material object, but admitting that there can be certain situations – in the case of „counterfeiting", when the material object is represented by a standard form that will be filled out by a person who lacks the capacity to do so.

Apart from the two aforementioned opinions expressed in regard to the material object pertaining to the offence of tampering with official documents, the hypothesis in which the said violation could involve a material object was analysed in a different variant of perpetration, one where the material element is not „counterfeiting", but where this offence is committed my means of material alteration, in which case the material object is represented by the official document that pre-existed the act of alteration[6].

We notice that, notwithstanding the age in which the concept of *„material object of an offence"* was defined and excluding any social or political influences, the central idea of this concept encompasses a material object that the lawmaker took into consideration when drafting the provisions of the criminal law.

It is easily noticeable that the elements defining the material object of a criminal offence are based on

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[1] C. Bulai – Manual de drept penal. Partea generală, Ed. All Educational S.A., 1997, p. 196.
[2] Aurel Dicu – Drept penal. Partea generală, vol. I, Ed. București, 1975, pp. 116–117.
[3] N. Neagu – Drept penal.Partea generală, Ed. Universul Juridic, 2019, București, pp. 80–81.
[4] Idem, p.81.
[5] C. Rotaru, A.R. Trandafir, V. Cioclei – Drept penal. Partea specială II. Curs tematic, ed. 4 revizuită și adăugită, Ed. C.H.Beck, București, 2020, pp. 378 – 379.
[6] M. Udroiu – Sinteze de drept penal. Partea generală, Ed. C.H. Beck, 2020, București, p. 101.

the distinction between conduct crimes and result crimes. Thus, the material object (also named immediate object[7]) is easily identified in the case of result crimes, and it consists in a movable asset, a written record or even in the body of a person, as opposed to conduct crimes, where legal scholars assessed in their works that the material object is of „an organisational, political or moral nature[8]".

Moreover, we estimate that a thorough analysis on the topic of the material object pertaining to a criminal offence does not only contribute to identifying the underlying differences between conduct crimes and result crimes, but also contribute to a higher level of understanding of the criminal law and its provisions – such as they are prescribed in the Special Part of the Romanian Criminal Code, as well as in other pieces of legislation.

While the existence of an individual or public interest that requires protection is an essential prerequisite for our being in the presence of a criminal provision under the law, the material object is not regarded, nor is it regulated, at the same tier of importance, so long as some offences can exist and are repressed even in the absence a material object, and this detail will be taken into closer consideration within the pages of this research.

In such a situation, however, we can ascertain that the endangerment or substantial harm afflicted on the material object brings injury to the safeguarded social relations contemplated by the law, and we can also retain that the absence of the material object (in the case of conduct crimes) negates the existence of the criminal offence[9].

Notwithstanding these, one opinion[10] among scholars points out to the existence of a material object even in the case of conduct crimes. It is also true that this opinion is founded on the existence of criminal provisions that are no longer prescribed under the current arrangements, and they refer to the offence of criminal insult aimed at a person. According to this theory, should the active subject bring insults to the passive subject, thus perpetrating a conduct crime, there could arise the possibility that a material object may exist and that harm may be caused to it when the offensive act of insulting is committed through the destruction of a piece of property representing the victim"s dignity – for example, a representative work thereof.

Under the current arrangements, we consider that such an act from the part of the active subject cannot be consistent with the elements of a conduct crime, but instead it will be materialised as a result crime. Through the destruction of a work product that belongs to the passive subject, apart from the state of discontent that it could instil in the latter, we conclude that we would be in the presence of a genuine case of aggravated criminal destruction of property – thus entering the realm of offences whose existence is dependent on the presence of a material object.

Equally, we cannot neglect the role of the material object in the process of accurately classifying an offence, of assessing the degree of threat that such prohibited conduct may generate, and of circumstantiating the moral factor of criminal intent[11]. One relevant example is represented by, say, a series of low-intensity physical aggressions effected by the active subject on a new-born baby[12], thus causing the infant to suffer traumatic damage that is incompatible with life, albeit the same trauma would have not endangered the life of an adult.

The assessment of such acts of battery, with consideration to the age of the passive subject, brings a considerable contribution to the process of ascertaining the level of criminal intent under which the offence was committed. In a situation similar to the one aforementioned, we could not assent to the claim that the active subject lacked full representation of their actions and that they could not foresee the possibility of inflicting traumatic lesions incompatible with life upon the passive subject.

2. The material object in conduct crimes and in result crimes

In examining the material object, we consider it is useful to make a clear distinction between what constitutes a conduct crime and what represents a result crime. One such expert opinion[13] has been expressed in regard to the practical importance of a good grasp of the material object – because the accurate classification of the criminal act consists in precisely this, and by so doing we acquire a good grasp of the safeguarded individual or public interest and of the safeguarded social relations – that constitute the subject matter of the criminal offence.

Even more so, a good grasp of the material object significantly contributes to the process of circumstantiating the level of criminal intent that the subject reaches at the time when the offence is committed. Another theory[14], under which the material object is instrumental in the correct assessment of the material damage incurred by the perpetration of an act covered by criminal law, is definitely not without importance.

[7] Aurel Dicu – Drept penal. Partea generală, vol. I, Ed. București, 1975, pp. 117-118.
[8] Idem.
[9] C. Bulai – Drept penal român. Partea generală, vol. I, Casa de Editură și Presă „Șansa" S.R.L., București, 1992, pp. 144–145.
[10] N. Giurgiu – Legea penală și infracțiunea. Doctrina, legislație și practică judiciară, Ed. Gama, pp. 162–163.
[11] F. Streteanu, D. Nițu – Drept penal. Partea generală Vol. I, Ed. Universul Juridic, București, 2014, pp.271–272.
[12] Idem.
[13] C. Bulai – Manual de drept penal. Partea generală, Ed. All, 1997, p. 197.
[14] F. Streteanu, D. Nițu – Drept penal. Parte generală vol. I, Ed. Universul Juridic, București, 2014, p. 271.

It becomes manifest, in a situation such as this, that the most eloquent example we are able provide is one in which we would examine the material object in the case of a theft, where it is easy to identify the material object taken by the active subject from the possession or control of the passive subject.

However, we consider that in the case of offences against property, the role of the material object can be regarded, and it can also be approached, in a manner that differs from the aforementioned academic opinion. For instance, in the case of a robbery, we are compelled to consider two distinct material objects: on the one hand, the material object represented by the movable asset belonging to the passive subject, and, on the other hand, the body of the passive subject upon which violence was exerted.

If we are to examine the provisions of section 233 of the Romanian Criminal Code and thus to analyse the material object from the perspective of the offence"s material element, we also arrive at the conclusion that the active subject of a robbery offence can bring manifest harm to one single material object, notwithstanding that we are in the presence of a complex criminal offence.

Thus, should the crime of robbery be committed by means of threats under which the passive subject yields and surrenders to the active subject all of the movable assets found in their possession, we notice that the immediate consequence is harm perpetrated against the property of the passive subject and, inherently, against the psyche thereof, but the harm caused to the psyche by the use of threats does not in itself constitute a result crime - on the contrary, it is a conduct crime.

Apart from the intrinsic examination of the section that incriminates robbery, we consider that such an interpretation does in no way influence the type and extent of penalties prescribed by the lawmaker in the provisions of section 233 of the Criminal Code.

A summary analysis of the criminal provisions allows us to conclude that the presence of the material object leads, on the one hand, to the classification of certain offences in the category pertaining to result crimes, while the absence thereof will classify offences in the category of conduct crimes, and on the other hand the same reasoning leads to the differentiation of criminal offences into two other categories: material crimes and formal crimes.

A material crime is defined as the „act characterised by the existence of a material object, upon which the action or omission is directed"[15], as opposed to a formal crime, that does „not provide for the prerequisite condition of a material object to exist […] not being closely connected to a certain thing[16]".

One first criminal offence that can be the object of this research is the crime of blackmail, regulated under section 207 of the Romanian Criminal Code and pertaining to the category of crimes against a person"s individual freedom. The crime of blackmail is recognised as a genuine result crime, albeit it lacks a material object[17], and its immediate consequence is the menace exerted against the mental freedom of the passive subject. In another opinion[18], it was also found to be true that the property of another that is obtained as a consequence of this offence being committed does not represent the material object, but the fruit of the crime.

We express our support for this classification, but we think it"s useful to point out several details leading to the conclusion that the crime of blackmail can have a material object, and that the said object can be represented by the body of the passive subject, without the need to consequently qualify this offence as a conduct crime.

The conclusion that we reached involves, as a preliminary phase, the examination of the material element regulated by the lawmaker under section 207 par. (1) of the Romanian Criminal Code, namely the act of „coercion" by the active subject exerted against the passive subject, aimed at compelling the latter to give, to perform, to refrain from or to suffer something. This coercion has been interpreted[19] as designating both moral and physical duress. Determining a person to perform a certain act by physical constraint implicitly requests the presence of a secondary material object, this being the body of the person upon which the violence is being effected.

In this respect, some authors[20] analysed the notion of „coercion" included by the lawmaker in the provisions of section 207 of the Romanian Criminal Code, and they concluded that the exertion of acts of physical violence, that fully attain the constitutive elements specific to the crime of battery, will end up being absorbed in the constitutive elements that characterise the crime of blackmail. Starting from this analysis, we conclude that an act of physical duress exerted by the active subject upon the passive subject, in an unwarranted manner, in order to obtain a gain of no monetary valuation, that would cause the latter a severe and permanent mutilation or disfigurement, would be classified as a genuine crime of mayhem, regulated under the provisions of section 194 par. (1) subpar. c) of the Romanian Criminal Code, as a

[15] Idem.
[16] Idem, p. 272.
[17] V. Cioclei – Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului, Ed. C.H.Beck, București, 2016, p. 139.
[18] L. M. Stănilă – Caiet de seminar. Drept penal. Partea specială, ed. a III-a revizuită și adăugită, Ed. Universul Juridic, 2020, p. 134.
[19] S. Bogdan, D.A. Șerban – Drept penal. Partea specială. Infracțiuni contra persoanei și contra înfăptuirii justiției, ed. a II-a revizuită și adăugită, Ed. Universul Juridic, 2020, pp. 256–257.
[20] Idem, p. 257.

concurrent offence to be prosecuted along with the crime of blackmail[21].

However, in the event of a perpetrator attempting, by the use of physical constraint, to subdue the passive subject into performing a certain act, followed by the latter"s refusal to comply to the coercion, the result is not the same as the one prescribed in the provisions of the incriminating norm found in section 207 of the Romanian Criminal Code. In such a situation, what is the violation for which the active subject will be held liable? The answer is that the active subject will be held criminally liable for the offence of blackmail, since the consummation of this crime intervened at the time when the threat towards the passive subject"s mental freedom was thus created[22].

Indeed, the lawmaker prescribed that one of the constitutive elements that condition the existence of blackmail is that the obtaining of the contemplated gain must be achieved in an unwarranted manner, a provision that rules out the *per a contrario* interpretation according to which the perpetrator who aims to unwarrantedly obtain a legitimate gain will not be committing the crime of blackmail, because in such a situation we would be validating the enforcement of a right by means of unwarranted violence[23].

Another relevant example, one pertaining to the category of crimes that involve the trafficking and the misuse of vulnerable persons, is the exploitation of beggary – a crime regulated under section 214 of the Romanian Criminal Code. We construed this offence to be another conduct crime, but, contrary to the initial distinction between the two classifications, in certain situations this one involves a material object.

„The act of an individual who causes […] repeatedly", which constitutes the material element of this offence, exacts some debate, since it is susceptible of being effected by means of physical duress, thus compelling the passive subject (the underage person or the physically/mentally disabled person) to resort to the pity of the general public. Therefore, we draw attention to the fact that, when examining the exploitation of beggary, we find that there is no material object, since the safeguarded social value that is protected by law is the person"s liberty and dignity, but when the body of the passive subject is involved, by submitting a person to physical constraint, we can discuss of a conduct crime whose material object is fully manifest.

Also pertaining to the category of crimes against property, and distinct from the initial example, where we tried to examine the material object of robbery, we analysed the offence of diversion of public tenders, regulated under section 246 of the Romanian Criminal Code. In this case, too, many authors[24] have expressed an opinion supporting the non-existence of a material object, but even so, this offence is a result crime.

At a first glance of the section indicated above, we conclude that the active subject in the diversion of public tenders aims to distort the final sale price in a public procurement procedure, which is correct, but we must not overlook the fact that this initiative is never manifest in the form of a material object. In the case of this particular regulation, too, some of the doctrine[25] considers that when the diversion is achieved by means of physical duress, we are in the presence of a result crime, one that involves a secondary material object – represented by the body of the person upon which the coercion is being effected.

There are also situations, in the case of crimes relating to the administration of justice, where the absence of a material object causes confusion in regard to the correct classification of an offence in either the category of result crimes or in that of conduct crimes. Such a situation can be encountered in the case of the criminal failure to report, an offence regulated under section 266 of the Romanian Criminal Code.

Some authors[26] claim that a material object is non-existent in this case, since the safeguarded social value thereby protected bears an abstract nature, which leads to the conclusion that failure to report, regulated under section 266 of the Romanian Criminal Code, is a conduct crime, but a contrary opinion[27] has also been expressed, supporting the conclusion that the material object of the crime that went unreported also constitutes, in reality, the material object of the criminal failure to report.

The controversial debate over the existence of a material object in the case of result crimes and the absence thereof in the case of conduct crimes seems to re-emerge when discussing crimes that pertain to the category of corruption and offences in public positions – more precisely, in the case of taking a bribe, an offence regulated under the provisions of section 289 of the Romanian Criminal Code.

Following an analysis of the judicial practice both before and after the enactment of the New Criminal Code, the doctrine reached a unanimous conclusion over the fact that the offence of taking a bribe is a conduct crime, while the same level of certainty was not expressed in regard to the existence or the non-existence of the material object[28].

[21] Gh. Ivan, M.C. Ivan – Drept penal. Partea specială, ed. 4 reviziuită și adăugită, Ed. C.H.Beck, București, 2019, p.118.
[22] V. Cioclei – Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului, Ed. C.H. Beck, București, 2016, pp. 140 – 141.
[23] Idem, p. 141.
[24] V. Dobrinoiu, N.Neagu – Drept penal. Partea specială, Ed. Universul Juridic, 2014, București, pp. 289–290.
[25] V. Cioclei – Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului, Ed. C.H. Beck, 2016, București, pp. 360–361.
[26] C. Rotaru, A.R. Trandafir, V.Cioclei – Drept penal. Partea specială II. Curs tematic, Ed. C.H. Beck, 2016, p. 42.
[27] V. Dobrinoiu, N.Neagu – Drept penal. Partea specială, Ed. Universul Juridic, 2014, București, p. 346.
[28] Idem, pp. 468–469.

3. The material object in special circumstances

Apart from the theoretical and practical importance afforded to the material object of criminal offences, from the perspective of their classification, we consider that the material object also represents an element of utmost importance in those situations where the presence or the absence thereof leads to an amendment of indictment and implicitly triggers a distinct criminal liability.

For example, in the case of harassment, regulated under the provisions of section 208 of the Romanian Criminal Code, some authors[29] reached the conclusion that this is a conduct crime which does not involve a material object. This being a crime that brings harm to a person`s mental freedom, harassment has often been considered similar in certain situations with an „insidious form of threats"[30], which requires certain comments, once it is encountered in the practice of courts.

Pursuant to this regulation, the material element of harassment consists in the unwarranted pursuit or surveillance of a person, an act whose immediate consequence is represented by the state of fear that is instilled in the victim. However, the body of the person in which fear is insinuated can represent the material object of an offence that derives from the crime of harassment.

If the unlawful surveillance perpetrated constantly and persistently will determine the passive subject to commit suicide, for fear of worse consequences that they may have to endure from the part of the active subject, we will find ourselves in the presence of another offence – a result crime, one whose material object undoubtedly exists.

Should a direct connection be established between the offence of harassment and the suicidal act of the passive subject, we can be contemplating the case of a murder committed knowingly, so long as the perpetrator *foresees the result of their actions and, although they do not pursue it, they accept the possibility that it may occur*.

In such an event, a conduct crime (lacking a material object) that harms the mental freedom of the passive subject converts into a result crime whose material object is constituted by the very body of the passive subject.

Another example is the crime of abandonment – regulated under the provisions of section 378 of the Romanian Criminal Code, one also considered by the literature as an offence that does not involve a material object[31], albeit in some practical situations that view is susceptible to change.

The prerequisite situation from whence to begin examining the crime of abandonment is represented by the existence of a legal obligation of maintenance, one that the perpetrator can also breach in the variants of the material element prescribed under section 378 par. (1) subpar. a) of the Criminal Code: „forsaking, banishment or leaving in distress", thus exposing the victim to physical and moral suffering.

In the context of a family, where the perpetrator is one of the parents, and the passive subject is an underage child, let us suppose that the parent repeatedly imposes physical correction on the child by exposing the minor to cold, every time the minor miscalculates one of the arithmetical operation they have to solve as homework. After repeated exposure to low temperatures, the child suffers a mild stroke and requires medical attention, without having their life endangered. In this case, too, we consider that the crime of abandonment, that has no material object, converts into another violation that does have a material object, one likely to also cause an amendment of indictment from abandonment to ill-treatment of a child, an offence regulated under the provisions of section 197 of the Romanian Criminal Code.

To conclude, the consequences generated by the perpetration of a criminal offence do not stop at the amendment of the indictment, but they also involve the examination of the existence or of the non-existence of a material object that has been subject to injury or harm.

4. Conclusions

As a consequence of the theoretical and of the practical correlations that we exposed in detail throughout the present research, we consider that the material object of the crime represents one of the most important elements when the examination of an incrimination norm is needed.

Its presence, the way in which it is characterised in dependence of the material element, but also in dependence of the level of criminal intent that is specific to each criminal offence, all constitute aspects that could lead to an amendment of indictment, thus generating legal consequences in the area of criminal liability, which sometimes can even be excluded.

Last, but not least, the analysis performed on the material object of the criminal offence also bears relevance in relation to the assessment of the level of intent under which the crime was committed. The actions or the omissions from the part of the active subject, effected on a certain material object, can prove instrumental in ascertaining the basic intent, the intent or the oblique intent of the perpetrator.

[29] Idem, p. 109.

[30] V. Cioclei – Drept penal. Partea specială I. Infracțiuni contra persoanei și infracțiuni contra patrimoniului, Ed. C.H. Beck, 2016, București, pp. 143–144.

[31] C. Rotaru, A.R. Trandafir, V. Cioclei – Drept penal. Partea specială II. Curs tematic, Ed. C.H. Beck, 2016, București, p. 454.

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THE HUMANISM OF CRIMINAL LAW

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Abstract

The humanism of criminal law is a principle of criminal policy and postmodern criminal law. It is listed in numerous internal and external sources. An international treaty based on the principle of humanism is the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment, adopted in New York in 1984. The European Court of Human Rights has a rich jurisprudence that sanctions violations of the European Convention (see art. 3) in the field of human rights protection, including in terms of humanism of criminal law.

Keywords: *humanism, criminal law, human rights, torture, criminal policy, inhuman punishments, degrading punishment.*

1. Introduction

The word „humanism" comes from the Latin word *humanitas* and means benevolence or humaneness, and currently it designates a true social and cultural movement, too. Humanism is a doctrine that places the human being, his welfare and the trust in human reason at its centre.

According to the Amsterdam Declaration (2002), humanism supports, *inter alia*, democracy and human rights, and emphasizes that individual freedom must be harmonised with social responsibility.

In the field of criminal law, humanism can be associated with the classical thinkers. The classical doctrine has opposed to the cruelty of penalties and has taken a stance against the death penalty, the inhuman, degrading and infamous punishment. We can safely say that the representatives of the classical school of thought in Criminal Law have advocated the humanism of Criminal Law[1].

The classical doctrine[2] of Criminal Law has appeared in the third quarter of the 18th century, and the father of this doctrine is deemed to be Cesare Beccaria, who has written the unsurpassed (appreciated especially *illo tempore*) work „*Dei delitti e delle pene*" in 1764[3]. A very probable reason for the birth of the classical doctrine of Criminal Law has been the conflict between the bourgeoisie and the feudal lords. The work of Beccaria is remarkable and, at the same time, fundamental for criminal law, whereas it is the only work of that time that deals with the essential topics of criminal law[4].

Cesare Beccaria has sketched the lines of modern criminal law. His ideas, together with those of Montesquieu and of other academics of that time, have been taken over and developed by the thinkers that followed him, have been included in the documents of the 1789 French Revolution, and some are enshrined in the contemporary criminal laws[5].

When we talk about the humanism of criminal law, we must not ignore that the criminals are, at least to some extent, a product of society. The idea of eradication of the criminal phenomenon is a regularly recurrent one and we find it including in formal legal documents, national or supra-national (strategies, recommendations, action plans, policies, etc.). This goal - the eradication of the criminal phenomenon - is a beautiful hope or a superb illusion, that feeds the social morale, thus helping many people not to resign and to find the motivation to progress.

2. The content of the principle of humanism of criminal law

Brevitatis causa, the humanism of criminal law is the obligation of the legislator and of criminal law enforcers to observe the fundamental human rights and freedoms. In other words, the humanism of criminal law is an indispensable requirement for the creation and the enforcement of criminal law.

Humanism is not only a principle of criminal law, but also a principle of criminal policy, because the state is bound to find the instruments or the means able to re-socialize the criminal offenders and to protect those who become the victims of crimes. Indeed, from a different perspective, the state is bound to create the optimal legal framework for successfully re-inserting into the society those who commit anti-social acts and

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[1] C. Duvac, N. Neagu, N. Gamenț, V. Băiculescu, Criminal Law. General Part, Universul Juridic Publishing House, Bucharest, 2019, p.42.

[2] For an in exteso presentation of the main schools of thought in criminal policy, see C. Duvac, N. Neagu, N. Gamenț, V. Băiculescu, op. cit., p. 42 et seq.

[3] The name of classical school was given by Enrico Ferri.

[4] The other titans of Illuminism - Rousseau, Montesquieu, etc.- have dealt more with the issues of general legal policy and less with those of criminal policy.

[5] M.A. Hotca, Criminal Law. General Part, Universul Juridic Publishing House, 2nd edition, Bucharest, 2020, p. 30.

for granting the necessary protection to the victims of crimes. In order to achieve this policy, the state is bound to adopt assistance measures aimed at the detained persons and their victims.

The principle of humanism is enshrined in both internal sources and international treaties. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in New York, in 1984. Our country has adhered to this treaty in 1990, by the Law No.19/1990[6].

According to Article 3 of the European Convention on Human Rights: „*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*."

The principle of humanism is also found in Article 22 paragraph (2) of the Fundamental Law, in a wording similar to the one of the Convention. According to this constitutional provision: „*No one shall be subjected to torture or to any kind of inhuman or degrading punishment or treatment*."

Torture means to deliberately inflict severe physical or mental pain in order to obtain confessions, information or testimonial depositions. Inhuman treatment means to inflict less severe physical or mental pain. Degrading treatment means a humiliation of the natural person aimed at weakening or breaking her mental strength.

The criminal offender, as a member of the society, with which he has come into conflict, must benefit from certain rights, inherent to the human being. He has to be brought back to the society of which he is part by measures aimed at changing his conduct. If an officer uses an inhuman or degrading treatment on a person, he shall be liable for the criminal offence of ill-treatment.

The Strasbourg Court has ruled that flogging or physical exercise is a degrading punishment[7], while spanking the hands of some Scottish pupils with a belt is not inhuman or degrading treatment[8]. On the other hand, the Court has ruled that the expulsion of an 18-year-old, at the time of the facts, to the US in order to be sentenced to death, is contrary to Article 3 of the Convention, because the suffering caused by the wait in death row (the death row syndrome), given the situation of the person in question, is able to put in danger the equilibrium between the general interest and the private one[9].

The European Court has also found the violation of Art. 3 of the Convention in the cases where the state bodies have used the physical force (electric shocks, for example) or mental pressure (blindfolding or detention in dark places, etc.)[10].

The last important legal document, that legally enshrines the principle of humanism of criminal law at the level of the European Union is the Charter of the Fundamental Rights of the European Union, which stipulates in Art. 4 that: „*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*."

The principle of humanism is twofold: the protection of the natural or legal person by prohibiting the actions dangerous to the social values; the observance of the criminal offender"s dignity and rights.

The principle of humanism opposes to the adoption of criminal penalties, inhuman or degrading. Also, the aim of enforcement of penalties has to be the re-education and the social reinsertion of criminal offenders.

According to this principle, the legislator and the law enforcement bodies are bound to regulate individualisation criteria and to adapt criminal sanctions to the particular case of criminal offenders respectively.

The principle of humanism of Criminal Law has another side, which involves, besides the protection of criminals" rights, the safeguarding of victims of crimes who should not be ignored from the legal equation of the criminal conflict relationship, due to the concerns regarding the criminal offenders.

Throughout the resolution of the criminal conflict relationships, the victim must enjoy at least the same degree of attention and protection as the criminal offender, otherwise criminal law would be adrift and

[6] Thus, the preamble of the New York states:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights2 and article 7 of the International Covenant on Civil and Political Rights, 3 both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975, desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world (...)".

[7] Ireland v. United Kingdom; Tyrer v. United Kingdom.

[8] Campbell and Cosans v. United Kingdom. The recitals of the Convention stipulate that the UK law (common law) allows the use of physical punishment on children by parents and educators, provided that they are not excessive and do not inflict mental or physical harm (humiliation, degradation). However, in our opinion, the Court's solution (in the case X, Y v. the Netherlands), according to which forcing a minor over 16 years, with serious mental disorders, to have sexual relationships, does not represent inhuman treatment, is questionable. The Court has considered that the gaps of the Dutch laws in these cases, in the sense that the start of the criminal investigation is made subject to the preliminary complaint of the injured person, are not enough to entail the application of the Convention.

[9] Soering v. United Kingdom.

[10] Takin v. Turkey; Ribitsch v. Austria. If the wounds are attributable to the accused, who has opposed to the arrest, Art.3 of the Convention is not violated (Klas v. Germany).

failure would be implacable. The immediate beneficiary of the act of justice has to be the one who has become the victim of the illegal act, although on another, more abstract level, the effects of justice radiate more or less on all members of the society.

Criminal law and the other criminal sciences must also deal with the passive side of the crime, the *victimicy* respectively. If crime, in general, means all the criminal offences committed during a certain period in a defined territory, *victimicy* means all the persons who have become the victims of criminal offences during a certain period in a defined territory. In a wider sense, victimicy can mean both the completed side (the real victimicy), and the potential side (the virtual or the possible victimicy). The real victimicy or the actual victimicy is composed of the persons who have become the victims of criminal offences, and the virtual or potential victimicy is represented by all the persons who can become victims of criminal offences, as they have an increased victim risk[11].

Like any other form of justice or maybe more than any other, the criminal justice involves, on the one hand, an increased attention to the person harmed by the criminal offence and, on the other hand, it involves, at the same time, the prominent contribution of state bodies. It is noted that, in comparison to the extra-criminal justice, mainly the one of private law, the criminal justice insists more on safeguarding, both as regards the private interest, and as regards the general interest, and it can be said that the act of criminal justice equally includes individual and public interests, but the state is bound to protect them both, even though the private ones are safeguarded only by taking into consideration the specificity of the injured party. Of course, that the private interest of the crime victim is included in the general one, as the safeguarding of crime victims exceeds the individual needs and interests, although it entails to take them into consideration[12].

Like all the principles of criminal law, the principle of humanism of criminal law is applicable both in the field of substantive criminal law, and in the field of criminal procedural law. Also, the humanism must also apply in the field of criminal enforcement law[13].

The first decision of the Convention, in a case concerning the detention conditions, brought before Romania, was given in December 2007. It is the case *Bragadireanu v. Romania*.

Without insisting here on the detention conditions, as this is a notorious issue, the minimum European standards applicable to persons deprived of their liberty are far from being met in Romania.

Between 2007-2012, the Court has given several decisions against Romania for violations of Article 3 of the European Convention on Human Rights, and found prison overcrowding and inappropriate material detention conditions both in penitentiaries, and in the detention and provisional detention facilities[14].

In July 2012, in the case *Iacov Stanciu v. Romania*, the Court has held that there was a structural problem in the field of material detention conditions.

In this decision, the Court has specified that it was necessary to create an internal appeal allowing the effective remediation of the damages suffered as a result of inappropriate detention conditions, including through compensation. After 2012, the number of cases pending before the Court has constantly increased[15].

In 2016, in the case *Muršić v. Croatia,* the Court has stated that the deprivation of liberty for 27 days in a personal area of less than 3 m^2 is an inhuman and degrading treatment, being applicable the provisions of Art.3 of the European Convention on Human Rights[16].

As regards the cases in which the minimum detention conditions are not provided, the President of the Strasbourg Court, Guido Raimondi, has recently declared that: „*these are priority cases, because they fall under the scope of Article 3 of the Convention, but these are recurrent cases, which reflect systemic or structural difficulties and require internal solutions*"[17].

On 25 April 2017, the ECHR has given a pilot decision in the case *Rezmiveş and others v. Romania*[18].

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[11] The academic literature considers that the victimicy of a certain person is the" pre-disposition", more specifically, the capacity to become, under certain circumstances, the victim of the crime committed through the criminal act or the inability to avoid the danger in the case where the latter could be prevented. The real victimicy cannot be clearly established, whereas its content includes not only the victims of known criminal offences (the revealed, discovered, apparent victimicy), but also the victims the unknown criminal offences (the black figures of victimicy).

[12] M.A. Hotca, Victim protection. Victimology topics. C.H. Beck Publishing House, 2006, pp.1-2.

[13] Al. Boroi, Gh. Nistoreanu, Criminal Law. General Part, 4th edition, All Beck Publishing House, 2004, p.14.

[14] The lack of hygiene, the insufficient airing and natural light, the inoperative sanitary facilities, the insufficient or inappropriate food, the limited access to showers, the presence of rats and insects in the prison cells. See R. Pașoi, D. Mihai, The pilot decision in the case Rezmiveș and others v. Romania in the field of detention conditions (available on www.juridice.ro).

[15] For more data, see R. Pașoi, D. Mihai, op.cit.

[16] By the decision of the Great Chamber of ECHR in the case Muršić v. Croatia of 20 October 2016, the Strasbourg Court has confirmed that 3 m^2 of personal area for a prisoner in a collective cell is the minimum rule applicable in respect of compliance with Art. 3 of the Convention.

[17] According Mediafax, he said:" First of all, in the case of Hungary and Romania, where the number of cases has increased by 95%, 108% respectively, in 2016 (of the complaints brought before ECHR – the author's note), this situation concerns cases related to the detention conditions. Undeniably, these are priority cases, because they fall under the scope of Article 3 of the Convention, but these are recurrent cases, which reflects systemic or structural difficulties and require internal solutions" (http://www.mediafax.ro/externe/seful-cedo-guido-raimondi-numarul-cazurilor-legate-de-conditiile -de-detentie-din-romania-a-crescut-cu-108-in-anul-2016-16136759).

[18] The pilot decision procedure is a form of cooperation between the ECHR and the defendant states, aimed at adopting general measures able to solve the systemic problem in question, acceptable instruments or means from the standpoint of the jurisprudence of the Strasbourg

The Court has reiterated the existence of structural problems in respect of the overcrowding of Romanian detention facilities and, although it has confirmed some progress, it has recommended additional measures from national authorities, concerning the logistics, the criminal policy, and the introduction the preventive and compensatory remedies for the persons in such situations.

The Court has granted the Romanian authorities a period of six months from the moment the decision has become final in order to present, in cooperation with the Committee of Ministers of the Council of Europe, an action plan identifying the additional measures and the timeline of their adoption[19].

Disappointing and even indignant is the fact that this situation has not been solved by now (May 2021) by the Romanian authorities.

3. Conclusions

Humanism is both a principle of criminal Law, and a principle of the criminal policy, whereas the state is bound to find to instruments and means able to re-socialize those who commit crimes and to protect those who become victims of crimes.

From a different perspective, the state is bound to create the optimal legal framework for the successful reinsertion into the society of those who commit antisocial acts and for providing the necessary protection to the victims of crimes. In order to achieve this policy, the state is bound to adopt assistance measures aimed at the detained persons and their victims.

The principle of humanism is enshrined in both internal sources and international treaties.

In comparison to the extra-criminal justice, mainly the one of private law, the criminal justice insists more on safeguarding, both as regards the private interest, and as regards the general interest, and it can be said that the act of criminal justice equally includes individual and public interests, but the state is bound to protect them both, even though the private ones are safeguarded only by taking into consideration the specificity of the injured party. Of course, the private interest of the crime victim is included in the general one, as the safeguarding of crime victims exceeds the individual needs and interests, although it entails to take them into consideration[20].

Like all the principles of criminal law, the principle of humanism of criminal law is applicable both in the field of substantive criminal law, and in the field of criminal procedural law. Also, the humanism must also apply in the field of criminal enforcement law.

The hope to bring the crime between reasonable (controllable) limits for the society is a goal that can be reached within a relatively close time horizon, if the people are educated, the laws harmoniously cover all social interests, including the individual ones, and those contributing to their enforcement act professionally.

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Court. According to the ECHR jurisprudence, the states are free to choose the measures by which they understand to fulfil the obligation to comply with the pilot decision.

[19] Also, the Court has ordered the suspension of the review of the applications pending before it and not yet served on the Government for observations.

[20] M.A. Hotca, Victim protection. Victimology topics. C.H. Beck Publishing House, 2006, pp. 1-2.

MORE ABOUT THE TRIAL AND DISPOSAL OF CASES WITHIN REASONABLE TIME UNDER THE BULGARIAN CRIMINAL PROCEDURE CODE

Lyuboslav LYUBENOV[*]

Abstract

In the Bulgarian theory of criminal procedure, the issue of trial and disposal of cases within reasonable time has emerged as relevant. In the first place, therefore, the lack of an objective and thorough study of it testifies. Secondly, it must be said that where it is concerned, this is in so far as it expresses different views on the progress of the process. With all this, however, it is not possible to reach the essence of the question and answer whether the consideration and resolution of cases within a reasonable time is a normative requirement or a principle of criminal proceedings. For this reason, with this report an attempt is made to check theoretically the possibility regulated in Art. 22 of the Bulgarian Criminal Procedure Code to be raised in an independent principle of the Bulgarian criminal proceedings. To achieve this goal, a critical analysis has been made for the compatibility of the envisaged situation, both with some of the main principles of the criminal process and with its tasks, including those institutions that shape its modern democratic image.

Keywords: *criminal proceedings, reasonable time, right of protection, European court of Human right, case-law, criminal law.*

1. Introduction

In the new Criminal Procedure Code of the Republic of Bulgaria (CPC)[1], the legislator enriched (expanded) Chapter Two - "Basic Principles". It also regulated the requirement to resolve criminal cases within a "reasonable time". Thus, according to Art. 22, para. 1 of the CPC: "The court shall try and dispose of the cases within „reasonable time". In para. 2 of Art. 22 of the CPC, it is explicitly stated that: "the prosecutor and investigative bodies shall be obligated to secure the conduct of pre-trial proceedings within the time limits set forth in this code." This amendment of the procedural law continues to give grounds to some established in the Bulgarian procedural theory authors to treat the requirement for "reasonable time" as a principle of modern criminal proceedings. Here is what Margarita Chinova shares on the issue, for example: "… the obligation to consider cases within a reasonable time is so significant that it is raised in a basic leading procedural position - the principle of criminal proceedings."[2] A similar opinion is expressed in the case law of the Constitutional Court of the Republic of Bulgaria. In Decision №10 of 28.09.2010 of the Constitutional Court the following was reproduced: „… the current CPC with Art. 22 assigns respective responsibilities to the bodies of the criminal process, raising the consideration and resolution of the criminal cases within a "reasonable time" as a basic principle of the criminal process. Most involved in the problem are those bodies that perform the functions of supervision at the relevant stage of the process - the prosecutor in the pre-trial phase and the court in the judicial phase…

2. Content

The perception of the obligation to resolve criminal cases within a "reasonable time" as a principle of the Bulgarian criminal process, in a sense has a legal basis in terms of the systematic place of Art. 22 of the CPC, namely, Chapter Two, which lists the basic principles. However, the systematic place of a provision does not always (automatically) reveal its essence. It is by nature an indication (direction) for this, therefore as an argument the systematic place appears - formal and insufficiently convincing in itself! For this reason, it is imperative that the proclamation of a given legal position as a principle be justified ideologically and conceptually, and not pro forma - by placing it among other (already) established in jurisprudence legal principles. The opinions cited above in favor of the principled character of Art. 22 of the CPC take into account, on the one hand, namely its systematic place in the code, and on the other hand, the notion that in this way the Bulgarian CPC is fully and in the most satisfactory way synchronized with the rule for hearing criminal cases within a "reasonable time" under Art. 6, item 1 of the ECHR.[3] It is worth mentioning here that this publication does not discuss the need and usefulness of such synchronization with the provisions of the ECHR, but only - how logical, effective and justified it is to do so by raising the "reasonable time" requirement in principle in the Bulgarian criminal trial!? In other words, it is not disputed whether, *de lege lata*, the resolution of criminal cases within a "reasonable time" is conceived and explicit as a

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[1] Обн., ДВ, бр. 86 от 28.10.2005 г., в сила от 29.04.2006 г

[2] М. Чинова, Досъдебното производство по НПК – теория и практика, С., „Сиела", 2013 г., с.34.

[3] М. Чинова, Г. Митов, Кратък курс лекции по наказателно-процесуално право, С., Сиела, 2021 г., с. 125.

principle, but whether this does not overestimate and favor the idea of ending criminal proceedings a case in an indefinite, but definable (reasonable) procedural term before the idea for the qualitative (correct) completion of the criminal proceedings. Moreover, there are many theoretical obstacles to the provision of Article 22 of the Criminal Procedure Code to manifest and develop as a classical legal principle of the system of basic principles of the Bulgarian criminal process. The main arguments in this direction are set out and developed below.

First of all, emphasis must be placed on the fact that the legislator puts different content into the requirement of a "reasonable time" depending on the addressee to whom it applies. According to Art. 22, para 1 of the CPC, the court must consider and decide the case within a "reasonable time". According to paragraph 2 of the same article, the prosecutor and the investigative bodies are obliged to ensure the conduct of the pre-trial proceedings within the terms provided for in the CPC. Therefore, in the first case, the work of the court is bound by a "reasonable time", which is clearly not defined, neither in absolute nor in relative terms, nor according to any legal criteria. And in the second case, the bodies of the pre-trial proceedings should be guided by the clear and explicitly fixed in the CPC deadlines, i.e. the term deliberately described in the law is preferred to the ad hoc "reasonable time". It is also not clear whether the deadlines set for the pre-trial proceedings in the Criminal Procedure Code are "reasonable" *in facto*. Another thing, however, is clearly absurd, the same legal principle leads to two opposites in meaning and content results!

It is no coincidence that the requirement to conduct criminal proceedings within a "reasonable time" under the ECHR is regulated as a subjective right of the accused and not as a legal principle. Thus, it turns out to be a recognized and guaranteed by the Convention possibility of the accused to possess, and to require observance of a certain counter-behavior by the state. It is in this way that uncontroversial regulation of public relations concerning the duration of criminal proceedings is ensured. Therefore, human rights theory assumes that the purpose of the "reasonable time" guarantee in criminal cases is to "avoid a situation in which a person with pressed charges has remained in a state of uncertainty for too long about his or her destiny."[4] Consequently, the right to have criminal cases heard within a "reasonable time" is part of the accused"s right to a defense, and in particular one of his rights of defense. The inclusion of this right in Art. 6, item 1 of the ECHR represents the strengthening of the principle of protection of the accused, and not the implementation of some new and independent principle of the criminal process!

From the literal interpretation of Art. 22 of the CPC, it is clear that the legislator does not define the term "reasonable time". There are no clear criteria by which participants in the process can assess and verify whether and to what extent a given deadline is "reasonable". Then, for what reason does a vague situation arise in principle of the criminal process, i.e. in a leading idea for constructing and developing the institutes of criminal procedure? The question is rhetorical! The role of legal principles in the continental legal system is also essential for law enforcement as an activity. In the absence of a law, or in the presence of an unclear law (in interpretation), the judge is obliged to resolve the legal dispute in a way that best corresponds to the basic principles of law.[5] Hence, Article 22 of the Criminal Procedure Code cannot (effectively) serve to fill in and overcome any ambiguities in the course of criminal proceedings, since it is itself unclear. Then where is his principled character?

The guiding criteria for determining the reasonableness of a procedural time-limit have been developed in the case law of the Strasbourg Court. In „König v Germany "[6], the reasonableness of the length of the proceedings was considered to be determined by the following three factors: the complexity of the case, the behavior of the person concerned (the accused) and the behavior of the competent public authorities. The reasonableness of the term ipso jure is always a function of specific factual and legal circumstances, and the more complex and diverse these circumstances are, the more extensible the "reasonable time" can be, and vice versa. Another issue is that the assessment of the existence and complexity of the mentioned circumstances is relative and depends on the experience, knowledge and professionalism of the state bodies involved in the criminal proceedings. Such a direct connection with the discretion of the competent procedural authorities reveals a risk of arbitrariness, both in determining the amount of the "reasonable" time limit and in resolving the issue of its expiration, respectively violation. It turns out that there is no obstacle for the same subject to lead the process (to accuse) and to define which term is "reasonable", i.e. to decide whether the right of the accused to a trial within a "reasonable time" has been violated in the absence of a legal template for this! It is here that it is appropriate to point out that the ECHR is interpreted and applied not arbitrarily and literally, but in compliance with a reasonable ratio of proportionality between the means used and the objective pursued.[7] It should also be borne in mind that the practice of the ECtHR is ambiguous. In a number of cases with a similar subject matter, the court has rendered radically different court decisions. The borrowing of institutions and practices indefinite in content is dangerous because it makes the Bulgarian

[4] Харис, О' Бойл, Уробрик, Бейтс, Бъкли, Право на европейската конвенция за правата на човека., С., „Сиела", 2015, с. 523.
[5] Р. Ташев, Обща теория на правото, С., Сиби, 2010 г., с.222.
[6] HUDOC.
[7] Харис, О' Бойл, Уробрик, Бейтс, Бъкли. Цит. съч., с. 3-27.

criminal process eclectic. On this occasion, it is worth paying serious attention to the following statement of Ivan Salov: "The main defect of our current criminal procedure system is its uncertainty and, accordingly, its opportunistic development and eclecticism..."[8] Here is an example that confirms the above. According to M. Chinova: "… in its case law, the European Court of Human Rights first determines the length of the relevant period by determining the starting and ending point, and then decides whether this period is reasonable. Reasonableness is assessed not in the abstract, but in view of the circumstances of the particular case."[9] It is clear from the citation that the uncertainty in the content of the concept of "reasonable time" leads to its confusion with the concept of relevant period of time. The term is always a numerically defined period of time for the realization of something. According to the author, however, the duration and reasonableness of the period are determined separately for each case, but not with the help of numbers, but by the circumstances of the case, i.e. it is not exactly a term, but a time. So, in fine the vague period of time becomes reasonable, if it is reasonable! In practice, we come to a useless tautology - "reasonable time" is "reasonable" because it is "reasonable"!

Furthermore, it follows from the fact that under the Convention the examination and resolution of criminal cases within a "reasonable time" is the right of the accused, that both its existence and its content are not judged presumably or by the conduct of public authorities, as is the case under Bulgarian law. As a general rule, subjective rights are provided for and determined by volume in the law and by the legislator. And their exercise depends on the will of the subject who owns them. The right to defense of the accused must also be implemented in the law by the legislator, for fear of being left objectively unrecognized and unsecured. Nowadays, in Art. 55 of the Criminal Procedure Code, which lists the rights of defense of the accused, the right to criminal proceedings cannot be found within a "reasonable time"! The accused is nevertheless able to derive this right directly from the Convention by invoking Art. 5, para 4 of the Constitution of the Republic of Bulgaria. In this sense, it is untenable to claim that as a principle Art. 22 of the CPC may give rise to subjective rights, resp. legal obligations.[10] It is sufficiently to remind that no legal principle, including that expressed in Art. 22 of the CPC, cannot have a decisive role as a source of subjective rights. The legal principle is first of all a way of arguing. It "expresses an idea, not a norm "[11], i.e. does not describe specific behavior that can / should be performed in a specific factual situation.

For greater objectivity, it should be mentioned that the ECtHR is inclined to treat the requirement of a trial within a "reasonable time" not only as a subjective right of the accused, but also as a legal guarantee. According to him, the requirement "emphasizes the importance of justice without delay, which could threaten its effectiveness and reliability."[12] From the views of the court it is easy to be left with the impression that faster a proceeding is more efficient and reliable it is! In other words, there is a tendency in jurisprudence to equate reasonableness with rapidity. In my opinion, raising such "reasonableness" in principle is harmful because it exaggerates the benefits of procedural economy and infiltrates rapidity among the tasks of the process. The pursuit of rapidity "stakes" the procedural error and "poisons" the need for a proper conclusion of the criminal case. In the same sense, Simeon Tasev states: "… procedural economy and rapidity in the proceedings should not be in conflict with the ultimate goal of the process - a lawful and fair process."[13] Making the requirement for a trial within a "reasonable time "in principle is subject to criticism in several other aspects.

First, the idea of "reasonable" (fast) proceedings does not correspond to the immediate task of criminal proceedings. According to Art. 1, para 1 of the CPC in each criminal case must be ensured the disclosure of the crimes, exposing the guilty and proper application of the law. Nowhere is it a question of quick (reasonable) detection of the crime, quick (reasonable) exposing of the guilty and quick (reasonable) application of the law. This is because in the criminal process the unconditional disclosure of the objective truth and the correct application of the law is a main priority! Therefore, any principle of criminal procedure should be in line with this priority. Not coincidentally, Stefan Pavlov points out that: "… according to the concept lying down in the Criminal Procedure Code, the basic principles of the criminal process are the basic guidelines on which the entire procedural system is built in order to ensure the implementation of its tasks."[14] From all that has been said so far, it can be summarized that it seems more logical and legally argumented not to set the timely completion of the criminal case as a principle, but as a practical result in the pursuit of the tasks of the process. Nikola Manev takes a similar position, arguing that: "it should not be forgotten that rapidity, a reasonable time for hearing the case is not so much a goal or principle in the criminal process but a result of the action of a well-worked state machine, criminal law enforcement and criminal justice… "[15]

[8] И. Сълов, Актуални въпроси на наказателния процес, С., „Нова звезда", 2014 г., с. 43.
[9] М. Чинова, Г. Митов, кратък лекционен курс.., цит. съч., с. 127.
[10] М. Чинова, Досъдебното производство…, цит. съч., с.34 -35.
[11] Р. Ташев, Цит. съч., с.213
[12] HUDOC, „H vs France "; „Stögmüller v Austria ".
[13] С. Тасев, За отказа от правосъдие, ИК „Труд и право", сп. Собственост и право, кн. 7/2013 г., с. 9.
[14] С. Павлов, Наказателен процес на Република България – обща част, С. „Сиби", 1996 г., с. 61
[15] Н. Манев, Развитие на реформата на наказателния процес, С., „Сиела", 2018 г., с. 73

Secondly, the basic principles of the criminal process of the Republic of Bulgaria are built in a complete system, in which they are mutually secured and conditioned. That is why, it is accepted in theory that they function in organic unity,[16] i.e. without contradicting each other. Therefore, if it is accepted that the resolution of criminal cases within a "reasonable time" is a principle, it must be accepted, and that it is organically compatible with the other principles of Chapter Two of the Criminal Procedure Code. The implementation of a comparative verification, however, convinces otherwise. For example, there is no organic compatibility between the principle of objective truth and that of resolving criminal cases within a "reasonable time". According to Art. 13, para 2 of the CPC, the disclosure of what has actually happened / occurred in the objective reality is not made dependent on any procedural term, even on a "reasonable" one. The objective truth must be established regardless of the expiry of the procedural time limits, as long as the statute of limitations for criminal prosecution has not expired. The Bulgarian CPC does not recognize the termination of the criminal proceedings due to the expiration of a "reasonable" procedural term - arg. Art. 24 CPC. In my opinion, the court is obliged to decide the criminal case and when the proper procedural deadlines have expired, the opposite will mean a denial of justice! Moreover, some of the criteria for a "reasonable time" *de lege lata* apply as preconditions for extending the time-limits. For example, the factual and legal complexity of the case is grounds for extending the term for pre-trial investigation - arg. Art. 234, para 3 of the CPC.

Thirdly, the theory confirms the understanding that the principles of the criminal process are applied "through the organization of the separate procedural stages and institutes determined by them ". Therefore, if it is assumed that in Art. 22 of the CPC contains a principle, it must, in order to be applied, should model certain stages and institutes of the CPC. Even the most superficial review of the law denies the veracity of such a statement. Where the regulations of the pre-trial proceedings provide deadlines, they are in a pre-determined amount by the legislator, and it is not a question of a "reasonable term" - arg. Art. 234; Art. 242, para 4; Art. 243, para. 4 and para 5 of the CPC. The same applies to the court phase - arg. Art. 247 a, para. 2, item 1; Art. 308; Art. 318 of the Criminal Procedure Code, etc. It is interesting to note that the requirement of a "reasonable time" does not determine the appearance of even section two of Chapter Fifteen of the CPC, which regulates: the calculation of time limits, compliance with time limits, extension of time limits and their recovery. The legislative approach to use a fixed ex lege period with the possibility of extension if necessary deserves support because, except bringing clarity, it disciplines and motivates the competent state authorities.

3. Conclusions

In conclusion, the following five conclusions can be made:

- firstly, the place of Art. 22 of the PPC in the system of basic principles is controversial and problematic;
- secondly, it is imperative the legislator to clarify the concept of "reasonable time";
- thirdly, understood as a guarantee against unjustified delay of the criminal proceedings, the requirement for a "reasonable term" has a place in the Criminal Procedure Code as a subjective right of the accused, respectively a legal obligation of the competent procedural bodies;
- fourthly, it is not always possible to equate the fast (reasonable) criminal process with the productive (lawful) criminal process;
- fifthly, a reasonable criminal trial is not one that ends quickly, but one that ends with a criminal conviction fully consistent with the objective truth and the law.

What has been said in conclusion can serve de lege ferenda as a ground for revoking Art. 22 of the CPC. Simultaneously, and as a presumption to supplement Art. 55 of the Criminal Procedure Code with a new right of the accused to a trial within a "reasonable time".

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[16] С. Павлов, Цит. съч., с. 65.

DETENTION CONDITIONS IN ROMANIAN PENITENTIARIES. COMPENSATORY APPEAL AND RECOVERY OF DAMAGE SUFFERED BY CONVICTED PERSONS DUE TO NON-COMPLIANCE WITH MINIMUM DETENTION CONDITIONS

Dantes MARCOVICI[*]

Abstract

Considering the debates in the public space regarding the detention conditions in the Romanian penitentiaries, in the present study I set out to analyze the way in which the detention conditions in the Romanian penitentiaries are ensured.

Thus, I will present the regulation in the national legislation of the minimum standards that must be observed, with emphasis on overcrowding of places of detention, but also compensation in case of accommodation in inappropriate conditions, with reference to the compensatory appeal, as regulated by Law 169 / 2017.

At the same time will be analyzed the ways in which the moral and material damage suffered by the convicted persons can be repaired, following the non-observance of the minimum conditions of detention, including the jurisprudence of the European Court of Human Rights, considering that the number of requests exceeded the figure of 3000 at the time of drafting of Law no. 169/2017.

Keywords: *detention conditions, convicted persons, compensatory appeal, Law no. 169/2017*.

1. Introduction

Given the acute lack of space in the detention rooms of Romanian penitentiaries, compliance with the minimum standards for the execution of custodial sentences must be analyzed in particular by Romanian courts, when analyzing the complaints or requests of the convicted persons.

I also presented the way in which it is possible for the national courts to repair the moral and material damage suffered by the convicted persons and I showed the problems generated by the application of Law 169/2017, regarding the commission of other offenses by parolees following the application of the provisions of the compensatory appeal as well as legislative changes following these issues.

2. Regulation in the national legislation of the minimum standards that must be observed, with emphasis on the overcrowding of places of detention

With regard to the execution of custodial sentences, given the acute lack of space in the detention rooms of Romanian penitentiaries, compliance with the minimum standards must be examined in particular by the judge supervising deprivation of liberty and by the Romanian courts, at the time of analyzing the complaints or requests of the convicted persons.

At the same time, according to the provisions of art. 1 para. 1 of the Annex of the Order of the Minister of Justice no. 433/2010 (in force until 2017), the spaces intended for the accommodation of persons deprived of liberty must respect human dignity and meet the minimum sanitary and hygiene standards, taking into account the climatic conditions and, in particular, the living space, air volume, lighting, heating and ventilation sources. Regarding the living area, the art. 3 letter b of the same normative act stipulates that in the accommodation rooms from the existing penitentiaries at least 4 square meters must be provided for each person deprived of liberty, employed in the closed regime or of maximum security.

Also, the Romanian courts, invested with solving some complaints or requests from the convicted persons, have the obligation to establish if the detention conditions can be considered degrading, including from the perspective of art. 3 of the European Convention on Human Rights.

Article 3 of the Convention enshrines one of the most important values of democratic societies, categorically prohibiting torture or inhuman or degrading treatment and punishment. In order to be incidental, the applied treatments must meet a minimum severity threshold, and in this context, the state has two types of obligations: a negative and general one not to subject a person under its jurisdiction to treatments contrary to art. 3 and a substantially positive obligation to take preventive measures to ensure the bodily and moral integrity of persons deprived of their liberty, such as the provision of minimum conditions of detention and adequate medical treatment.

Thus, in the Kalashnikov v. Russia case, the detention room was permanently overcrowded. Each person had at his disposal only 0.9 - 1.9 m2, two or three people had to share the same bed, so they could lie down only one at a time. The detention room was lit

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during the day and night. The 18-24 people deprived of their liberty were constantly making noise, smoking was allowed, there was no ventilation system, and the detainee was allowed to spend only two hours a day outside the detention room. At the same time, the sanitary endowment was deficient, there was no disinfection, and in the four years of detention in this condition, a substantial worsening of his health was found.

In view of these aspects, the Court considered that this was a degrading treatment within the meaning of Article 3 (ECHR, 15 October 2002, Kalashnikov./Russia, no. 47095/99, paragraphs 92 to 103).

At the same time, the Court ruled in the case of Iacov Stanciu against Romania, application no. 35972/05, paragraph 166, that custodial measures applied to the person may sometimes involve an inevitable element of suffering or humiliation but, nevertheless, the suffering and humiliation involved must not exceed that inevitable element of suffering or humiliation related to a certain form of legitimate treatment or punishment.

With regard to persons deprived of their liberty, the Court has already emphasized in previous cases that a prisoner does not lose, by the mere fact of his imprisonment, the defense of his rights guaranteed by the Convention. On the contrary, the detained persons have a vulnerable position, and the authorities have the obligation to defend them, and pursuant to art. 3, the state must ensure that a person is detained in conditions compatible with respect for his or her human dignity, that the manner and method of execution of the measure does not subject him to stress or difficulties that exceed the inevitable level of suffering in detention and given the practical needs of detention, health and well-being are adequately ensured.

The Court emphasized the exemplary judgments in Torreggiani and Others v. Italy (Applications Nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10), final to 27/05/2013, as a result of which pecuniary and moral compensations had been granted to the detainees forced to stay in a 3m² cell or in an insufficiently lit and ventilated space, without access to hot water.

Relevant is the fact that before the European Court for the Defense of Human Rights were registered 4 requests directed against Romania, through which four nationals of this state, the plaintiffs Daniel Arpad Rezmiveș, Laviniu Moșmonea, Marius Mavroian, Iosif Gazsi notified the Court on September 14, 2012, June 6, 2013, July 24, 2013 and October 15, 2013, pursuant to art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The object of the requests was, among others, the violation of the provisions of art. 3 of the Convention, on the conditions of detention in various penitentiary units or detention and pre-trial detention centers of the police in various localities, in which the petitioners also complained about cell overcrowding, inadequate sanitation and poor hygiene, poor food quality , the validity of the materials received, as well as the presence of rats and insects in the cells).

In its pilot judgment of 25 April 2017, the Court requested the Romanian State, within six months from the date of final judgment, to provide, in cooperation with the Committee of Ministers of the Council of Europe, an exact timetable for the implementation of appropriate general measures. capable of resolving the problem of overcrowding and inadequate conditions of detention, in accordance with the principles of the Convention as set out in the pilot judgment. The Court also decided to postpone similar cases that had not yet been communicated to the Romanian Government until the adoption of the necessary measures at national level. The Court considered that, although the measures taken by the authorities up to that date could contribute to the improvement of living and sanitary conditions in Romanian prisons, coherent and long-term efforts, such as the adoption of additional measures, should be made to achieve compliance with the Articles 3 and 46 of the Convention.

The Court also considered that, in order to comply with the obligations arising from its previous judgments in similar cases, an appropriate and effective system of internal remedies must be established.

The Court noted at the time of the judgment that the applicants" situation could not be dissociated from the general problem which is caused by a structural dysfunction characteristic of the Romanian penitentiary system, which has affected and may continue to affect many people in the future. Despite internal, administrative and budgetary measures taken, the systemic nature of the problem identified in 2012 persists and the situation is therefore a practice incompatible with the Convention.

According to the decision, the measures expected from Romania were structured on two levels: measures of an administrative nature, which would reduce overcrowding and improve material conditions of detention and measures of a legislative nature to ensure an effective remedy for the injury suffered, of the nature of the preventive appeal and of the specific compensatory appeal.

The Court cited by way of example a number of additional measures that could be considered by the Government in order to address the problem of detention conditions such as improving the probation system and simplifying the procedure for access to parole.

3. Compensatory appeal, as regulated by Law 169/2017 and secondary legislation

In 2017, compared to the signals received from the ECHR and reiterated by its president, Guido Ramondi, who recommended Romania and Hungary to adjust their logistics and criminal policy in order to stop the precarious conditions in penitentiaries, was adopted

the Law no. 169/2017 for amending and supplementing Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judiciary during criminal proceedings, which provided a compensatory mechanism for persons deprived of liberty accommodated in inappropriate conditions of detention, by reducing the sentence, as a general measure to relieve penitentiaries.

According to art. 55/1 of this normative act, when calculating the sentence actually executed, regardless of the regime of execution of the sentence, as a compensatory measure, the execution of the sentence in inappropriate conditions is taken into account, in which case, for each period of 30 days executed in inappropriate conditions, even if they are not consecutive, are considered executed, in addition, 6 days of the sentence applied.

For the purposes of this normative act, accommodation in any of the following situations is considered the execution of the punishment in inappropriate conditions:

a) accommodation in an area less than or equal to 4 sqm / detainee, which is calculated, excluding the area of toilets and food storage spaces, by dividing the total area of detention rooms by the number of persons accommodated in the respective rooms, regardless of the endowment of the space in question;

b) lack of access to outdoor activities;

c) lack of access to natural light or sufficient air or availability of ventilation;

d) lack of adequate room temperature;

e) lack of the possibility to use the toilet in private and to observe the basic sanitary norms, as well as the hygiene requirements;

f) the existence of infiltrations, dampness and mold in the walls of the detention rooms.

The provisions also apply accordingly to the calculation of the sentence actually served as a preventive measure or punishment in detention and pre-trial detention centers in inappropriate conditions.

In order to apply the compensation established by law for the execution of the sentence in inappropriate conditions, was adopted the Order of the Minister of Justice no. 2773 / C / 2017 for the approval of the Centralized Situation of the buildings that are unsuitable from the point of view of the detention conditions, published in the Official Gazette no. 822 of October 18, 2017, which establishes the categories of buildings, identified by the inventory number, which were classified as unsuitable in terms of detention conditions, taking into account the criteria established by Law no. 169/2017, but also by the landmarks established by this normative act which does not impose a centralization of the rooms that ensure inadequate detention conditions, but the elaboration of a centralized situation of the buildings intended for the accommodation of persons deprived of liberty. Their situation is updated annually or whenever changes occur that could generate a reclassification of accommodation.

It should be noted that the notion of "compensatory appeal" does not exist as such in the legislation, and both in Law no. 254/2013, as well as in Law no. 169/2017, which amended it, there are the terms "compensation" and "compensatory measure". The advantage of the convict who benefits from the "compensatory measure", introduced by this normative act (which applies retroactively, starting with July 24, 2012), is that he can appear faster than usual before the court, which can order conditional release. Also, for some convicts, the application of the compensatory measure meant that the entire sentence applied was considered executed, so that they were released on time, immediately, without the need to request parole.

4. The reparation by the national courts of the moral and material damage suffered by the convicted persons

Countless times, the persons deprived of their liberty addressed the national courts in order to obtain compensation for the execution of sentences in inappropriate places.

Regarding the observance of the rights of convicted persons, the courts found the incidence of the provisions of art. 1349 paragraph (1) of the Civil Code, according to which any person has the duty to respect the rules of conduct imposed by law or local custom and not to infringe, through his actions or inactions, the rights or legitimate interests of other persons, and according to art. 1357 paragraph (1) of the Civil Code, the one who causes damage to another through an illicit deed, committed with guilt, is obliged to repair it.

These provisions establish the conditions of tortious civil liability for one"s own deed, respectively to have an illicit deed, this to be committed with guilt, to produce a damage, and to have a causal link between the illicit deed and the occurrence of the damage.

The courts found that art. Article 3 of the European Convention on Human Rights enshrines one of the most important values of democratic societies, categorically prohibiting torture or inhuman or degrading treatment or punishment. In order to be incident the art. 3 of ECHR, the treatments applied must meet a minimum severity threshold. In this context, the state has two types of obligations: a negative, general one, not to subject a person under its jurisdiction to treatments contrary to art. 3 and a substantially positive obligation to take preventive measures to ensure the bodily and moral integrity of persons deprived of their liberty, such as the provision of minimum conditions of detention and adequate medical treatment.

Although deprivation of liberty applied to the person may sometimes involve an inevitable element of suffering or humiliation, the suffering and humiliation involved must not exceed that inevitable element of suffering or humiliation related to some form of legitimate treatment or punishment.

According to art. 1357 paragraph 2 of the Romanian Civil Code, the national courts have established that the perpetrator is liable for the slightest fault, and regarding the occurrence of the damage, that the damage is fully repaired, unless otherwise provided by law, and as a rule, regarding the granting compensation for moral damage suffered by non-compliance with the minimum conditions of detention, the national court was guided by the recommendations made by the European Court of Human Rights at the end of the judgment in Ivanov Stanciu v. Romania (see civil judgment no.2287 / 16.03.2018 of the Court Sector 5 Bucharest, remained final by civil decision No. 3505 / A / 23.10.2018 of the Bucharest Tribunal, in file No. 6216/302/2016).

At the same time, it was pursued that the level of compensations granted for the moral damage by the national courts in case of finding the violation of art. 3 must be reasonable, taking into account the fair reparations granted by the Court in similar cases and the right not to be subjected to inhuman or degrading treatment is so important in the human rights defense system, that the authority or court dealing with it must present convincing and serious reasons for justifying the decision to award less compensation or not to award any compensation for moral damage.

5. The problems generated by the application of Law 169/2017 and the legislative amendments that led to the repeal of the law

Although it temporarily solved the problem of overcrowding in places of detention, following the introduction in Romanian law of the "compensatory appeal", one of the visible effects of the law, which created a growing concern among public opinion was the massive increase in the number of those released on time by reducing the duration of the sentence that had to be actually executed: from an average of about 900 people / year, in the period 2014-2016, it reached an average of about 1800 people / year, in the period 2017-2018.

Both the release on time, much faster following the adoption of the law of "compensatory appeal", and the conditional release of some convicts who did not correct their behaviour and can not be reintegrated, stimulated by the fact that there are not enough places of detention, it only encouraged the criminal phenomenon.

As a result, new crimes were committed, some of them very serious, it led to new victims of the new crimes and, eventually, the return to prison of some of the released prisoners without them being able to reintegrate to society.

In the case of such offenses, such as in particular, those against life, against bodily integrity or health, offenses of trafficking and exploitation of vulnerable persons or against sexual freedom and integrity, the Criminal Code may provide for certain legislative measures such as an increase in the number of penalties that must be effectively executed in the case of serious crimes, or the amendment of the Criminal Code in the sense that for serious crimes the conviction can be ordered without the possibility of conditional release.

Thus, during 19.10.2017-21.06.2019, a number of 18,849 persons were released from the units subordinated to the National Administration of Penitentiaries, by granting the compensatory benefits provided by Law no. 169/2017.

Of these18,849 persons, 840 persons were convicted for the crime of murder, 73 were convicted for the crime of aggravated murder, 81 persons were convicted for the crime of hitting and causing death, and 355 were convicted for the crime of hitting or other violence.

According to the data provided by the Romanian Ministry of Justice in a response to an interpellation formulated by the deputy Florin Roman, according to the latter"s statement dated 2.11. 2019 revealed that from 19.10.2017 to 18.09.2019 there were 21,049 releases, as a result of the application of the provisions of Law no. 169/2017. Of these, 634 were convicted of rape and 1,670 for aggravated robbery, and in the mentioned period, out of the total releases, 1,877 re-incarcerations were registered. Of these, 47 were rape, 226 robbery and 36 murder.

In this context, it should be emphasized that parole is only a vocation and not a right of the convicted person, and the court invested with a request for parole may or may not order the release of a convict, not being obliged to release automatically anyone who requests release conditioned. Moreover, the Criminal Code provides, in art. 99-100, that parole can be ordered only if "the court is convinced that the convicted person has straightened up and can reintegrate into society."

In relation to the consequences of the law, through the legislative proposal registered at the Chamber of Deputies under no. Pl-x no. 281/2019, it was proposed to repeal Law no. 169/2017 for amending and supplementing Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal process, amending and supplementing Law no. 286/2009 on the Criminal Code, amending Law no. 254/2013. The explanatory memorandum showed that the criminal phenomenon in Romania, unfortunately, is out of control. The social reactions caused by the peculiarities of this phenomenon are particularly intense, especially in the last period of time, the public opinion being particularly concerned about recidivism and crimes committed by acts of violence, and recidivism is at alarming levels in Romania, whether we are talking about the actual recidivism, or the common recidivism, i.e. the criminal record. If the actual recidivism occurs among convicts in the proportion of about 40%, probably the highest rate in the EU, the criminal record - improper recidivism - reaches levels exceeding 60%. These are data that prove that the main purpose of the

punishment, namely that of social reintegration and avoidance of recidivism by criminally convicted persons is not achieved in Romania.

Also, the social reaction consisting of concern and revolt could not be ignored, the citizens losing their confidence that the criminal policies, the way in which these policies are implemented regarding the punishment and the execution of the punishment in case of committing criminal acts, especially of acts committed with violence, are in line with the social security need of the citizen. The distrust - that the punishment and, in particular, the execution of the punishments would reach its general purpose of discouraging the commission of serious antisocial acts - is generated by the way in which the execution of the punishment is regulated today by Law no. 169/2017, through the amendments brought by this law of the "compensatory appeal" to the legislation regarding the execution of punishments from Law no. 254/2013 and the Criminal Code.

The amendments aimed at returning to the situation from 2016 regarding the reduction of the sentence which is considered as executed, so that in the Official Gazette no. 1028 / 20.12.2019, was published the Law no. 240/2019 regarding the abrogation of Law no. 169/2017, as well as for the amendment of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings.

By the new law, were repealed the articles II-VIII of Law no. 169/2017, which provided for the establishment of a Commission for the evaluation of detention conditions for the application of the provisions regarding compensation in case of accommodation in inappropriate conditions and the application of these provisions. It was also repealed the art. 551 of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings, which regulated the compensatory appeal.

At the same time, has been modified the method of calculating the sentence that is considered to be executed on the basis of the work performed or of school training and professional training, in order to grant conditional release. Thus, if a paid job is performed, 5 days are considered executed for 4 working days; in case of unpaid work, 4 days are considered executed for 3 days of work; if the work is performed during the night, it is considered 3 days executed for two nights of work.

6. Conclusions

Although the Action Plan of 25.01.2018 of the Government of Romania (see https://sgg.gov.ro/new/wp-content/uploads/2020 /11/ PLANUL-DE-ACTIUNE-.pdf) speaks of changes at the strategic level, of the improvement of the probation service, of the preparation, at the legislative level of an amendment of Law 254/2013, and by the document sent by the Romanian authorities on 23.04.2019 to the Committee of Ministers of the Council of Europe (page 5), containing information about this plan in the case of Bragadireanu and Rezmives and others v. Romania, accessible on the website www.rm.coe.int, requested the Council of Europe Development Bank to allocate an amount of 177 million euro for the creation of 5,110 additional places of detention in the period 2019-2023 it can be stated that the law on compensatory appeal has only partially solved the problem of agglomeration in places of detention.

Thus, on 19.01.2021, according to official figures (http://anp.gov.ro/blog/lnk/ statistici), the penitentiary system had a total capacity of 18,245 places and housed 21,854 detainees (a level of occupancy of about 120% and a rate of one detainee per 1,000 inhabitants, similar to France which has, however, completely different criminological premises), reason for which it can be concluded that the compensatory appeal decongested the penitentiaries to some extent, but after its repeal without the change in criminal policy, the overcrowding trend has resumed.

References

- The Criminal Code of Romania, adopted by Law no. 286/2009, published in the Official Gazette no. 510 of July 24, 2009, entered into force on 01.02.2014;
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- Law no. 179/2017, for the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal process, published in the Official Gazette no. 571/ 18July 2017;
- Law no. 240/2019 on the abrogation of Law no. 169/2017 for the amendment and completion of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings, as well as for the amendment of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the judicial bodies during the criminal proceedings published in the Official Gazette no. 1028/20 December 2019;
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SOME CONSIDERATION REGARDING THE SCOPE OF MEDICAL SAFETY MEASURES IN THE CASE OF NON-TRIAL ORDINANCES

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Abstract

The medical hospitalization and medical treatment are medical safety measures can be taken across the duration of criminal cases and aim to remove a state of danger and prevent the illicit acts provided by the criminal law. In accordance with GEO number 80/2016, the legislator introduced the possibility of taking these safety measures of a medical nature both in situations where a solution of non-prosecution, respectively filing or waiving the criminal investigation is ordered.

Thus, from the corroborated interpretation of the provisions of art. 315 para. 2 lit. a, of the C.p.p. and art. 318 para. 8 of the C.p.p., it appears that the ordinances by which the prosecutor orders a solution of non to send to court may include provisions regarding the notification of the judge of the preliminary chamber in order to take, confirm, replace or terminate said medical safety measures.

Regarding the prosecutor"s request through the order of dismissal or waiver of criminal prosecution of the judge of the preliminary chamber to decide on a medical safety measure, the specialized doctrine and the judicial practice have outlined two opinions.

In a first opinion, it is considered that the notification of the judge of the preliminary chamber in order to take a safety measure of a medical nature must be made only after the non-trial solution remains final.

According to the second opinion, the prosecutor is not obligated by any procedural condition to respect a specific term when he notifies the judge.

The present paper aims to analyze the arguments of the two opinions by means of analysing the legal doctrine, the relevant jurisprudence in the matter, but also to the standards imposed by the EDO Convention.

Keywords: *medical hospitalization, medical treatment, non-litigation solutions, prematurity, social danger.*

1. Introduction

The medical safety measures are ordered in a criminal trial against a person who has committed an unjustified act prohibited by the criminal law and who poses a danger to society.

In order to order a medical safety measure, it is not necessary for the perpetrator to have committed a crime, since it is sufficient for him to commit an unjustified act provided by the criminal law, and to present a danger to society due to a mental illness or infectious disease or as a result of the chronic consumption of alcohol or psychoactive substances.

Thus, beyond the situation of taking a medical safety measure by the decision to convict the person accused of committing the crime, in the judicial practice we encounter more and more cases in which the obligation to medical treatment or hospitalization are requested by the prosecutor and ordered by judge after non-court solutions.

This study aims to present the procedural steps to be followed in this procedure and to analyze the issues and difficulties involved.

We are going to analyze the two existing opinions in the judicial practice regarding the moment of notifying the judge of the preliminary chamber with the proposal to order a medical security measure, by reference to the purpose and meaning of the applicable criminal procedural norms.

2. Content

Medical safety measures have both an immediate purpose, that of removing a state of danger, and a mediated purpose[1], namely the prevention of illicit acts.

By their nature, medical safety measures presuppose the interference with the rights of individuals.

Medical hospitalization is a real deprivation of liberty, and the conditions of its disposal must be in accordance with the provisions of the E.C.H.R..

The nature of the institution of medical hospitalization - a safety measure of a medical, curative nature, implies a deprivation of liberty, as implied in the jurisprudence of the E.C.H.R. in the matter[2], notwithstanding the fact that such a measure can only be taken if at least three conditions are met.

Thus, the illness (alienation) must have been clearly established; second, the disorder must be of such magnitude as to justify hospitalization; third, hospitalization can be extended only if the persistence of this medical condition is proven.[3]

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[1] Mihail Udroiu, Drept penal. Partea generală, Ediția a 3-a, Editura C.H. Beck, București, 2016, p. 419.

[2] Case of Filip c. Romania, ECHR rulling 14.12.2006.

[3] Case of Johnson c. United Kingdom, ECHR rulling 24 octombrie 1997.

The jurisprudence of the E.C.H.R. has established that not only violent behavior poses a danger to society, but any action or inaction that infringes on the social values protected by the criminal law, namely any act infringing on its provisions.

The E.C.H.R. considers that no deprivation of liberty of an alienated person can be considered in accordance with Article 5 para. 1 e) if it was decided without taking into consideration the opinion of a medical specialist.

The deprivation of liberty, in the form of hospitalization, is such a serious measure that it is only justified if the less severe measures have been considered as insufficient to ensure the protection of both the personal or public interest.

It must therefore be held that the deprivation of liberty of the person concerned is indispensable on the basis of the particular circumstances of the case.[4]

Thus, from the perspective of the standards imposed by the E.C.H.R. and the consistent jurisprudence of the E.C.H.R. on the medical security measures (especially those of deprivation of liberty) it is essential that prior to ordering such a measure an expertise be performed to ascertain the health of the individual.

Regarding the procedural moment of taking said medical safety measures, it is found that they can be taken either provisionally, during a criminal trial, or definitively, at the end of the criminal trial, by the decision to convict, acquitt, terminate the criminal trial or by the order of waiver of the criminal investigation.

In essence, the medical safety measures, taken both during the criminal process and those ordered at the end of it, are temporary procedural measures, the duration of which is influenced by the evolution of the medical situation of the person.

The main difference is that the temporary medical safety measures produce are in effect only during the criminal trial, whereas those taken by means of the final decision in the case or after a solution of non-prosecution, remain in force until the perpetrator recovers, regardless of the evolution of the criminal process.

According to art. 245 para. 1 of the Criminal Procedural Code, the judge of rights and freedoms during the criminal investigation, the judge of the preliminary chamber, during the preliminary chamber procedure or the court, during the trial, may order the measure of obligation to medical treatment or medical hospitalization, according to art. 109 or art. 110 of the Penal Code.

The medical safety measure provided for in Article 109 of the Criminal Code consists in obliging the suspect or defendant to regularly follow the medical treatment prescribed by a specialist.

As to the measure mentioned in Article 110 of the Criminal Code, it consists in the involuntary admission of the suspect or defendant to a specialized medical care unit.

Both measures shall be in effect until the person recovers or until an improvement in his health occurs, sufficient to remove the state of danger.

If a medical safety measure has been taken provisionally, at the time of completion of the criminal proceedings it will again be subject to review by a judge.

In the situation of pronouncing a criminal decision, according to art. 404 para. 4 lett. d. of the Criminal Code, the court is obliged to rule on the needed security measures, including on a medical one.

In the phase of the criminal investigation, the provisions of art. 246 para. 13 in accordance with art. 248 para. 14 of the Criminal Procedural Code, which stipulates that in case of ordering a non-court solution, the prosecutor will notify the judge of the preliminary chamber for confirmation or, as the case may be, replacement or termination of the medical security measure.

In order to prevent situations in which, although it is necessary to undergo a medical safety measure, due to the intervention of a non-prosecutorial solution, it is no longer be possible to order the provisional application of such measures, the legislator allows a request to the judge of the preliminary chamber.

Thus, according to the provisions of art. 315 para. 2 letter e, of the Criminal Procedural Code, the non-prosecutorial ordinance should mention provisions expressed in art. 286 para. 2, as well as provisions regarding the notification of the judge of the preliminary chamber with the proposal of ending the security measures provided by art. 109 or 110 of the of the Penal Code, in full accordance with provisions of art. 246 para. 13.

Also, according to art. 318 para. 8 of the Criminal Procedural Code, the ordinance ordering the renunciation of the criminal investigation should include both the aspects provided by art. 286 para. 2 of the Criminal Procedural Code, as well as the provision provided by art. 315 para. 2 lett. E of the Code of Criminal Procedure regarding the notification of the judge of the preliminary chamber regarding the taking, confirmation, replacement or termination of medical safety measures.

According to art. 246 para. 13, in case of a solution of not to send to court, the prosecutor notifies the judge of the preliminary chamber for the confirmation or, as the case may be, the replacement or termination of the measure.

The latter, in the council chamber, with the participation of the prosecutor, listens, if possible, to the person subject to the provisional measure, in the presence of his lawyer, and, after performing a forensic examination, decides by means of a reasoned rulling. An appeal may be lodged against the decision, within 3 days of the ruling, which shall be resolved by the

[4] Case of Litwa c. Poland, no. 26629/95, § 78, ECHR 2000-III.

judge of the preliminary chamber of the hierarchically superior court to the notified one or, as the case may be, by the competent panel of the High Court of Cassation and Justice.

In the judicial practice and in the specialized literature, the issue of the moment when the notification of the judge of the preliminary chamber was made with the proposal to take a medical security measure, according to the provisions of art. 315 para. 2 lett. e of the Criminal Procedural Code and art. 318 para. 8 of the Criminal Procedural Code.

According to one opinion[5], the judge of the preliminary chamber invested with the proposal to take the measure of the medical hospitalization or the obligation to medical treatment must immediately rule on the request of the Public Ministry, even if the solution of non-prosecution is not yet final.

This hypothesis is encountered in situations where the request is made:

- by a classification ordinance against which a complaint was filed in the procedure provided by art. 340-341 of the Criminal Procedural Code;
- by a filing ordinance that can still be challenged within 20 days from the communication, according to art. 339 para. 4 of the Criminal Procedural Code;
- by an ordinance of renunciation of the criminal investigation which has not yet been confirmed by the judge of the preliminary chamber, according to art. 318 para. 15 of the Criminal Procedural Code

The supporters of this jurisprudential orientation appreciate the fact that since by modifying art. 315 para. 2 lett. R of the Code of Criminal Procedure, the legislator established the possibility for the prosecutor to notify the judge of the preliminary chamber to take the medical safety measure, provided by art. 109 and art. 110 of the Criminal Code, irrespective of the definitive or non-definitive character of the solutions for filing or waiving the criminal investigation.

In this opinion it is argued that the provisions of article 315 par. 2 lett. E of the Criminal Procedural Code allow a notification of the judge of the preliminary chamber, without conditioning the admissibility of the notification of any procedural conditions, the judge being allowed to analyze the substantive conditions for ordering such a measure.

It is noted that a contrary interpretation, in terms of waiting for the finalization of the solution of classification or waiver of criminal prosecution, would be excessive, unforeseen by law and sometimes likely to perpetuate a state of danger that must be removed immediately and not after finalizing the non-litigation solution[6].

The second opinion states that the judge of the preliminary chamber can rule on the request to take a medical security measure only after the solution mentioned earlier remains final, respectively after the 20 days term from the moment it reached the recepient; after the rejection of the complaint against it; after the admission of the complaint, but with the change of the classification ground; after the confirmation of the solution of the waiving of the criminal investigation by the judge.

It should be noted that in the case of admission of the complaint in the procedure mentioned in art. 341 para. 6 lett. c, para. 7 lett. d of the Criminal Procedural Code, it is mandatory that the new ground retained by the judge of the preliminary chamber should constitute an unjustified act incriminated by the criminal law, without it being absolutely necessary to constitute a crime.

If the prosecutor requests a medical safety measure after the closing a case, in, for example, one of the cases provided by art. 16 para. 1 of the Code of Criminal Procedure regarding the non-existence of the deed, the lack of evidence of the deed[7], the lack of incrimination of the deed in the criminal regulation or the existence of a justifying cause, the request should not be admitted.

Medical safety measures may be taken, in accordance with art. 107 para. 2 Code of Criminal Procedure only against that person who committed an unjustified act incriminated by the criminal law,.

Regarding the waiver of the criminal investigation, ordered by the prosecutor by ordinance or by the indictment act of other participants, the medical measure becomes final when the request for confirmation of the solution by the judge of the preliminary chamber is granted, in accordance with the procedure provided by art. 318 of the Criminal Procedural Code.

As far as we are concerned, we agree with the second opinion expressed in the legal doctrine and in the judicial practice regarding the moment of the possibility of analyzing the proposal to take a medical safety measure, namely after a final solution of classification or waiving of the criminal investigation.

Thus, the moment of formulating the request for notifying the judge regarding the taking of a medical safety measure must be only when the non-referral solution remains final.

A contrary interpretation, which would allow a definitive security measure to be taken before the final clarification of the fact that the criminal action has been extinguished, cannot be accepted.

It is particularly important to distinguish between the two categories of medical safety measures, namely provisional and definitive measures.

By reference to art. 245 para. 2 of the Criminal Procedural Code and art. 247 para. 2 of the Criminal Procedural Code, both types of medical safety measures have a limited duration in time, namely until the recovery of the individual, the improvement of his

[5] Penal Decision no. 8 of 07.01.2021, of the Prahova Tribunal, unpublished; Penal Decision no. 471 of 31.12.2021, of the Prahova Tribunal, unpublished.

[6] Penal Decision no. 471 of 31.12.2021, of the Prahova Tribunal, unpublished.

[7] Criminal sentence no. 17/22.02.2021, of Câmpina District Court, unpublished.

health or the when the state of danger that led to the measure has passed.

If in this respect the two types of medical safety measures are similar, the main difference between them should be noted.

Provisional security measures have their effects only within the limits of the criminal process and can be applied only while the person is a suspect or defendant in a criminal case.

The temporary medical hospitalization and temporary obligation to medical treatment join can be viewed as accessory measures to the criminal process, their existence being limited to its duration.

As soon as the criminal proceedings are completed, regardless of the procedural stage they have reached, these provisional measures shall be subject to a new judicial review.

From the interpretation of art. 246 para. 13 in accordance with art. 248 para. 14, after a decision not to prosecute, the prosecutor is obliged to refer the matter to the preliminary chamber judge in order to decide on the confirmation, replacement or termination of the measure.

After the judge is notified regarding the confirmation, replacement or termination of the security measure that was already provisionally ordered, the request is to be analyzed in accordance with the procedure provided by art. 246 para. 13.

The judge will hear, if possible, the person subject to the provisional measure, in the presence of his lawyer, and after performing a forensic examination, will rule by reasoned decision.

Corroborating this text with art. 246 para. 2 of the Criminal Procedural Code and art. 248 para. 2 of the Criminal Procedural Code we find that in most cases, an expertise has already been undertaken at the time of the provisionally security measure.

However, in order to have a more recent perspective on the evolution of the health of the subject to the medical safety measure, in practice a new forensic examination is often undertaken.

In order for the security measures to remain definitive, these steps shall be taken after the criminal process is completed with a solution of non-prosecution.

We recall that the reason why the temporary medical hospitalization and temporary obligation to medical treatment are not definitive (without including in this reasoning the time-limited nature of medical safety measures in general) is the very fact that they were ordered within the confines of the criminal process and their duration cannot exceed the moment the criminal process is finalized.

At that moment, if it is considered that the substantive conditions are met (the respondent commits an unjustified act incrimined by the criminal law, the existence of a state of danger that originates from an illness, etc.) the judge of the preliminary chamber will decide, this time definitively, on the confirmation, replacement or termination of the medical safety measure.

Under the same conditions, stemming from the interpretation of art. 315 para. 2 lett. e of the Criminal Procedural Code, the judge of the preliminary chamber will analyze and will also rule on a firstly requested proposal when the requested measures have not already been taken during the criminal investigation.

However, in these conditions, we consider that the notification of the preliminary chamber judge is a subsidiary provision to the solution of dismissal or waiver of criminal prosecution, its existence being totally dependant on the principal solution, which is necessary to become "*final*".

That is why, in general, prosecutor"s offices send files to the preliminary chamber judge for medical security measures (as well as for ordering the special confiscation or revocation of a certain document), after the solution of waiving the criminal investigation has been confirmed or the complaint against the filing solution was rejected, or no complaint was filed within the legal deadline.[8]

The medical safety measure depend symbiotically on the legality and validity of the solution of classification or waiver of criminal prosecution.

Otherwise, should the classification solution be annulled by the hierarchically superior prosecutor or by the judge of the preliminary chamber, and the criminal investigation continues its course, the provisions of art. 315 para. 2 lett. e, of the Criminal Procedural Code may be breached.

By analyzing the instances when the medical security measure is taken before the non-trial solution becomes final, we could encounter situations in which these are indefinite, irrespective of the completion of the criminal process.

We could also encounter the situation in which, according to art. 341 para. 7 lett. C of the Criminal Procedural Code, the judge would admit the complaint against the dismissal, would annul the solution and would order the beginning of the trial, while a final medical security measure is still ongoing.

The judge may consider that the reason that was the basis of art. 549 index 1 of the Criminal Procedural Code (procedure in which it is necessary to finalize the classification solution) must be transposed by analogy also in the case of a medical safety measure.

In support of this opinion we also mention the fact that unlike the confiscation procedure in case of classification, regarding the paradigm of the medical security measures which may last until the end of the criminal investigation, the prosecutor can use art. 245-248 of the Criminal Procedural Code which clearly underline the provisional character of the obligation to

[8] Minutes of the Meeting of the Presidents of the Criminal Sections of the High Court of Cassation and Justice and of the Courts of Appeal - 18.12.2020, p. 50, accessed at *http://inm-lex.ro/wp-content/uploads/2021/03/Minuta-intalnire-presedinti-sectii-penale-18-decembrie-2020.pdf.*

medical treatment or temporary medical hospitalization.

With regard to the argument put forward in support of the first case-law, namely the existence of a delay in taking a measure designed to remove a state of danger, we consider that this is precisely the role of the provisional safety measures, to remove the state of danger, provisionally, until the non-litigation solution is final.

Thus, we consider that it is imperative to finalize the classification solution, so that, at the time when the preliminary chamber judge is notified, the deadline for filing the complaint against the classification order has expired or the complaint has been rejected, or admitted, with the confirmation of the solution but with a different basis, since in the latter case the criminal investigation is definitively completed and the basis of the solution is foreseeable.

Given the deprivation of liberty involved in the measure of hospitalization, the judge would consider that the notification must be made as soon as possible after the finalization of the dismissal solution.

We consider that it is necessary for the dismissal order to remain final prior to the notification, because even if it remained final between the time of the notification and the time of the decision, the procedural rights of the suspect or defendant would be harmed, since he would no longer effectively benefit from the double degree of jurisdiction conferred by law.

3. Conclusions

In conclusion, in the judicial practice and in the doctrine there are different orientations regarding the moment when the judge of the preliminary chamber should be invested with the claim to take some medical safety measures.

Taking into the to the scope of establishing the right to notify the judge of the preliminary chamber according to art. 315 para. 2 lett. E of the Criminal Procedural Code, and the nature of the two types of medical safety measures, we consider that the judge of the preliminary chamber can rule on the request to order the taking of the measure of medical hospitalization or the obligation to medical treatment **only after the non-litigation solutions remain final**.

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THEORETICAL AND PRACTICAL CONSIDERATIONS REGARDING THE INTERRUPTION OF THE STATUTE OF LIMITATIONS PERIOD FOR PENAL LIABILITY IN LIGHT OF THE DECISION NO. 297 OF 2018 OF THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The authors intend to present in this article a series of theoretical and practical aspects with regard to the application of the Decision of the Constitutional Court of Romania no. 297 of 2018, declaring the unconstitutionality of the dispositions under art. 155 par. (1) in the New Penal Code, and the problems showed by the practice of the Romanian courts, in the meaning of non-uniform application of such decision. We shall attempt hereinafter to present, subject to our own conscience, a series of theoretical and practical aspects regarding the correct interpretation of the decision aforementioned and of the effects it causes, given that the legislator did not intervene in any manner on the law text declared unconstitutional, as provided by the dispositions under art. 147 in the Romanian Constitution.

Keywords: *Statute of limitation, judicial practice, non-uniform practice, communication of procedural acts, constitutionality*

1. Introductory Aspects

The New Penal Code of Romania entered into force on 1 February 2014. As of that date, the Constitutional Court of Romania has successively intervened, declaring the unconstitutionality of some articles, while, on the other hand, the High Court of Cassation and Justice settled some interpretation problems, through the stipulations provided under art. 471 *et seq*. and art. 475 *et seq.*, namely, the Appeal in the interest of law and pronouncing a preliminary decision for solving some law matters.

Without describing the entire activity of such courts, in this article, we will focus on the law matter notified to the Constitutional Court of Romania by the Oradea Court of Appeal with regard to the unconstitutionality of the dispositions under art. 155 par. (1) in the Penal Code, in relation to which the authority controlling the constitutionality of normative acts admitted the objection to constitutionality, and established that the legislative solution providing for the interruption of the statute of limitations period for penal liability, by fulfillment of „any procedural act in the case", in the dispositions under art. 155 par. (1) in the Penal Code, is unconstitutional.

The interruption of the statute of limitations period for penal liability consists of losing the benefit of the time passed until the performance of any procedural act in the case (a procedural act that, according to the penal process law, may be a prosecution act or an adjudication act, fulfilled until the pronouncement of the final judgment), a moment as of which a new statute of limitations period starts to pass.

In the old regulation, the stipulation of interruption of the statute of limitations period for penal liability was provided in the dispositions under art. 123 in the Penal Code:

„The statute of limitations period provided under art. 122 is interrupted by the fulfillment of any act that, according to law, should be communicated to the accused or the defendant during the penal trial."

In the new regulation, the stipulation of interruption of the statute of limitations period for penal liability is provided in the dispositions under art. 155 in the Penal Code:

„The statute of limitations period for penal liability is interrupted by the fulfillment of any procedural act in the case."

By this new regulation, the legislator proposed a legislative solution inspired from the French and Spanish law. In these two national law systems, the interruption of the statute of limitations periods is not conditional upon serving the process documents to the suspect or the defendant.[1] On the other hand, in countries such as Estonia, Finland, France, Germany, Italy, Malta, The Netherlands, Portugal and Slovakia, the interruption of the statute of limitations period for penal liability is performed through the fulfillment of process acts that are communicated to the suspect or

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[1] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Adrian Mihai Hotca, Ioan Chiș, Maxim Dobrinoiu, The New Penal Code with Comments. General Part. 3rd Edition, Universul Juridic Publishing House, 2016.

the defendant, or which involve the latter"s presence before the judiciary authorities, or through acts that concern directly the settlement of the conflicting penal legal relationship.

We notice that the fundamental difference between the two law texts reviewed arises mainly with regard to the need for communicating the act that should be fulfilled for complying with the dispositions regarding the interruption of the statute of limitations period for penal liability.

Thus, in the old regulation, the condition of the act fulfilled for the occurrence of the interruption of the statute of limitations period concerned an act that, according to law, had to be communicated, while the new regulation loosened such condition in the meaning of fulfillment of any procedural act in the case.

The new regulation was subject to the checks performed by the Constitutional Court of Romania for the purpose of assessing the constitutional character of the phrase „*any procedural act in the case*", establishing that the legislative solution in the dispositions under art. 155 par. (1) in the New Penal Code is unconstitutional.

In relation to this aspect, it is absolutely necessary to perform an analysis of the manner in which the stipulation reviewed was applied, in the context of the declared unconstitutionality and its statement of reasons in which, among others, the constitutional control authority mentions that „**the previous legislative solution, provided under art. 123 par. (1) in the Penal Code of 1969, fulfilled the predictability conditions** prescribed by the constitutional dispositions reviewed, given that it provided the interruption of the statute of limitations period for penal liability only through the fulfillment of an act that, according to law, had to be communicated, in the case in which the person concerned acted as an accused or defendant"

Given that, within 45 days since the publication of the decision in the Official Gazette, as otherwise did on a regular basis, the legislator failed to fulfill their obligation to intervene on the law text declared unconstitutional, the effects generated were challenged in practice.

2. Modes of interpretation of art. 155 par. (1) in the Penal Code, determined by the Decision of the Constitutional Court of Romania no. 297/2018

A first case law **interpretation**[2] (in minority), the Decision of the Constitutional Court of Romania „is not an interpretative one, but one declaring the unconstitutionality of a part of art. 155 par. (1) in the Penal Code", while the phrase through the fulfillment of any procedural act in the case was lawfully suspended, as a consequence of the legislator"s passivity, therefore it ceased to be effective.

Such first interpretation, whereby the decision of the Constitutional Court is granted a plain and not an interpretative effect, was used before by other Romanian courts, too[3] establishing that „**at present, there are no regulated causes for interruption of the statute of limitations period for penal liability**, because, under the Decision of the Court, the court for constitutional disputes declared as unconstitutional the dispositions under art. 155 par. (1) in the Penal Code, which provided the causes for interruption of the statute of limitations period (...)"

It was underlined that this aspect does not amount to such Decision acquiring an interpretative character, given that:

a) the operative part of the Decision is very clear, and should the constitutional control forum wished to provide an interpretation of the relevant legislative solution in compliance with the Constitution, it would have provided the explanations required by means of reasons;

b) The Constitutional Court may not proceed to an interpretation reactivating the old regulation, because, in such a case, it would subrogate the legislator, a fact that is prohibited by art. 61 par (1) in the Constitution, according to which „The Parliament is the sole legislating authority of the country." The Court itself, in paragraph no. 23 in the Decision no. 629/2014, established that: „it has constantly stipulated in its case law that it has no jurisdiction to get involved in legislating matters and in the penal policy of the state, any contrary attitude being interference in the jurisdiction of other constitutional authorities".

This opinion was stated also by other authors of specialist literature, in the meaning that „the phrase through any procedural act performed in the case came from the active source of penal legislation, the legislator failing to introduce another phrase in its place; otherwise, the decisions of the Constitutional Court declaring the unconstitutionality of some legal dispositions amount to repealing laws (...) a repealed legal disposition may never be reinterpreted or applied again and, mutatis mutandis, neither may do so a decision of the Constitutional Court. To do otherwise would mean, by judiciary means, to keep in force a text that was removed from the active legislation by establishing its unconstitutionality"[4].

According to the second case law **interpretation** (in majority), it was showed that the Decision of the Constitutional Court no. 297/2018 is a

[2] Penal Decision no. 1348/A/2018, of 19 November 2018 of Cluj Court of Appeal. Decision rescinded by appeal in cassation - Decision no. 174/RC of 15 May 2019 of the High Court of Cassation and Justice.

[3] Penal Decisions no. 1208/2018 and 1209/2018, of 31 October 2018 of Timișoara Court of Appeal.

[4] An opinion stated by the Faculty of Law within „Nicolae Titulescu" University of Bucharest, on the occasion of the petition filed by Constanța Court of Appeal – Penal Section for minors and family cases, in the penal case no. 18.348/212/2016 – Decision no. 5/2019 of the High Court of Cassation and Justice.

decision provided in **the interpretation of art. 155 par. (1) in the Penal Code**, its effects being mandatory as regards both the operative part and the reasons.

For these purposes, it was assessed that the unconstitutionality of the legislative solution does not involve the unconstitutionality of the dispositions under art. 155 par. (1) in the New Penal Code in their entirety, as showed by the considerations of the decision of the court for constitutional disputes, which mention that the regulation under art. 123 par. 1 Penal Code of 1969 – interruption of the statute of limitations period for penal liability through fulfillment of an act that, according to law, should have been communicated to the accused or the defendant – met the predictability conditions prescribed by the constitutional dispositions reviewed.

As regards the characteristics of the act interrupting the statute of limitations period, the Constitutional Court mentioned that only a procedural act procuring that the person has the possibility to be aware of the aspect of interruption of the statute of limitations period for penal liability and of the start of a new statute of limitations period warrants the predictable character of the dispositions under art. 155 par. (1) in the New Penal Code (par. 28).

In other words, the court for constitutional disputes has established that a new statute of limitations period may not pass prior to guaranteeing the person concerned the right to become aware of the aspect of interruption of the statute of limitations period for penal liability and of the start of a new statute of limitations period.

In its turn, in the reasons of the Decision no. 25/2019, the High Court of Cassation and Justice „established that the interruption of the statute of limitations period may be performed only by fulfilling an act which, according to law, should be communicated, in the case within which the person concerned acted as an accused or defendant, as expressly stipulated by the Constitutional Court."

The facts stipulated by the High Court of Cassation and Justice were reviewed also by the National Institute of Magistrates, which mentioned that „based on the reasons of the decision no. 297/2018, we may draw the conclusion that the present regulation is prone to prejudice the suspect or the defendant through the state of perpetual uncertainty this is in, taking into account that this was not informed, through interruption documents, that the penal deed committed by them has not lost its social significance that it had when it was committed".[5]

According to the opinion of the National Institute of Magistrates, the regulation regarding the interruption of the statute of limitations period for penal liability in the previous Penal Code was resumed.

In line with the High Court of Cassation and Justice is both the specialist literature and national case law, which assess that the effect interrupting the statute of limitations period occurs as of the date when the act is communicated, or as of the date when this is performed in the presence of the suspect or of the defendant, as we will show hereinafter:

In the Penal Decision no. 907/21.06.2019, the Bucharest Court of Appeal established: „the interruption of the statute of limitations period for peal liability means the cessation of that period through the fulfillment by the judiciary authorities with jurisdiction, before the expiry of the statute of limitations period, of any act that, according to law, should be communicated to the defendant (summons, notice of charge, initiation of penal action, hearing, confrontation, etc.) and that these acts should be communicated to the defendant or performed in its presence."

In the Penal Decision no. 368A/10.08.2018, Oradea Court of Appeal has established that: „with regard to the Decision no. 297/26.04.2018 pronounced by the Constitutional Court, it shall establish that the statute of limitations regarding penal liability of the defendants with regard to committing the crimes (...) occurred, as a consequence of the fact that, since the moment when the deed was committed, that is 06/07.06.2004, and until the moment of performance of some penal procedural acts that should be communicated to the defendants (...)"

In another case, the court of law[6] proceeded to reviewing the effects of the Decision no. 297/2018 on the defendants" situation, in light of the last act performed in the case, prone to interrupt the penal statute of limitations period.

Therefore, in the absence of a procedural act that should be communicated according to law to the suspect or the defendant, the interruption of the statute of limitations period for penal liability may not be carried out, considering the dispositions under art. 155 par. (1) in the Penal Code, as construed considering the Decision of the Constitutional Court no. 297/26 April 2018.

3. Practice of the High Court of Cassation and Justice

Up to the present, the High Court of Cassation and Justice has dismissed as inadmissible both a petition requesting to pronounce a preliminary decision for solving in principle some law matters, and the appeal in interest of the law filed by the Attorney General of the Prosecution Office by the High Court of Cassation and Justice, both regarding the interpretation and application of the dispositions under art. 155 par. (1) in

[5] Meeting of the Presidents of penal sections of the High Court of Cassation and Justice and of courts of appeal, conducted at the Bucharest Court of Appeal in the period 16-17 May 2019.

[6] Penal Sentence no. 1923/2018 pronounced by Medgidia Trial Court.

the Penal Code, following the Decision of the Constitutional Court of Romania no. 297/2018.

As regards the petition aforementioned, which was dismissed as inadmissible by the Panel for solving some law issues in penal matters, the High Court of Cassation and Justice stated its opinion in line with the case law of the Constitutional Court[7] according to which „The High Court of Cassation and Justice has no jurisdiction to pronounce itself on the effects of the decision of the Constitutional Court, or to provide mandatory solutions contravening to the decisions of the Constitutional Court".

The appeal in the interest of law was in its turn dismissed as inadmissible, the panel for adjudication of appeals in the interest of law, based on the case law of the Constitutional Court of Romania and also of the High Court of Cassation and Justice, „establishing that the law issue on which the courts pronounced themselves differently goes beyond the jurisdiction of the supreme court, the Constitutional Court being the only one that may stipulate on the effects of the decisions pronounced"[8].

After reviewing most of the judgments provided by the High Court of Cassation and Justice, we have not been able to identify any judgments by which it followed the minority interpretation of the effects of the decision of the Constitutional Court aforementioned. However, given that, at a national level, we have identified a trend of non-uniform practice, the problem should be solved by a decision with a mandatory effect on courts, whether we speak about an appeal in the interest of law, or we speak of a preliminary decision for solving some law matters, given the importance of the stipulation reviewed.

4. The phrase „that should be communicated" and the interruption of the statute of limitations period

With regard to the acts that lead to the interruption of the statute of limitations period for penal liability and with regard to the moment when such interruption becomes effective, most judiciary doctrine and practice assessed that a new statute of limitations period starts to pass starting from the date when the act was communicated, or the date when the act is performed in the presence of the suspect/ defendant.

The following are prosecution acts that should be communicated to the defendant: continuation of prosecution of a person, initiation of the penal action, preventive arrest, etc. The following are process documents that should be served on the defendant: summons, decisions made during adjudication, etc. We shall consider as acts communicated to the defendant also the procedural acts performed before them (interrogation, confrontation) or the acts performed in their presence (searches, investigation on site). The date when a new statute of limitations period starts to pass is, as the case may be, either the date when the act was communicated to the defendant, or the date when the act was performed in the presence of the accused or of the defendant, that is the date when the procedural act interrupting the statute of limitations period was fulfilled.[9]

Without reiterating the aspects presented previously, we consider that three conditions are required for the interruption of the statute of limitations period:

1. fulfillment of a process or procedural act;

2. the act interrupting the statute of limitations period should be communicated according to law. In other words, the law provides what the (process or procedural) acts are that should be communicated to the defendant; in general, these are related to guaranteeing their rights during the penal trial, but also related to their obligations arising from the penal legal relationship, given that the accused or the defendant is held liable for the penal deed committed.

3. the act, according to law, should be communicated to the suspect or the defendant during the penal trial and not only should it be among the ones that should be communicated. The communication should be carried out effectively.[10]

5. Conclusions

We consider that, pursuant to the provisions under art. 147 par. (1) in the Romanian Constitution, according to which „The dispositions in the laws and ordinances in force, as well as the ones in regulations, found as being unconstitutional, cease their legal effects within 45 days since the publication of the decision of the Constitutional Court if, during such interval, the Parliament or the Government, as the case may be, do not align the unconstitutional provisions to the dispositions in the Constitution. During such term, the dispositions found as being unconstitutional are lawfully suspended", the Decision no. 297 of 26 April 2018 of the Constitutional Court of Romania is effective *ex nunc*, more precisely starting from 25 June 2018, the date of its publication in the Official Gazette.

Given the legislator"s failure to intervene in order to amend the unconstitutional provisions, we consider that the interruption of the statute of limitations period for penal liability occurs in the conditions established in paragraph 34 in the Decision no. 297/2018, namely only „through the fulfillment of an act that, according to law, should be communicated to the suspect or the

[7] Decision of C.C.R. no. 454/2018, of 4 July 2018.

[8] Decision no. 25/2019, of 11.11.2019 of Î.C.C.J.

[9] V. Dongoroz et al., Theoretical Explanations of the Romanian Penal Code. General Part. Vol. II, Academia Republicii Socialiste România Publishing House, Bucharest, 1970, p. 363- 364.

[10] H. Dumbravă, Penal Liability, Interruption of Statute of Limitations Period, in R.D.P. no. 1/2000, p. 62-64.

defendant during the penal trial", similarly to the previous legislative solution, provided under art. 123 par. (1) in the Penal Code of 1969, which, in the constitutional judge"s opinion, „met the predictability conditions prescribed by constitutional dispositions".

In our opinion, by agreeing on the majority interpretation, namely based on the old regulation (according to par. 34 in the Decision of the Court), one of the basic rules of the penal trial, that is guaranteeing the right to defend oneself, is supported. Otherwise, we could found the dissolution of a fundamental principle, a fact that is incompatible with the right to a fair trial in the meaning of art. 10 in the Penal Procedure Code and art. 6 in the European Convention of Human Rights (the right to a fair trial).

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THE PERSON DEPRIVED OF LIBERTY AND THE RESTORATIVE JUSTICE

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Abstract

The concept of restorative justice offers a new way of approaching and understanding all the concepts with which professionals in the field of criminal law work: crime, offender, victim, criminal trial, criminal sanction, imprisonment, etc.

Restorative justice aims to balance the problems of the victim and the community, as well as the need for social reintegration of the offender, to assist the victim in the recovery process and to give all parties the right to be present and to be actively involved in justice. caused by the commission of an offense, based on an approach involving not only the parties but also the community at large, in close liaison with specialized institutions in the field.

Starting from the hypotheses according to which the crime has its origins in social conditions and community relations, that crime prevention depends on the assumption by local and central authorities of responsibilities related to social policy to remedy the conditions that cause crime, the consequences of the crime can not be fully resolved for the parties without their personal involvement, the main objectives of restorative justice are:

- to respond to the needs of the victims - material, financial, emotional and social needs (including those close to the victim, who may also be affected);

- to prevent recidivism by reintegrating criminals into the community;

- to determine the criminals to actively assume responsibility for their deeds;

- to create a community that supports the rehabilitation of criminals and victims and that is active in crime prevention;

- to provide some means of avoiding the burden of the criminal system, costs and delays, but also the abandonment by society of passive roles in traditional retributive, rehabilitative justice..

Keywords: *offender, victim, compensation, mediation, enforcement.*

1. Introduction

Initiated in North America in the 1970s[1], this criminal philosophy is based on programs aimed at reconciling the victim and the offender and identifying appropriate solutions to repair the harm caused by the crime, developing as an alternative to the retributive criminal system.

In 1996, the British criminologist Tony Marshall[2] offered the world a definition of the concept of restorative justice, a definition recognized as valid by the entire world movement in this field: *Restorative Justice is a process whereby parties with as take in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.*

In his opinion, Restorative Justice is based on the following *assumptions*:

- that crime has its origins in social conditions and relationships in the community,
- that crime prevention is dependent on communities taking some responsibility (along with local and central governments responsibility for general social policy) for remedying those conditions that cause crime,
- that the aftermath of crime cannot be fully resolved for the parties themselves without facilitating their personal involvement,
- that justice measures must be flexible enough to respond to the particular exigencies, personal needs and potential for action in each case,
- that partnership and common objectives among justice agencies, and between them and the community, are essential to optimal effectiveness and efficiency
- that justice consists of a balanced approach in which a single objective is not allowed to dominate the others.

2. Approaching and interpreting the concept of restorative justice

From the perspective of international documents[3], the interest of specialists in implementing the ideas of

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[1] The name of Restorative Justice comes from the English language, which demonstrates the Anglo-Saxon origins of the concept that was first applied in 1974 when two Canadians, Mark Yantzi and Dave Worth, asked a judge in Kitchener, Ontario, to allow them to try a different approach in the intervention of justice on two young criminals arrested for destroying property. The idea was to allow the victim and the offender to play a leading role in deciding on the most appropriate method of responding to the harm done. *Apud* Elena Bedros in the article *Conceptul de justiție restaurativă și legătura acestuia cu tendințele moderne de dezvoltare a procesului penal*, p.39, available on line: http://www.legeasiviata.in.ua/archive/2014/6/8.pdf, consulted on 04.03.2021, 04:56 hour.

[2] T.Marshall, *Restorative justice: an overview,* pp.5-6, available on line: http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdf, consulted on 03.03.2021, 18:58 hour.

[3] National Institute of Criminology, Restorative Justice Programs in the Contemporary World (Documentary Analysis), 2005, p.11, available on line pe http://criminologie.org.ro/wp-content/uploads/2015/08/Programe-de-justitie-restaurativa-in-lumea-contemporana-Studiu.pdf, document consulted on 16.08.2018, ora 16:26

restorative justice in judicial practice in more and more countries around the world, as well as the introduction of restorative practices that meet high methodological requirements, but also take into account the particularities of each state, has materialized in the elaboration of international documents regarding the basic principles of restorative justice in criminal matters.

One of the basic international documents in the field of restorative justice is *ECOSOC Resolution 2012/12 Basic principles on the use of restorative justice programmes in criminal matters*, adopted on 37th plenary meeting 24 July 2002 which, in art. 2 of the Annex defines the restorative process as means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

The same document, in art. 3, defines the "Restorative outcome" as means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

Restorative outcomes[4] include responses and programs such as reparation, restitution, and community service to meet individual and collective needs, offender reintegration, family and community reconciliation, individual and group counseling in prisons, mediation actions between the offender and the victim, various educational programs in the field of communication, literacy, schooling, professional qualification, moral education, special programs for preparation for release, with the active participation of the detainee, family and community in which will return.

The model of restorative justice was one of the topics addressed at United Nations congresses, such as: the 11th Congress in Bangkok, April 18-25, 2005, and the XIIth Congress in El Salvador (Brazil), between April 12-19, 2010.

The work of both congresses focused on the need to reform the criminal system and by implementing the model of restorative justice, as an alternative to the traditional criminal system, to avoid the harmful effects of incarceration, in order to reduce the workload of courts, emphasizing the need for Reintegrate alternatives to incarceration, which may include community service work, restorative justice, electronic surveillance, and the need to support rehabilitation and reintegration programs, including those aimed at correcting criminal behavior, along with educational programs and vocational for convicts[5].

The approach and interpretation of the concept of restorative justice have also been established on the European continent[6] because the most vulnerable persons are those who find themselves in particularly exposed situations, such as persons subjected to repeated violence in close relationships, victims of gender based violence, or persons who fall victim to other types of crimes in a Member State of which they are not nationals or residents, are in need of special support and legal protection. Victims of terrorism also need special attention, support and social recognition. An integrated and coordinated approach to victims is needed, in line with the Council conclusions on a strategy to ensure fulfilment of the rights of, and improve support for, persons who fall victims of crime.

Emphasizing, as a matter of priority, the support and recognition of the rights of all victims, so that they receive adequate support to facilitate their recovery and to have sufficient access to justice, *Directive 2012/29/EU Of The European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*[7], in art.12 provide that Member States shall take measures to safeguard the victim from secondary and repeat victimisation, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services.

In this spirit, as the terminology of „restorative justice" developed around the globe[8], Emphasizing the benefits of such a way of compensating for damage caused by crime, as well as the limitations that characterize traditional approaches to criminal justice, having regard to the provisions of Directive 2012/29 /EU, Recommendation CM/Rec(2018) 8 concerning

[4] I.M.Rusu, *Drept execuţional penal,* Editura Hamangiu, Bucureşti, 2015, p.417.

[5] E.Bedros, *Conceptul de justiţie restaurativă şi legătura acestuia cu tendinţele moderne de dezvoltare a procesului penal*, p.39, available on line http://www.legeasiviata.in.ua/archive/2014/6/8.pdf, consulted on 01.03.2021, 19:17 hour.

[6] *The Stockholm Programme — an open and secure Europe serving and protecting citizens*, *2010/C 115/01*, art.2. 3. 4, consulted on 04.03.2021, 07:03 hour, available on line: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:52010XG0504(01).

[7] Published in Official Journal of the European Union, series L nr.315/14.11.2012, available on line http://data.europa.eu/eli/dir/2012/29/oj, consulted on 04.03.2021, 07:21 hour .

[8] *Commentary to Recommendation* CM/Rec(2018)8 *of the Committee of Ministers to member States concerning restorative justice in criminal matters*, available online on https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808cdc8a, consulted on 26.02.2021, 18:35 hour.

restorative justice in criminal matters[9] updated the list of international documents and agreements considered and placed greater emphasis on the principles of restorative justice and recent advances in studies in this field, adding in due course to the growing number of international instruments working in the field of use and evolution of restorative justice. The recommendation reflects the idea that restorative justice should be regulated only to the extent necessary and that restorative justice services should be independent in carrying out their mission. The Recommendation also calls on the Member States to strengthen the capacity to exercise restorative justice in all geographical areas under their jurisdiction, for all offenses and all stages of criminal proceedings.

In the Romanian criminal system, most part of this directive are already transposed, especially by the provisions of the Code of Criminal Procedure, and of Law no. 211/2004[10] on certain measures to ensure the protection of victims of crime.

However, there are also a number of provisions of the directive that require adaptation to domestic law by creating a legislative framework to amend and supplement Law no. 211/2004 and Law no. 192/2006[11] on mediation and organization of the mediator profession.

By Law no. 97 of April 27, 2018[12] on some measures to protect victims of crime, the provisions have been transposed the provision of art. art.3 para. (3), art. 4 para. (1) leter i and j, art. 5 para. (1) and (3), art. 12 para.(1) letter c and art. 19 para. (2) of Directive 2012/29 / EU, in order to ensure that victims are treated with respect and to enable them to make informed decisions about their rights, as well as their participation in the mediation procedure.

These provisions must be correlated with the provisions of Criminal Procedure Code which in art.16 para.1, letter g (concluding a mediation agreement being one of the cases that prevent the initiation and exercise of criminal proceedings), art. 23 para. 1 (the transaction, mediation and recognition of civil claims), art.81 para.1, letter i (right of the injured person to resort to a mediator), art. 83 para.1 letter g (right of the defendant to appeal to a mediator), art. 108 para. 4 (communication of rights and obligations), art. 111 para.1, letter b (the manner of hearing the injured person), art. 313 para.3 (mediation is one of the cases of suspension of the criminal investigation), art. 318 para.4 (waiving the criminal investigation), art. 483, para.3 (submission by the prosecutor to the court of the plea agreement, accompanied by the transaction or the mediation agreement), art. 486 (settlement of the civil action), recognizing both the injured person and the defendant the right to appeal to a mediator in the cases provided by law.

By forming the „victim-offender-community triad" [13] this new criminal philosophy differs from that of traditional justice in that restorative justice focuses on repairing harm caused by crime, while traditional justice focuses on punishing a crime; then, restorative justice is characterized by dialogue and negotiation between the parties, while traditional justice is based on the principle of adversarial proceedings, and, thirdly, restorative justice requires members of the community or organizations to take an active role, to take responsibility for both sanctioning, as well as for the recovery of the delinquent, while for traditional justice, the "community" is represented by the state[14].

Payment of damage to the victim, requirement for parole

Mediation, in the criminal trial, as an alternative method of resolving conflicts, is applied both on the criminal side and on the civil side of the criminal trial. On the criminal side , the provisions on mediation apply only in cases of offenses for which, according to the law, the withdrawal of the prior complaint or reconciliation removes criminal liability[15].

The law does not limit, in relation to the type of crime committed, the possibility of resorting to mediation to resolve the civil side of the case, therefore recognizing the right to appeal to a mediator to resolve the civil side of any criminal trial.

However, the exercise of this right may be restricted in certain situations, such as taking a preventive measure against the defendant which involves, *inter alia*, a ban on approaching of the injured person and communicating directly with this person or

[9] Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies, available on line:https://www.coe.int/en/web/prison/home/-/asset_publisher/ky2olXXXogcx/content/recommendation-cm-rec-2018-8, consulted 05.02.2021, ora 18:35.

[10] Published in Monitorul Official Gazette of Romania, Part I, nr. 505/ June 4, 2004.

[11] Published in Monitorul Official Gazette of Romania, Part I, nr. 441/ May 22, 2006, with subsequent amendment.

[12] Published in Monitorul Official Gazette of Romania, Part I, nr. 376/ May 2, 2018.

[13] M.I. Rusu, *op.cit*, p.416.

[14] K. Daly, *Revisiting the Relationship between Retributive and Restorative Justice*, p.6, To appear in Restorative Justice: From Philosophy to Practice, edited by Heather Strang and John Braithwaite, Australian National University.Aldershot:Dartmouth(2000), available on line https://www.griffith.edu.au/__data/assets/pdf_file/0028/223759/2001-Daly-Revisiting-the-relationship-pre-print.pdf, consulted on 16.02.2021, 10:53 hour.

[15] Art.II paragraph 2, thesis II of the Law no.97 / 2018 on some measures for the protection of victims of crime, the conclusion of a mediation agreement in the criminal side, under the conditions of this law, may occur until the reading of the act of notification of the court. By Decision no. 397/15 June 2016 of the Constitutional Court, following the debate on the exception of unconstitutionality of the provisions of art. 16 par. (1) lit. g) the final thesis Criminal Procedure Code and of art.67 of Law no.192 / 2006 on mediation and organization of the mediator profession, the exception of high unconstitutionality was admitted and it was established that these provisions are constitutional insofar as the mediation agreement on the offenses for which the reconciliation may occur produces effects only if it takes place until the reading of the act of notification to the court..

a reasonable suspicion that the defendant is trying to fraudulent deal with injured person. However, the parties of the criminal dispute, both on the criminal side and on the civil side, may give special power of attorney to another person to conclude the mediation contract, thus having the possibility to avoid direct contact between the subjects of the crime[16].

Restorative justice is in the criminal code a new condition imposed by law the persons deprived of liberty until the date of analysis in the parole board. We note in practice that at the level of parole board there is intransigence regarding this criterion, the presentation of payment receipts being mandatory.

However, some inmates, although they have been serving a long period of imprisonment, during which time they have spent large amounts of money deposited by relatives in the penitentiary account, far beyond their needs in detention, did not show any interest in paying these expenses to the civil parties, to the state (in this case National Agency for Fiscal Administration-ANAF), considering themselves persons without income from work, justifying their disinterest by the fact that, being several participants in the crime, they have joint and several obligations in the damages payment, so it is not known who would be the share of each defendant in these payment, that he cannot contact the other defendants because they are out of the country or are imprisoned in other prisons and also lack financial means, that the injured person no longer lives at the address known to the detainee in an attempt to make a payment agreement with this person, that the injured person wishes to be paid in full the amount due by the beneficiary of the damages payment, etc.

We consider as correct the practice adopted by the parole board to order the postponement of the analysis of the situation of the inmates who does not met the condition of full payment of damages (art. 99 para. Letter c and art. 100 para. 1 letter c of Criminal Code), until the intervention of one of the following situations:

- full payment of damages;
- proof that the detainees has made every effort to pay the damages, i.e. payment agreements concluded between the detainee and the legal persons of the civil parties (e.g. Ambulance Service, Emergency Reception Unit, etc.) or between him and the injured persons, agreement authenticated by a notary in the latter situation, from wich to result an agreement on the payment schedule, the opening an account at CEC Bank in the name and at the disposal of the injured person in which to transfer the amounts due to the latter, until full payment, requests made by the detainees addressed to the Financial Service, requesting the retention of a percentage of the amounts from the account or in order to pay the damages or proof of extinction of the obligation by compensation (deed regarding the transfer in order to extinguishment of the payment obligation);
- or proof that the injured person has expressly waived compensation.

We cannot agree with the statements of the detainees who are dissatisfied with the fact that the discussion of their situation in the parole board has been postponed precisely because of non-payment of damages, which would, in their view, be an abusive decision of parole board, the detainees considering that if they show a certificate from ANAF that they do not appear with income, it means that they are unable to pay the damages, even if during the execution of the custodial sentence they spent thousands lei from their account, much more than had to pay to the civil parties, and did not take the slightest step in order to pay these damages, which proves the bad faith on the part of the convict.

The Constitutional Court[17] ruled that the premise that the criticized provisions exclude from the right to obtain conditional release those detainees who do not have the means to pay compensation is wrong.

Thus, from the very way of regulating the provisions of art. 99 para.1 letter c) Criminal Code, it results that the full fulfillment of the civil obligations established by the conviction decision is circumstantial, precisely from the perspective of the individual financial possibilities, the convicts having the possibility to prove the fact that they did not have the material resources required to fulfill the civil obligations. Thus, the non-fulfillment of this condition can be found only if the convicted person, who requests parole, does not fulfill in bad faith the civil obligations established by the conviction, and not in all cases, regardless of the existence or not of material resources.

Given that the proof of the impossibility of voluntary payment of civil obligations can be made by certifying the lack of income or by a certificate issued by the City Hall (especially in the case of detainees from rural areas) that the person does not own properties, by correlating this information with those resulting from the analysis of the amount in the personal account, we ask ourselves, what about the victim"s right to be compensated?

Does the impossibility of the convict's voluntary payment of civil obligations mean the disappearance of the obligation to repair the damage? Or can the prescription of the right of the civil parties to request the forced execution it can be considered as a tacit, virtual waiver of damages?

The answer can only be negative, the person deprived of liberty will not be exempted from the payment of civil obligations because the civil party did not enforce the decision, and thus his right to request enforcement was prescribed.

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[16] N.Volonciu (scientific coordinator), Codul de procedură penală comentat, p.236, Editura Hamangiu, Bucureşti, 2017.

[17] Decision of the Constitutional Court nr.57 on February 2, 2017, pct. 20, regarding the exception of unconstitutionality of the provisions of art. 100 para. (1) lit. c) of the Criminal Code and the provisions of art. 97 para. (3) lit. c) of Law no. 254/2013 on the execution of sentences and custodial measures ordered by the court during the criminal trial, published în Official Gazette, Part I, nr. 366/May 17, 2017.

The text of the law was established precisely to verify the attitude of the person deprived of liberty towards the obligations imposed by the court, as well as to protect the interests of civil parties, so that the prescription of the right of civil parties to enforcement cannot be considered tacit waiver, as long as an express manifestation of the will of the civil party is required.

The essential condition imposed by Art. 99 para.1 letter c) of the Criminal Code, the second thesis, that of being a debtor in good faith, i.e. to prove that, despite all his efforts, it was impossible for him to fulfill his obligations is not fulfilled if the convict avoided the execution of civil damages, waiting until expiration of the right of the civil party to request enforcement.

The prescription[18] concerns only the forced pursuit of the execution of the claim resulting from the conviction decision, without affecting in any way the validity of the obligation, according to art. 707 para (2) Code of Civil Procedure, reason for which, if the debtor pays the obligation after the expiration of the limitation period, he can no longer request the refund. However, if the statute of limitations does not affect the claim itself, it is natural that the person deprived of liberty should be obliged to pay it in order to be offered parole.

The reason for the condition examined does not consist in forcing the convict to pay compensation, which could no longer be achieved as a result of the intervention of the statute of limitations, but in that his efforts to repair the damage caused by the crime show a subjective position on the consequences and an element of appreciation of the extent to which he has become a responsible person, the discharge of civil obligations being precisely the means by which this is established.

We consider that it is necessary *de lege ferenda* to amend Art. 99 para.1 letter c) and art.100 para.1 letter c) of the Criminal Code, by introducing in their body as a way of extinguishing the civil obligations, the express waiver of the civil party to the compensations due to him, following that the text of the law should have the following content: "the convicted person has fully fulfilled the civil obligations established by the conviction, unless he proves that he had no possibility to fulfill them or the civil party he expressly waived the compensation".

3. Conclusions

Parole is a privilege, not a constitutionally protected right, being a „commitment" made by the detainee to the community through its ability to manage interpersonal relationships, by setting significant goals in education or training, through involvement in the activity self-improvement and therapy, using available resources (dwelling house, financial stability, family support) will overcome the recognized problems and help the offender to continue to serve in his efforts to reintegrate the community and within his family unit as useful productive individual.

Compared to the way of regulating the parole institution, we note the emphasis placed by the legislator on proving by the detainee good faith only in terms of payment the civil expenses to which he was obliged by the court decision, not in respect of other expenses the detainee was obliged by the court during the execution of the sentence, for example the judicial expenses to the state as a result of the rejection of some requests, so that their non-payment will not influence in any way the decision of the parole board, as long as the civil expenses of the sentence were paid.

Considering the fact that the lack of obligations constitutes one of the proofs of good faith, we consider that another proposal *de lege ferenda* would be welcome, consisting in the introduction of a new condition at Art. 99 par.1 letter c) and art.100 par.1 letter c) of the Criminal Code, that of ordering the deprivation of persons deprived of liberty to pay of legal expenses due to the state during detention, in the sense that "the convicted person has fulfilled his established civil obligations required by the court in which case he proves that he has no possibility of fulfilling them".

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[18] See Minutes of the meeting of the presidents of the criminal sections of the High Court of Cassation and Justice and of the courts of appeal Bucharest Court of Appeal, 16-17 mai 2019, p.3, available on- line http://inm-lex.ro/fisiere/d_2441/Minuta%20intalnire%20presedinti%20sectii%20penale%2016%2017%20mai%202019.pdf., consulted on 09.03.2021, ora 06:43.

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THE RESTORATIVE JUSTICE PROCESS IN THE WAKE OF THE GLOBAL PANDEMIC

Nagore PÉREZ HIERRO[*]

Abstract

The COVID-19 pandemic has completely changed the way we relate, both personally and socially, and at work. Isolation, confinement, restrictions or fear of contagion have led to the need to adapt to a virtual reality. And so, although many sectors have been paralyzed, many others are experiencing an express maturation thanks to the phenomenon of the Internet.

In the field of justice, it has also been proposed to implement the judicial processes in a telematic way. However, the Spanish system is not yet ready to face virtual reality. Spain is suffering a significant collapse in the courts, due to the unprecedented health crisis. It is therefore necessary to promote alternative processes of conflict resolution, embodied in restorative justice, as an expeditious and effective way out of this saturation of the judicial system. To this end, it is vital to have sufficient regulatory support to regulate such reparation processes, such as criminal mediation, which lacks systematic regulation in our legal system, as well as to enable online sessions in order for us to embrace the new virtual reality defined after the pandemic.

Keywords: *Restorative Justice, repair, pandemic, mediation, virtual reality.*

1. Introduction

This research work is about criminal mediation, an institution of great importance incardinated in Restorative Justice, which is opposed to Retributive Justice, and whose objective is the satisfaction of all parties to the process, that is, from the point of view of the victim of the crime as well as from the point of view of the rehabilitation of the perpetrator.

The interest that it arouses is none other than the lack of an express regulation in Spain that recognizes this institution in the field of criminal law, unlike other countries of the European Union that do regulate in a satisfactory way the criminal mediation.

It must be said that, for the study of research, it is at least necessary to refer to European legislation in order to determine how Restorative Justice is inserted into the different legal systems of the Member States, and analyze how it could be done in Spain.

It is true that many authors have delved into the application of alternative conflict resolution processes and, especially, on mediation. However, in the field of criminal law, it does not take off.

2. Content

It is a reality that in recent years the Spanish judicial system has been especially collpased. The high litigation present in Spanish society is a well-documented fact. The General Council of the Judiciary (CGPJ) has already highlighted on numerous occasions the existing congestion in the courts and tribunals of the country. That defendants wait many years to receive a judgment or for it to be carried out is the harsh reality of the Spanish judicial system. And unfortunately it seems that the Spanish are going to continue condemned to have a slow and absolutely saturated judicial system.

Improving the functioning of the Administration of Justice is the key in a State of Law, as the UN assures, and although it should have already been dealt with urgently by the authorities, the need increases even more in this current context of global health crisis produced by COVID-19 in which we find ourselves.

The justice has been and continues to be the great forgotten by the State and, after the pandemic, it has been retested. The Administration of Justice is suffering a significant slowdown due to this unprecedente health crisis. The collapse of the courts, the delay in the issuance of judicial decisions, the lack of confidence of citizens in a system where they see neither the right to an effective judicial protection nor the right to obtain a judicial response without unacceptable delay; together with the increase in litigation after the confinement, leads us to think about the need to promote alternatives conflict resolution systems.

It is at least a priority to encourage other procedures that manage to resolve conflicts between the parties from a higher quality of Justice. An agile way out of this saturation of the traditional judicial system is, without a doubt, mediation.

The resource of mediation, along with other figures such an arbitration or conciliation, were erected as substitute instruments for the ordinary process, whose main objective was none other than to lighten the weight borne by the courts.

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It is true that these strategies have been reaching greater diffusion over the years. An example of this is the approval of the report on the draft law to promote mediation. However, this practice has not yet taken off.

Perhaps the lack of knowledge, the lack of mediators or the lack of confidence in the effectiveness of these methods are the causes that impede their growth process and that can explain the limited success of mediation in Spain.

In the criminal sphere, the lack of security of the crime victim that the mediation procedure does not entail a danger to her security or a risk of suffering further material or moral damage has to be added.

However, and bringing up the data provided by the Judicial Statistics Section of the General Council of the Judiciary on mediations, the resolution rate, which relates the volumen of income wih the resolution capacity, is encouraging. For this reason, it is considered vital a modernization of the Administration of Justice, which bets more on these alternative dispute resolution mechanisms.

In this line, and supporting the idea of promoting these procedures, three possible proposals are worth highlighting: favoring criminal mediation and betting on an express regulation; firstly; including mediation in the content of the Free Legal Assistance, secondly; and, finally, promoting the sessions electronically.

Regarding the first proposal, the legislator has dedicated and focused his attention on developing mediation especially in civil and commercial sphere. And it seems that he has forgotten about criminal mediation.

We found an isolated sentence such as the one issued by the provincial Court of Madrid, Section 17, 621/2015, of September 16 (Appeal 6037/2013), which transversely contemplated the criminal mediation procedure. Nevertheless, the reality is that, despite a theoretical basis is placed, there is a lack of a true legal regulation of the institution in Spain.

The reform of the Penal Code has already allowed the legislative entry of mediation, but there is still a long way to go before the judicial authorities consider it a legitimate, adequate and effective figure.

We are witnessing how European legislation (the Framework Decision of the Council of the European Union of March 15 /2001/220/JAI, regarding the status of the victim in criminal proceedings; and then Directive 2012/29/EU of the European Parliament and the European Council of October 25, 2012, which stablishes minimum standards on the rights, support and protection of crime victims, which has set a serie of guidelines for the implementation of Justice Restorative in the members countries of the European Union) has already endowed mediations with a specific regulation (Italy, Germany or Netherlands, among others), and it is undoubtedly that it's a key instrument for society and the fabric of the judicial system.

Not only does it manage to minimize the criminal response, but it also contributes to the task of Restorative Justice: it facilitates the rehabilitation of the culprit and the compensation of the victim.

Therefore, it can be considered necessary to give greater visibility to this practice and face an express regulation of criminal mediation, which ensures the safety of the crime victim and promotes the principles that allow to achieve the guarantees of Modern Criminal Law.

Regarding the second proposal, it is vital that mediation is going to be included within the content of Free Legal Assistance (AJG), which is already regulated in Law 1/1996, of January 10, on Free Legal Assistance.

As well is established in its Statement of Motives, the objective of this law in none other that to regulate a free justice system that allows citizens who prove insufficient resources to litigate, to provide themselves with the necessary professionals in order to access to the effective judicial protection and see their rights and legitimate interests adequately defended.

Article 119 of the constitutional text provides that Justice will be free when the law so provides and, in any case, with respect to those who prove insufficient resources to litigate. Our Supreme Norm designs a regulatory framework for the right to judicial and effective protection in which integrates a service activity aimed at providing the necessary means to make this right real for all the citizens.

Within the content of this right, article 6 of mentioned law refers to the advice and guidance prior to the initiation of the process, the defense and representation by a lawyer, expert assistance, the substantial reduction of the cost for obtaining deeds, notarial documents, custom duties and those who emanating from the Public Registries, which may be accurate for the parties in the process.

However, if we star from dispensering the same treatment of the judicial process to alternative dispute resolution systems, making these and equally valid option, it will soon be necesssary to expand the material content of the AJG. Since the defendants who opt for the mediation ressource will also have to face those amounts that this system inevitably entails, such as the mediators" fees, management or administration expenses, among others, despite the fact that the cost of the process is cheaper than the judicial procedure.

The Court of Justice of the European Union in the judgement of June 14, 2007 (case C-75/16, Livio Menini and Maria Antonia Rampanelli / Banco Popolare Società Cooperativa), established that for the mediation to be compatible with the principle of effective judicial protection, among other conditions, should not cause expenses or, in any case, they must be scarcely significant.

Nevertheless, however small they are, they can be an obstacle to the parties with insufficient resources from exercising the right to the protection of their legitimate interests. For this reasons, the insertion of mediation in the content of the law is more than justified.

Finally, and in relation to conflict resolution systems, it can be proposed the promotion of these tools in their online mode.

The COVID-19 pandemic has completely changed the way we interact with each other, both personally and socially, as well as in the work field. Isolation, confinement, restrictions or fear of contagion have led to the need for us to adapt to the virtual reality.

And for this reason, although many sectors have been paralysed, many others are experiencing an express maduartion thanks to the Internet phenomenon. In the field of Justice, it has been also proposed to carry out judicial processes electronically. However, the Spanish system is not yet ready to face virtual reality.

The fact is that, if we do not have the means to ensure a trial with all the guarantees, not only would the defense rights of the defendants be violated, but the online practice would turn out to be counterproductive. That is why it is essential to modernize the Spanish judicial system to new information technologies, as well as the alternative dispute resolution systems, emphasizing the rights of all the parts of the process.

3. Conclusions

For all the exposed, it should be noted that mediation stands as an economic and agile resource, which requires an active participation of the interested parties themselves, and generates a high dose of satisfaction in those who they come to it. Therefore, it is worth highlighting the need for the Spanish legal system to opt for a systematic and complete regulation of the institution of mediation, extending to the criminal field, given the undeniable benefits that its exercise entails, both for the State with respect to relief the workload for judges and courts, as for the parts, who save time and money.

In addition, it can be emphasized the possible insertion of mediation in the free justice content, given the equality of the judicial procedure with respect to the disbursements that may derive from its application, in order to avoid this flagrant discrimination among those defendants who choose the judicial process and those who decide to submit to mediation.

Finally, it can be said that it is important for society to adapt to new social reality defined after the pandemic, and, along the same lines, it is vital that the Administration of Justice itself do so, so as to achieve a proliferation of alternative systems for solving problems by a telematic way. Telecommunication networks have become more relevant than ever, and they are vital in this era of digitalization. Therefore, the need to bet on true digital justice is more than evident, as well as the promotion of the telematic use of alternative systems, that ultimately suppose an absolute support for the judicial process.

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DISTINCTION BETWEEN THE OFFENCE OF TRADING IN INFLUENCE AND THE OFFENCE OF DECEPTION/FRAUD

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Abstract

On the occasion of the research for the elaboration of this scientific paper, I plan to treat the constituent elements of the criminal offences of deception and trading in influence succinctly, in order to neatly lay off their defining characteristics.

Based on the above, I believe that the analysis of the two offences separately is highlighted for a better understanding, but also by the way of comparing their material elements.

Due to the similarities between the offence of deception and the offence of trading in influence in the "let it be believed" way, the literature has the obligation to provide the necessary clarifications in order to eliminate any existing doubt.

Keywords*: offence of trading in influence, fraud, distinction, offence of deception, similarities, differences.*

1. The offence of deception

1.1. Assessment of the constituent elements

The offense of deception is provided for in the Criminal Code, the Special Part in Title II (offenses against property), Chapter III (offenses against property by disregarding trust), being dedicated in Article 244.

It presents a standard variant, which incriminates as a crime "misleading a person by presenting as true a false deed, or as false a true deed, in order to obtain for himself/herself or for another an unjust patrimonial benefit and if damage is caused, is punishable by imprisonment from six months to three years"[1].

In the second paragraph of Article 244, the Romanian legislator states an aggravated variant of the offence of deception, enacting "deception committed by using false names or capacities or other fraudulent means is punishable by imprisonment from one to five years." If the fraudulent means constitute in itself an offense, the rules on concurrent offences shall apply"[2].

The criminal action in the case of the offence of deception is initiated *ex officio*, regardless of the criminal modality or the aggravated variants, as the Criminal Code does not make a distinction between the standard variant and the other more serious forms of the offence.

The norm of incrimination expressly provides that reconciliation removes criminal liability [Art. 244 (3)], the provisions regarding this institution provided in the provisions of Art. 215 of the previous criminal code being maintained.

By O.U.G. no. 18/2016, a new aggravated variant of the offence of deception was introduced for the hypothesis in which the commission of the crime results in particularly serious consequences (Art. 256[1] Criminal Code), the latter consisting in a material damage exceeding Ron 2,000,000 (Art. 183 Criminal Code).

Also, Article 248 of the Criminal Code expressly states that the attempt to commit the offense provided for in Article 244 of the Criminal Code is punishable, regardless of the form of the attempt (perfect, imperfect, relatively inappropriate), this being both possible and incriminated.

The special legal object of the offence of deception consists in the protection of social relations regarding the patrimony by disregarding trust.

The generic legal object consists in the protection of the social relations regarding the patrimony.

In the case of deception, the material object of the crime is any tangible movable property having an economic value[3] or immovable property.

1.1.1. The subjects of the offence

The active subject of the offence of deception can be any natural or legal person with criminal capacity, the criminal participation being possible in all its forms.

The passive subject of the crime can be any natural or legal person against whom the material elements of the offence of deception have been carried out.

As well stated in the specialised legal literature/ legal scholarship[4], in the event that there is no identity between the injured person and the misled person, the person misled in the legal relationship of conflict will appear as a secondary passive subject.

1.1.2. The objective side/point of view

The material element consists in misleading a person, both by an action and by omission, by presenting a false deed as true, or a true deed as false,

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[1] Art. 244 para. (1) Criminal Code, in *Criminal Code, Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2020.

[2] Art. 244 para. (2) Criminal Code, in *Criminal Code, Code of Criminal Procedure*, Hamangiu Publishing House, Bucharest, 2020.

[3] M. Udroiu, *Sinteze de drept penal, Partea specială*, C.H. Beck Publishing House, Bucharest, 2020, page 427.

[4] Ibidem.

capable of distorting objective reality and creating for the passive subject an erroneous perspective on it.

It was also rightly held in the specialised legal literature[5] that error must be invincible in the sense that distorted, erroneous or false representations of reality, which produce effects on the victim"s decision-making process[6] must not be such as to produce only a doubt in the psyche of the passive subject, but must be apt by reference both to the deceitful ways used by the perpetrator, as well as to the intellectual factor of the passive subject of the crime, to overcome any doubt of the latter.

If the actions or inactions of the perpetrator do not lead to the elimination of any doubt, and the passive subject, knowingly, diminishes his/her patrimony by enriching that of the perpetrator, I consider that we are not in the hypothesis in which criminal liability could be engaged for committing the offence of deception, but the civil offense if the conditions for making such a claim are met.

The immediate consequence of the offence of deception consists in diminishing the patrimony of the passive subject of the crime (main / secondary passive subject - as we have showed above) and the correlative enrichment of the perpetrator"s patrimony.

In other words, a damage is committed to the property of the passive subject person, a damage (*damnum emergens*) which is an essential condition of the offence of deception, which must exist at the time of the crime, while not the unrealized benefit (*lucrum cesans*), which is taken into account in the analysis of the civil action[7].

Causation is the cause-effect relationship between the material element and the immediate consequence, a relationship that must be proven.

1.1.3. The subjective side/point of view

The offence of deception can be committed only with direct intent qualified by purpose, the form of guilt not being expressly specified in the incrimination rule, this being deduced from the wording used by the legislator in the constitutive content of the crime.

In my opinion, the only form of guilt accepted by the conditions enacted in Article 244 of the Criminal Code is direct intent, because it is qualified by purpose, a purpose that cannot be called into question in the case of an indirect intent incidence by which the perpetrator predicts the result of his deed, ***although it does not seek to obtain it***, accepts the possibility of its outcome.

Therefore, the purpose provided in Article 244, as well as the intellectual factor of the perpetrator in achieving the criminal resolution are likely to limit the subjective side only under the conditions of direct intention, under the conditions of Art. 16 Criminal Code.

In other words, the perpetrator seeks to obtain an unfair patrimonial benefit for himself/herself or for another, by using fraudulent methods, the determining motive for committing the crime being irrelevant.

1.2. The aggravated variant

The aggravated variant of the offence of deception consists in the use of false names or capacities or other fraudulent means - Art. 244 (2) Criminal Code.

The fraudulent means are mentioned in the aggravated version, because they represent much stronger deceitful ways on the psyche of the injured person/party.

By the decision of the Constitutional Court no. 49/2019, the Court considered the phrase "***or of other fraudulent means***" from the content of the aggravated variant of the offence of deception satisfies the standard of clarity and predictability. The same held that "in the standard version of the crime, the concrete means and ways in which the active subject makes the passive subject believe the untruths presented, i.e. the former misleads or maintains the latter in error or produces the illusion of truth, can be very different, as for example: craftiness, slyness, schemes, ploys, ruses, mystifications, dissimulation, seductions, deceptions, tricks, intrigues, etc. Therefore, these means or ways of misleading the passive subject can only be in the form of simple lies, because if they are fraudulent, i.e. supported or strengthened by other means, such as names, capacities, documents, staging of deeds, etc., so that the lie is more convincing, the deed shall be included in the aggravated version.

The latter variant of the offence of deception differs from the standard variant only by the means by which the offence of deception was committed, the misleading of the passive subject, and which are likely to ensure the success of this action more easily.

The fact that in the text of Art. 244 (2) of the Criminal Code for the designation of such fraudulent means, the expression "fraudulent means" is used, giving as an example "false names or capacities", does not mean they are exhaustive.

The criticized legal provisions are clear and unequivocal, as the recipient of the criminal norm of incrimination has the possibility to foresee the consequences deriving from its non-observance, meaning that he can adapt his/her conduct accordingly. In this regard, the Constitutional Court has ruled in its jurisprudence (i.e., Decision no. 1 of 11 January 2012, published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2012) that, in principle, any regulatory act must meet certain quality conditions, including predictability, which means that it must be sufficiently precise and clear to be applicable; thus, the sufficiently precise wording of the regulatory act allows the interested persons - who may, if necessary, seek the advice of a specialist - to foresee to a reasonable extent, in the circumstances of the case, the

[5] G. Fiandaca, E. Musco, Diritto penale. Parte speciale, I delitti contro il patrimonio, vol. II, Zanichelli Editore, 2015, page 186.
[6] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 429.
[7] Idem, page 436.

consequences that may result from a given act. Of course, it can be difficult to draft laws of total precision and a certain flexibility may even prove desirable, flexibility which must not affect the predictability of the law (see, in this regard, the Constitutional Court Decision No. 903 of 6 July 2010, published in the Official Gazette of Romania, Part I, No. 584 of 17 August 2010, and Decision of the Constitutional Court No. 743 of 2 June 2011, published in the Official Gazette of Romania, Part I, No. 579 of 16 August 2011). (...) Therefore, the argument that the addressees of the criticized legal provisions cannot adapt their conduct according to their content, because they are sufficiently clear and predictable cannot be accepted, in the way that the Court finds that the wording of the law is not likely to generate difficulties of interpretation, the term "fraudulent" not being susceptible to different interpretations. Moreover, it is often used in criminal law, without difficulties of interpretation, the legislator seeking to punish more severely the commission of an act of deception by means which themselves involve acts of bad faith, in violation of the law. (...) At the same time, by Decision no. 676 of November 6, 2018, published in the Official Gazette of Romania, Part I, no. 1,115 of December 28, 2018, paragraph 23, and following, and Decision no. 50 of February 14, 2002, published in the Official Gazette of Romania, Part I, no. 144 of February 25, 2002, the Constitutional Court ruled that an aggravated variant of the offence of deception is committed when the deception is committed through the use of false names or capacities or by other fraudulent means. The note in the second sentence of the paragraph, according to which, if the fraudulent means constitutes by itself a crime, the rules regarding the concurrent offences are applied, it does not contradict the provisions of Art. 4 item 1 of the Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, provisions prohibiting the prosecution or punishment of a person who has previously been convicted or acquitted, by a final judgment, of the same acts. The fact that it is retained in all cases a qualified deception, including when the use of the fraudulent means constitutes in itself an offense, does not mean the double sanctioning of the offense. The fraudulent means used by the perpetrator can be a variety of illegal acts. Their mere existence, regardless of their number or gravity, gives the offence of deception a qualified character, being necessary, according to the will of the legislator, a harsher sanctioning of this category of offenders. The fact that the fraudulent means is in itself a crime cannot change the aggravating nature of the incrimination. To put on the same level the swindler who uses fraudulent means which are not crimes with the one who uses such means, but which in themselves constitute crimes, means to grant impunity to the latter for such crimes, which is inadmissible. The existence of plurality of offenses in this situation does not mean a plurality of sanctions established contrary to the provisions of Art. 4 paragraph 1 of Protocol no. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but the application of a principal punishment established in accordance with the rules on concurrent offences.[8]

By the phrase "false names" from the content of article 244 (2) Criminal Code, we mean the use of real or unreal names which do not belong to the perpetrator, for the purpose enacted in Art. 244 (1) Criminal Code.

By the phrase "false capacities", we mean the use of any capacities the perpetrator understands to use to reach the desired criminal resolution, a way that can attract criminal liability for other crimes as well (i.e. unlawful impersonation of a person or an authority), in the event that the capacity used implies the exercise of state authority and is accompanied or followed by the performance of an act related to it.

1.3. The punishability of attempt

Article 248 of the Criminal Code expressly establishes that the attempted offense provided for in Article 244 of the Criminal Code is punishable, regardless of the form of the attempt (perfect, imperfect, relatively inappropriate), which is both possible and incriminated.

However, the legislator does not distinguish between the standard variant and the aggravated form, which is why the attempt is possible for both forms.

1.4. Judicial practice

However, regarding the offence of deception - in the sense that the defendant A. obtained as a result of these fraudulent steps and manoeuvres a court decision inconsistent with the factual and legal reality, respectively the Civil Decision no. 1210 of September 26, 2011 of Suceava Tribunal, civil section, it cannot be legally established that a court was deceived.

The appellate court refers to the constant judicial practice in the matter, which shows that the legal object regulated by law for deception cannot be violated by such a concrete activity, as the judges cannot be harmed by committing the respective act (by way of example, Decision No. 449 / A / 2015 ruled by the High Court of Cassation and Justice or, the criminal sentence No. 51 of February 24, 2009 of the Bucharest Court of Appeal).

Therefore, the false presentation of certain factual or legal aspects before a judicial authority falls outside the scope of these relations protected by the criminalisation of deception, and may be protected in the strict framework of crimes against the administration of justice, which has not been called into question. The use of forged documents in court is an activity subsumed to the offence of forgery or using a false instrument/ forgery of administrative documents and trafficking therein and not to the offence of deception.

[8] Decision of the Romanian Constitutional Court no. 49/2019.

Consequently, the act is not provided by the criminal law, as it cannot be committed with respect to the members of the court panel, whose property was not affected by committing this act of alleged deception *(High Court of Cassation and Justice, criminal section, decision no. 407/23.11.2017, www.scj.ro)*.

The controversial fact in question is the real or fictitious nature of the legal aid contracts concluded, as well as the evidence proving the payment of fees, the defendants claiming, contrary to the accusation, that they certify real operations, stating that the purpose was to determine the civil party to respect the rights of the defendant A. in the future over the real estate in question, which constitutes in their opinion an abuse of right/ abusus juris, and not the offence of deception.

Prior to any analysis of the fictitious or simulated nature of the mentioned documents, the High Court of Cassation and Justice finds that the facts, as described in practice, do not realize the typicality of the offence of deception, a crime against property, the specificity of which is that, by deceitful manoeuvres of the perpetrator or by resorting to other fraudulent elements, the victim of the misleading act engages in prejudicial conduct.

The essence of this crime is that the perpetrator deceives, disregards the trust given in relations with the patrimonial content, or, the deed underlying the accusations brought against the defendants consists in the fact that they used, by filing in enforcement files, contracts of legal assistance and receipts which do not certify real operations, the civil party being enforced even for amounts that represent allegedly fictitious legal fees.

The false presentation of certain factual or legal aspects before a judicial authority falls outside the scope of these relations protected by the incrimination of deception (Art. 244, Title II), but is protected in other crimes such as forgery (Title VI), against the administration of justice (Title IV) etc. Thus, the "misleading" of an authority brings into question other types of disregarded social relations and other incidental incriminations, those that protect the authority, such as false statements, false testimony, false identity, presentation to the customs authority of forged documents etc.

The use of forged documents in an enforcement case which is subject of a levy of execution/enforcement could constitute an act provided by the criminal law subsumed to the offence of forgery and / or using a false instrument, and not to the offence of deception. The conclusion results from the fact that the legal object of the offence of deception is the protection of patrimonial social relations based on trust, while the legal object of the offence of forgery is different and refers to the protection of social relations in relation to the value of public trust granted to certain categories of documents. In the same sense, in the practice of the supreme court, it was ruled that the lawyer"s act to submit to the court, in a trial, forged receipts that unrealistically certify the collection of sums of money as a fee, in order to get the opposing party ordered by the court to pay legal expenses, does not meet the constitutive elements of the attempt at the offence of deception, prov. by Art. 32 Criminal Code in ref. to Art. 244 (1) and 2 of the Criminal Code, but only the constituent elements of the criminal offence of forgery of documents under private signature, since the offence of deception constitutes a crime against property by disregarding trust in relations with patrimonial content, and misleading an authority is not included in the sphere of the relations protected by the criminalisation of deception (decision no. 449/A of December 8, 2015, published on the website www.scj.ro).

Moreover, in the case of the offence of deception, the property constituting the unjust material benefit leaves the possession or detention of the passive subject and falls within the scope of the perpetrator as a result of misleading the former, who is thus forced to take a damaging property order. Or, in this case, the damage does not appear as a direct effect of the deception, it does not come from an act of will of the bailiff/enforcement officer or the civil party - debtor in the enforcement procedure, but from the abusive manner in which the defendants exercised their rights in this phase of the civil lawsuit.

Thus, the defendant A. submitted in the execution files receipts attesting the allegedly uncollected fees for the execution to bear on their payment as execution expenses. Or, according to the provisions of Art. 6 of Law 188/2000 "Bailiffs cannot refuse to perform an act given in their competence except in the cases and under the conditions provided by law.", provisions which corroborated with those prov. by Art. 56 of the same regulatory act, according to which the refusal to fulfil the attributions provided in Art. 7 (b) –(i) shall be motivated, if the parties insist in their request for fulfilment thereof, it results that the enforcement of an enforcement order, attribution prov. for in Art. 7 (a) cannot be the object of a refusal.

In accordance with Art. 622 (3) Code of Civil Procedure, the enforcement takes place until the realisation of the right recognised by the enforcement order, as well as of the enforcement expenses, the lawyer"s fee in the enforcement phase, being one of the expenses expressly listed by Art. 669 (3) Code of Civil Procedure. Also, Art. 669 (4) Code of Civil Procedure states that:

"The sums due to be paid shall be determined by the bailiff, in conclusion, on the basis of the evidence filed by the interested party, in accordance with the law. Such amounts may be censored by the enforcement court, by way of the enforcement appeal filed by the interested party and taking into account the evidence administered by the same ... ".

As such, the act, as described in the document instituting the proceedings, which is the object of the trial as defined by Art. 371 Code of Criminal procedure, is not provided by the criminal law. The conduct of the defendant A. could be subsumed to the

offence of forgery of documents under private signature, but the analysis of the factual and legal elements regarding the imposition of criminal liability for this exceeds the object of the trial, in the context in which the accusation was formulated explicitly only in terms of misleading through the use of fraudulent means, without a separate accusation in terms of forgery of documents under private signature, used to produce a legal consequence. Or, art. 244 (2) final thesis Criminal Code expressly mentions:

"If the fraudulent means is in itself a criminal offense, the rules on concurrent offences shall apply", the offence of forgery being an autonomous offence for which the prosecutor did not exercise the criminal action in this case, so that any other analysis regarding the real or fictitious character of those recorded in the documents submitted in the enforcement procedure exceeds the object of the trial and would necessarily imply a complete, substantive change of the factual situation, which would violate the right to defence, a component of the right to a fair trial. The principle of separation of judicial functions prohibits the court from determining the possible criminal act committed in a manner that modifies the object of the trial by a change of the legal classification in question from the offence of deception to the offence of forgery of documents under private signature *(High Court of Cassation and Justice, criminal section, decision no. 156/2018, www.scj.ro).*

2. The offence of trading in influence

2.1. Assessment of the constituent elements

The offence of trading in influence is found in Title V (offenses of corruption and crimes committed while in office), Chapter I (offenses of corruption), which is regulated by Article 291 of the Criminal Code.

The legal object of trading in influence offence consists in the protection of social relations related to the development of service relations in good faith.

In other words, the offence of trading in influence is a guarantee offered by the legislator to subjects of law, a guarantee likely to protect social relations of office, in the sense that no one is above the law, we are all equal before it and no person can abuse for his/her own interest to the detriment of the general interest.

These guarantees are offered even by the Fundamental Law of the state, being consolidated by rendering punishable as criminal offences some objective situations capable of violating the constitutional principles.

Therefore, the duties of service must be exercised in good faith, for the purpose and the limits for which they were created, without prejudice to the social values protected by criminal law.

We are in the presence of a crime that lacks a material object, an aspect resulting from the analysis of the provisions of Art. 291 Criminal Code.

I consider that the offence of trading in influence is *not* an indirect form of discrediting the officials or the persons provided in Art. 308 of the Criminal Code, as specified in the specialised legal literature[9], but a substantial remedy and a guarantee offered by the legislator, for the purpose of the good development of labour relations, under the conditions of Art. 308 Criminal Code.

2.1.1. The subjects of the offence

The active subject of the offence of trading in influence can be any natural or legal person who has criminal capacity, who can have, has or is believed to have influence over an assimilated or private public official.

Criminal participation is possible in all its forms: co-authorship, complicity, or instigation.

As is well stated in the literature[10], it is possible for a person to be an accomplice to both the offence of trading in influence and the offence of buying influence, if he/she supports the acts of the influence trader/ peddler and the acts of the influence buyer.

The main passive subject of the offence of trading in influence is represented by the public authority, public institution, the institution or the public / private benefit corporation in which the public official operates and exercises his/her duties, the secondary passive subject being the one on which it is claimed the influence will be trafficked.

2.1.2. The objective side

The material element of the offence of trading in influence consists only in an action which cannot be committed by omission, and the material element can be achieved by claiming, receiving or accepting the promise of money, goods or other benefits, directly or indirectly, for oneself or for another, claiming to have influence, or suggesting that he/she has influence over a public official, promising to cause the latter to perform, not to perform, to hasten or delay the performance of an act falling within his/her service, or perform an act contrary to such duties.

These modalities listed above (claim, receipt or acceptance) represent the only execution possibilities of the material element of trading in influence.

In the event that the offence is committed in other ways than those mentioned above, the conditions provided in legal texts are not met, the deed not being typical, it will not constitute a crime.

Similar to the offence of bribery, the term payments or other benefits has the classic meaning corresponding to the crimes of corruption (both bribery, and trading in / buying influence).

[9] S. Bogdan, D.A. Șerban, Drept penal, partea specială, infracțiuni contra patrimoniului, contra autorității, de corupție, de serviciu, de fals și contra ordinii și liniștii publice, Universul Juridic Publishing House, Cluj-Napoca, mai 2020, page 302.

[10] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 719.

An intriguing problem arises in the specialized legal literature[11] in the sense that some authors consider a doubt in the hypothesis of obtaining benefits of a sexual nature.

In my opinion, the Romanian legislator in Article 291 of the Criminal Code by the phrase "other benefits", does not limit in any way the possibility of the perpetrators to obtain any type of benefits, including in the previously mentioned situation.

I am of the opinion that the intention of the legislator is to include (by the phrase "payments or other benefits") any type of "reward" of the influence trader by the buyer, and no limits are established to exclude sexual benefits, this being one among the particular ways of realising the material element.

In this regard, the judicial practice agrees with this approach, the courts noted that we are discussing trading in influence in the event that the defendant, a university professor, claimed sexual favours to traffic his influence in relation to a colleague, in order to facilitate the passing of exam[12].

The Constitutional Court by Decision no. 650/2018 (Official Gazette no. 97 of February 7, 2019) considered that "By conditioning the material element of the crime by the material benefits claimed / received / accepted, an impermissible restriction of the conditions for criminalising trading in influence is found, as long as the intangible - non-patrimonial benefits are excluded. It leads to the evasion from the sphere of incrimination of an act of corruption, which is contrary to Art. 1 (3) of the Constitution".

It does not present a relevant aspect if the goods are actually handed over, the criminal liability not being conditioned in this sense by the incrimination norm.

In the event the influence peddler who is a public official and has powers in connection with the act for which the fulfilment, non-fulfilment, urgency, delay trades the influence, concurrence of bribery and trading in influence shall be retained[13].

Also, in the event the influence trader, in order to reach the desired result, offers payments or other undue benefits to the public official for the fulfilment, non-fulfilment, urgency, delay of the duties, or for the fulfilment of an contrary act, concurrence of bribery and trading in influence shall be retained.

The immediate consequence of the offence of trading in influence is represented by the state of danger generated by the perpetrators (the influence buyer and peddler), a state of danger that may endanger the good development of the service relations in which operates the one over whom the influence is trafficked.

The causal link results *ex re*, from the materiality of the deed, this being an offense of abstract danger.

2.1.3. The subjective side

The offence of trading in influence can be committed only with purpose qualified direct intent, the form of guilt not being explicitly specified in the criminalisation rule, but being deduced from the constitutive content of the crime.

In my opinion, the only form of guilt, as I have shown in the case of the offence of deception, accepted by the conditions enacted in Article 291 of the Criminal Code, is direct intention, because it is qualified by purpose, a purpose that cannot be called into question in the case of the incidence of an indirect intention by which the perpetrator foresees the result of his deed, ***although he does not pursue it,*** accepts the possibility of its occurence.

Therefore, the purpose provided for in Article 291, as well as the intellectual factor of the perpetrator in carrying out the criminal resolution are likely to limit the subjective side only to the conditions of direct intent.

In other words, the perpetrator seeks the trading of influence over a public official so that the latter fulfils, does not fulfil, speeds up or delays the performance of an act part of his/her duties or performs an act contrary to such duties.

2.2. The aggravated variant

In the event the offence is committed by a person exercising a function of public dignity, a judge, prosecutor, criminal investigation body or has responsibilities for finding or sanctioning contraventions, or based on an arbitration agreement are called to rule with regard to a dispute that is given to them for settlement by the parties to this agreement, regardless of whether the arbitration procedure is carried out under Romanian law or under another law (Art. 293 Criminal Code, Art. 7 of Law no. 78/2000).

For the aggravated variant, the punishment is imprisonment from two years and eight months to nine years and four months.

2.3. The mitigated variant

The Criminal Code establishes a mitigated variant of the offence of trading in influence, incriminating the typical act that is committed in connection with private officials, i.e. persons who exercise, permanently or temporarily, with or without remuneration, a task of any kind in the service of a natural person, as provided in Art. 175 (2) Criminal Code (natural person exercising a service of public interest for which he/she

[11] S. Bogdan, D.A. Șerban, Drept penal, partea specială, infracțiuni contra patrimoniului, contra autorității, de corupție, de serviciu, de fals și contra ordinii și liniștii publice, op. cit., page 303.

[12] The word "benefit" is defined as a moral or material gain. Judicial practice has also ruled in this regard, considering that, for example, sexual favours (non-pecuniary benefits) can be considered undue benefits, the scope of undue benefits that can be obtained by the perpetrator is very wide, including not only material benefits, of patrimonial nature, such as money, goods, or material advantages, but also the so-called moral advantages, so that sexual favours may also be included in the scope of the notion of other undue benefits. (C.A. Timișoara, dec. no. 550/2016; Trib. Mehedinți, Sent. Pen. 117/2016; CAB, Dec. Pen. 925/2017; ICCJ, Dec. Pen. 118/A/2019).

[13] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 718.

has been invested by public authorities or who is subject to their control or supervision regarding the performance of such public service) or within any legal person[14].

For the mitigated option, the punishment is imprisonment from one year and four months to four years and eight months.

2.4. The punishability of attempt

In the situation of the offence of trading in influence, the attempt is not incriminated, this being assimilated by law to the consumed act (the crime involving anticipated consumption).

2.5. Judicial practice

The existence of the offence of trading in influence does not imply a real influence of the defendant over an official in order to determine the latter to do or not to do an act that falls within his/her duties, but it is necessary that the influence the perpetrator has or lets be believed that has, regards an determined official or indicated generically by the nature of the influence to be exercised, who has attributions in fulfilling the act for which the perpetrator received or claimed payment or other benefits. Consequently, there must be a causal link between the receipt of such benefits and the promise to exercise influence, whether claimed or actual. If the receipt of goods is made prior to the request for intervention, unrelated to the requested intervention, the conduct of the accused, no matter how immoral it may be, does not fall within the objective side of the offence of trading in influence .

The offence of trading in influence is consumed by committing any of the typical actions provided alternatively in the rule of incrimination (receiving or claiming payments or other benefits or accepting promises, gifts, committed by a person who has influence or suggests that has influence over an official, in order to determine the latter to do or not to do an act that falls within his/her duties.

Although it is irrelevant whether the claim for benefit has been satisfied, nor whether the acceptance of the promise of benefits has been followed by their provision, for the existence of the criminal offense it is necessary to prove from the objective point of view:

1. the act which the defendant was to determine by his/her influence;

2. the receipt or acceptance of benefits in connection with the exercise of influence;

3. the connection between the exercise of the claimed or real influence and the claim / receipt / acceptance of the benefits

From the subjective point of view, it is necessary to prove the facts which lead to the conclusion that the accused person sought to receive benefits by having or suggesting that he/she has influence over an official so that the latter would exercise his/her duties in a certain way.

If the receipt or acceptance of benefits takes place prior to the request for the exercise of influence, the evidence must indicate the anticipation of the invocation of influence, in a certain case, by the defendant. The guilt of the defendant is proved in relation to his own conduct. The guilt of the defendant cannot be inferred exclusively from the reason for which the injured party gave the respective benefits, unless there is an act of conduct of the defendant confirming that the injured party was entitled to believe that the defendant would exercise his/her influence. The receipt of the benefits the injured party gives for a possible future, general, indeterminate protection (if necessary), does not fall within the objective side of the offence of trading in influence .

In conclusion, although it is not relevant whether or not the intervention took place, or whether it is real or not, or when it was carried out in relation to the time when one of the actions constituting the material element of the crime was committed, for the existence of the objective side of trading in influence. it is necessary for the evidence to indicate the influence that the defendant had or allowed to be believed to have on an official and what is the act that falls within the duties of an official that the defendant was to determine to do or not to do, and from the subjective point of view, the facts which lead to the conclusion that the accused person sought to receive benefits by having or suggesting that he/she has influence over an official in order for the latter to exercise his/her duties in a certain way. Invoking influence, directly or indirectly, must be decisive for receiving the benefits *(High Court of Cassation and Justice, criminal section, decision no. 676/2013, www.scj.ro)*.

From the perspective of the legality of the judgment, the appellate court finds that, compared to the factual situation retained by the courts, based on the evidence, the deed of the defendant who, during June 2010, claimed from the witness-complainant S.I.A. the amount of Eur 50,000, representing a percentage of the value of some works, to ensure the latter, through the influence he has on some officials in the administrative apparatus, would win tenders worth Eur 5 million, and from the witness-whistleblower M.P. the amount of Eur 100,000, before signing a contract, assuring the whistleblower of winning the tender for the award of works worth RON 50 million, as he would have known influential people from the Ministry of Agriculture, where he claimed to work; on November 30, 2010, he claimed from the witness- whistleblower C.P. the amount of Eur 50,000, for the intervention before a court-appointed administrator in order for the whistleblower to win a tender having as object real estate located within the municipality of Bucharest; on December 7, 2010, he claimed from the said K.L. 3% of the value of a work of about USD 100 million, as

[14] M. Udroiu, Sinteze de drept penal, Partea specială, op. cit., page 738.

advisory fee (representing, in fact, part of the price of trading in influence) and the amount of Eur 100,000 cash, claiming to have influence over officials at the Ministry of Foreign Affairs, respectively a person who works in this ministry in the Libyan area, in order to determine the award of the works to the company of the Turkish citizen, meets the constituent elements of the offences of trading in influence *(High Court of Cassation and Justice, criminal section, decision no. 1004/2014, www.scj.ro)*.

3. Distinction between the offence of trading in influence and the offence of deception. Conclusions

Starting from the legal object of the two crimes, we can observe that the offence of trading in influence has as LO the social relations regarding the good development of service relations, and the offence of deception the protection of the social relations regarding the property.

Since their regulation, the legislator has been considering the separation of offences, even if they involve similar issues in some cases, in crimes against property (deception/fraud/swindling) and crimes of corruption and crimes committed while in office (trading in influence).

Apparently, there is similarity between the two offences, which consists in misleading a person in the normative version of the material element of the offence of trading in influence by the phrase „ ... or suggests that he/she has influence over a public official" given that the other normative variant of the offence of trading in influence assumes that the perpetrator has influence, especially when the buyer of influence has a criminal initiative.

In the event that he/she "lets to be believed", the perpetrator is the one who proposes to the buyer of influence to exercise his/her influence over a public official for the purpose provided in Article 291 of the Criminal Code.

Therefore, the influence peddler may be in two situations:

1. the situation in which the perpetrator *has* influence over the public official, influence capable of producing legal consequences;

2. the situation in which the author *has no* influence over the public official, but "let other believe that he/she has influence".

However, if the buyer of influence agrees to give, promise, offer money, goods or other benefits for the purpose of trading in influence, there is no question of retaining the offence of deception "by misleading", as the buyer buys the influence from the influence trader and diminishes his/her patrimony consciously and voluntarily, his consent not being vitiated, the purpose pursued by the two being different, and the consequences produced being of a criminal nature both for the buyer and for the peddler.

Even if the influence trader does not have influence over the public official, but "lets it be believed so", the buyer of influence has a criminal attitude unlike the person injured by the offence of deception.

From the above, it results that the person against whom the offence of deception is committed is innocent, being a person injured by the commission against him/her of an act provided for by the criminal law.

In the case of the offence of trading in influence, both the perpetrator and the one buying influence, has a criminal character, the purpose of the two being the purchase-trading in influence.

In concreto, the influence buyer appeals to a person – the influence trader - who has, may have or lets it be believed to have influence over a public official in order to distort the latter"s employment relationships.

Thus, both attitudes, of the buyer and of the peddler, are criminal.

In comparison to the offence of deception, the one on whom the material element of the crime is committed is an innocent person, the perpetrator distorting reality by deceitful methods, in order to obtain an unfair patrimonial benefit for himself or for another.

The essence of the offence of deception is for the perpetrator to exercise acts of misleading on the injured person, and for the passive subject to be induced an invincible error in relation to which he/she fulfils the essential features of an injured person by committing an act against him, provided for by criminal law.

If an attempt is made to mislead the buyer of influence in the regulatory version of "letting it be believed that he/she has influence", and the buyer is not convinced of the possibility of the influence trader, refusing the offer of trading in influence, apparently committing the offence of deception may be called into question, but only in an attempted form.

An important criterion is found even in the provisions of Article 291, second thesis Criminal Code "and who promises to determine him/her", a criterion which, if fulfilled, one no longer speak of an attempt at the offence of deception, but of a consumed offence of trading in influence.

The rule of 291 of the Criminal Code penalises the behaviour of a person who, in order to unjustly acquire money, goods or other benefits, commits acts of corruption so that, whenever it is found that a possible misleading of the potential buyer of influence who does not agrees to buy the influence, since the action is placed in relation to the duties of some public officials, is always retained the offence of trading in influence, this being considered a priority ("special") rule over the rule regulated in Article 244 Criminal Code which incriminates acts of misleading unrelated to the duties of public officials.

Therefore, whenever it is a question of misleading a potential buyer of influence by promising the

intervention of the peddler on a public official, the offence of trading in influence will be unequivocally held, and not that of deception.

As we have shown in the analysis of the constituent elements of crimes, they are fundamentally different, in the sense that the legislator understood to place them in different spheres of protection, with distinct purposes, as well as attitudes of participants and criminal resolutions.

In the event the influence peddler misleads the buyer through the normative method "lets it be believed", but the peddler does not promise to intervene before the public official, and the benefits are not remitted to him, we are only in the presence of an attempted form of deception.

In conclusion, the two crimes have similar aspects, but the constituent contents differ and delimit the material elements in a natural and simple way, these delimitations being likely to differentiate in a direct way the offence of trading in influence from the offence of deception.

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CAPITALIZATION IN DOCTORAL THESES OF TEXTS NOT PROTECTED BY COPYRIGHT, RESPECTIVELY OF COURT DECISIONS, TEXTS FROM NATIONAL AND FOREIGN NORMATIVE ACTS AND POSSIBLE PROBLEMS OF ORIGINALITY, SIMILARITIES OR LACK OF SCIENTIFIC VALUE OF THESES AS A RESULT OF THE USE OF THESE RESOURCES

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Abstract

May a court decision be considered as a work of intellectual creation? The question is likely to generate a lot of controversy. An affirmative answer would be criticizable from the perspective of the definitions given to the work by the Berne Convention and of those generally accepted in the specialized doctrine. A negative answer risks ignoring the fact that in some cases, the interpretation of the law or the principles of law by the judge is an act of intellectual creation whose originality cannot be questioned.

However, the answer should be affirmative. Judgment is a work of intellectual creation, which can sometimes meet the condition of originality. It will not in any case be the subject of copyright, being expressly excluded from protection by the provisions of Art. 9 let. b) of Law no. 8/1996 on copyright and related rights. Being excluded from copyright protection and taking into account that this exclusion is determined by the nature and purpose of these judicial texts, judgments enter the public domain from the perspective of intellectual property rights, are accessible to anyone, and logical-legal reasoning included in them they can be used freely, without restrictions.

Keywords: *court decisions, judgement, work of intellectual creation, scientific value.*

1. Introduction

May a court decision be considered as a work of intellectual creation? The question is likely to generate a lot of controversy. An affirmative answer would be criticizable from the perspective of the definitions given to the work by the Berne Convention and of those generally accepted in the specialized doctrine. A negative answer risks ignoring the fact that in some cases, the interpretation of the law or the principles of law by the judge is an act of intellectual creation whose originality cannot be questioned. Moreover, it is not uncommon for magistrates involved in solving cases that raise problems of interpretation of the law, develop logical-legal reasoning in articles, monographs or other such works that can not be denied the quality of work and can is the subject of copyright.

In order to achieve a satisfactory answer to the above question, we will proceed to an analysis of the meaning of the notions of "work of intellectual creation" and "judgment", respectively, and will examine the issue of legislative, national or foreign texts.

1.1. The meaning of „work of intellectual creation"

The Berne Convention of 1886 for the Protection of Literary and Artistic Works completed in Paris on 4 May 1896, revised in Berlin on 13 November 1908, completed in Bern on 20 March 1914, revised in Rome on 2 June 1928, revised in Brussels on 26 June 1948, revised in Stockholm on 14 July 1967 and in Paris on 24 July 1971 and amended on 28 September 1979[1], has, according to Article 2 (1), as its object of regulation the protection of "works", which are defined indirectly by associating them with the literary, scientific or artistic fields, whatever the form of expression and in a way that is not intended to be exhaustive, by enumerating the ways of their concretization, respectively: the books, brochures and other writings; conferences, speeches, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and pantomimes; musical compositions with or without words; cinematographic works, to which are assimilated the works expressed through a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving, lithography; photographic works, to which the works expressed by a process similar to photography are assimilated; works of applied art; illustrations, geographical maps; plans, sketches and works of art relating to geography, topography, architecture or science.

Using a similar legislative technique, the Romanian legislator provides by art.1 of Law no.8 /

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[1] To which Romania acceded by Law no. 77/1998 for Romania's accession to the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, in the form revised by the Paris Act of July 24, 1971 and amended on September 28, 1979, published in the Official Gazette, Part I no. 156 of April 17, 1998.

1996[2] on copyright and related rights that the copyright on a literary, artistic or scientific work and on other works of intellectual creation is guaranteed and recognized under the conditions of this normative act. Article 7 of the same normative act also proceeded in a manner that is not intended to be exhaustive, to the enumeration of works of intellectual creation in the literary, artistic or scientific field that constitute the object of copyright, whatever the method. of creation, the mode or form of expression and independent of their value and destination, being added the condition of their originality.

Thus, according to Law no. 8/1996, the object of copyright is represented by the original works of intellectual creation, and the protection conferred by it includes moral or patrimonial attributes, from the moment of their realization, even in unfinished form. It is observed that the Romanian legislator tried to define the notion of "work" that falls under copyright both by associating it with the phrase "intellectual creation" and by listing the mode or form of expression, explicitly adding the condition of their originality.

In the absence of a definition given by law, the doctrine has shown that the works, creations, products of human spiritual activity are the result of a conscious approach, the intentional approach being the common denominator for any act or creative fact. Starting from this finding, it was shown that "the work (...) can be defined as the product of the spiritual activity carried out with the will to achieve something that did not exist before, to modify the existing reality, the product of that activity from which a creation of the spirit or, in an even more general sense, to include technical creations in the definition, an object over which the creator is granted an intellectual property right "[3].

2. The meaning of „judgement"

Regarding judgment, this is one of the main duties of magistrates and a requirement that accompanies the right to a fair trial, guaranteeing the parties that their defenses were "heard" by the judge and are protected against arbitrariness. In a broader sense, to these are added the decisions by which the supreme national court rules on controversial issues of law, within the mechanisms of unification of judicial practice, such as preliminary rulings for the settlement of legal issues or those for the settlement of appeal in the interest of the law and which have binding effect for all courts regardless of the level of jurisdiction. Although it does not constitute a court decision in its own sense, from the perspective of the object of this study we believe that the analyzed category may include decisions rendered by the constitutional court and judgments handed down by supranational courts, which in turn have binding effects *erga omnes* for jurisdictions of the States which have acceded to the treaties or conventions under which they were established. The decision of a court usually finds its definition in relation to its legal effects and its importance in a system of law, national or supranational. Although it is indisputably the result of a magistrate"s own reasoning that interprets a rule of law and sometimes may have scientific value, thus contributing to the evolution of legal sciences, rarely will the judgment be defined as an act of intellectual creation and to be recognized originality.

In the technical terms imposed by the norms of legislative technique[4], the court decision is "defined" by the provisions of art. 370 of the Code of Criminal Procedure as the decision by which the case is resolved by the first court or by which it disinvests without resolving the case or by which the court rules on the appeal, recourse in cassation and appeal in the interest of the law. Similarly, the provisions of art. 403 of the Code of Criminal Procedure provide that the decision must include, among others, the motivation of the solution regarding the criminal side, by analyzing the evidence that served as a basis for it and those that were removed and the motivation the solution regarding the civil side, as well as the indication of the legal basis that justifies the solutions given in question. Things are not different in non-criminal matters, the provisions of art. 425 of the Code of Civil Procedure stipulating that the decision must show, among other things, the factual and legal reasons on which the solution is based, they admitted, as well as those for which the parties" claims were withdrawn.

Although the evoked norms do not expressly mention, "showing the legal basis" should not be understood as a simple evocation or enumeration of incidental legal texts, but an exposition of the legal reasoning / legal syllogism of the judge, who is the one who attributes to the court decision the value of an act of intellectual creation.

It should be noted here that only legal reasoning, interpretation of legal rules or principles of law can have such value, since the facts and elements of fact which the magistrate has to examine in a case are a "given", they pre-exist. and they are not the fruit of the judge"s own thinking activity, he being only required to establish them on the basis of the evidence administered.

The situation is somewhat similar with regard to the judgments of the European Court of Human Rights, the provisions of Article 45 of the European Convention for the Protection of Human Rights and

[2] Published in the Official Gazette. no. 60 of March 26, 1996; Following successive amendments, the law was republished in the Official Gazette. no. 268 of March 27, 2018, giving the texts a new numbering.

[3] V. Roş, A. Livădariu; "The condition of originality in scientific works", in the Romanian Journal of Intellectual Property Law, no. 2/2014.

[4] Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts, republished, published in the Official Gazette. Part I no. 260 of April 21, 2010.

Fundamental Freedoms[5] providing that "judgments and decisions declaring applications admissible or inadmissible shall state the reasons" and art.74 of the Rules of Court, judgments must include, among others, the legal reasons underlying the adoption of solutions.

With regard to the judgments of the Court of Justice of the European Union, regardless of whether they seek the annulment of some legislative acts of the U.E. or the interpretation of European law by means of preliminary rulings or other types of actions submitted to it, the Treaty on the Functioning of the European Union[6] does not contain any reference to decisions of this judicial authority, and the Statute of the C.J.U.E. it simply stipulates in art.36 that "judgements shall state the reasons on which are based". However, the Court"s judgments always include an extensive analysis of the general principles specific to European law and of the provisions which need to be interpreted, in such a way that the character of intellectual creation and originality cannot be denied.

3. The court decision – a work of intellectual creation according to Law no. 8/1996?

Considering the definition we referred to earlier, we believe that court decisions can be considered, at least in some cases, as works of intellectual creation, being the result of a conscious approach, of an intellectual activity to achieve something that it did not exist before, for creative purposes. We refer here to situations in which the judge, solving a given case, makes an interpretation through a logical-legal reasoning of a legal rule or principles of law, sometimes the result of recent legislative changes and thus, "creates law". Such reasoning, beyond the fact that under certain conditions or systems of law will be imposed by force whenever the same issue of law will be analyzed in other cases, may form the basis for various articles, studies, monographs or other in-depth studies in field, contributing to the evolution of legal sciences.

However, regardless of the scientific value that a court decision may have, it will not be the subject of copyright in any situation, being excluded from protection by the provisions of art. 9 let. b) of Law no. 8/1996 on copyright and related rights.

The doctrine[7] has shown that the Berne Convention does not categorically exclude such texts from protection, leaving Member States the right to determine the protection to be given to official legislative, administrative or judicial texts and official translations of such texts, as well as the right to exclude, in whole or in part, from protection political speeches and speeches delivered in judicial debates. Thus, Article 2 paragraph (4) of the Convention provides that "the law of the countries of the Union reserves the right to determine the protection to be accorded to official texts of a legislative, administrative or judicial nature, as well as to official translations of such texts", and in Article 2 bis paragraph (1) that "the legislation of the countries of the Union reserves the right to exclude, in part or in whole, from the protection provided in the previous article political speeches and speeches delivered in judicial debates".

Despite these reservations, some EU member states and signatories to the Berne Convention have opted to exclude from protection all official texts of a legislative or judicial nature. For example, German law on copyright protection (Urheberrechtsgesetz) provides in Article 5 that "official laws, ordinances, edicts and notifications, as well as officially developed decisions and guidelines for decisions, are not protected by copyright." Also, in Spain, the law of copyright (La ley de property intelectual) provides by art.13 that are not subject to intellectual property "legal or regulatory provisions and their corresponding projects and decisions of courts ...". In Italy, the relevant normative act (Legge 22 aprile 1941 n. 633 Protezione del diritto d"autore e di altri diritti connessi al suo esercizio) provides by art. 5 that "the provisions of this law do not apply to the texts of official acts of the state and of public administrations, both Italian and foreign". On the other hand, the French law on copyright (Code de la propriété intellectuelle), although it lists conferences, speeches, sermons, pleadings and other works of the same nature in the category of protected works (Article L112-2), does not expressly provide for an exemption from official texts of a legislative or judicial nature from protection.

The Romanian legislator chose to exclude from protection of all official texts of a legal and judicial nature, providing by the provisions of art. 9 let. b) of Law no. 8/1996 that the official texts of a political, legislative, administrative, judicial nature and their official translations cannot benefit from the legal protection of copyright. By using the phrase "nature", the legislator thus excludes from protection all official texts that are limited to judicial proceedings.

It is to be observed here the special nature of the provision from Art. 9 let. b) of the law compared to the provision of art. 7 let. a) of the same normative act, which includes the pleadings in the sphere of works that benefit from protection. Starting from the general meaning of the term, the plea represents a defense, oral or written support of a case, an idea, thesis, etc., and in particular means an oral presentation made by a lawyer before a court to defend the case of a between the parties involved in the law case[8]. Consequently,

[5] Adopted on November 4, 1950, entered into force on September 3, 1953 and ratified by Romania by Law no. 30/1994 published in the Official Gazette. Part I no. 135 of May 31, 1994.

[6] Available on the website https://eur-lex.europa.eu/legal-content/.

[7] V. Roş, Intellectual Property Law, Bucharest, Ed. C.H. Beck, 2016, pp. 183.

[8] According to DEX.

pleadings in the general sense of the term will not be excluded from copyright protection, while a lawyer"s plea in court proceedings will not benefit from such protection, and may be freely reproduced, including by its taking over in the content of the court decision.

The conclusion deriving from the legislative technique used by the legislator is that the quality of an intellectual creation work of a plea is recognized, including that of a lawyer and exposed before a court, but the latter is excluded from copyright protection not from the cause of the lack of value, originality or other such criteria, but because it is limited to a judicial procedure in which justice is administered. A similar reasoning can be applied with regard to judgments, the only difference being that judgments cannot be pronounced outside judicial proceedings. The recognition by law of an exception, in the sense of inclusion in the category of works protected by copyright is thus prevented by the fact that they are in all cases limited to judicial proceedings and the administration of justice.

The exclusion from copyright protection of court decisions of national, foreign or supranational courts, together with the texts of national and foreign normative acts lies in the reason for their existence and purpose.

If, as regards normative acts, they enshrine legal norms defined as general and obligatory rules of conduct, the purpose of which is to ensure social order and which can be enforced by the state, by coercion[9], they form the basis of the normative order. in law, establishing the rules of conduct to be followed in the relations between individuals and / or legal persons, as well as the sanctions in case of their violation, the court decisions represent the means by which justice is administered by the courts. In both cases, both the law and the judgment are intended for all persons, either by establishing a presumption of their knowledge (*nemo censetur ignorarem legem*), or by establishing a general obligation to respect their authority. Also, normative acts, national or foreign, do not have a known author, in the proper sense of the word, their paternity being assumed in an impersonal way by the issuing institutions.

Judgments cannot fall into the category of works protected by copyright for the simple reason that through them, in the name of the law (art. 124 para. (1) of the Romanian Constitution), courts administer justice (art. 126 para. (1) of the Romanian Constitution). Given that according to the Constitution, justice is unique, impartial and equal for all, the conclusion that justice is a public service, which is performed in the name of the law and is guaranteed to any person, is justified.

The consequence of the public service nature of justice, as well as the fact that it is guaranteed to everyone and accessible to all, is that everything that is limited to the administration of justice and judicial procedures is part of the public domain, is not appropriate and can be used without restrictions. Moreover, the public character and accessible to anyone of the judicial procedure extends to its content, with certain limitations, the provisions of art.35 paragraph (1) letter. a) of Law no. 8/1996 allowing the reproduction of a work in judicial, parliamentary or administrative proceedings or for public safety purposes, previously brought to public knowledge, without the consent of the author and without payment of any remuneration, provided that they comply good customs, not to contradict the normal exploitation of the work and not to prejudice the author or the holders of the rights of use.

Thus, regardless of the scientific value of a logical-legal reasoning by which the judge interprets the law, as long as it is contained in a court decision, it enters the public domain, being accessible to any person and can be used without invoking any right of author.

However, if the magistrate who drafted the court decision or another person will present the same reasoning in an article, specialized paper or other such forms, by taking over *ad literam* those contained in the decision, but without specifying this fact, the paper to constitute a work of intellectual creation that meets the condition of originality and will benefit from the protection of copyright under the conditions of Law no. 8/1996? And, especially, in these conditions can we talk about an autoplagiarism or a plagiarism?

The condition of originality, explicitly provided by the provisions of art.7 of Law no.8 / 1996 in order to be the object of copyright, does not necessarily refer to the novelty of the work (objective criterion), but is given by the personal imprint that the author gives it to his work, the unique way, the particular way, proper to each of the creators (subjective criterion)[10]. However, the lack of originality of a work does not necessarily mean plagiarism or self-plagiarism, but can express the lack of personal creative contribution of the author and which can lead to a lack of value of his creation.

Although Law no. 8/1996 on copyright and related rights does not include a definition of plagiarism, according to art. 4 let. d) and e) of Law no. 206/2004 on good conduct in scientific research, technological development and innovation[11], plagiarism is the exposure in a written work or oral communication, including in electronic format, of texts, expressions, ideas, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of other authors, without mentioning this and without referring to the original sources; and self-plagiarism, the presentation in a written work or oral

[9] N. Popa (coord.), E. Anghel, C.B. Ene-Dinu, L. Spătaru Negură; General theory of law: seminar notebook; Bucharest, Ed. C.H. Beck, 2017, pp. 109.

[10] V. Roș, op.cit., P. 212.

[11] Published in the Official Gazette, Part I, no. 505 of June 4, 2004.

communication, including in electronic format, of texts, expressions, demonstrations, data, hypotheses, theories, results or scientific methods extracted from written works, including in electronic format, of the same author, without mentioning this and without referring to the original sources.

Law no. 206/2004 qualifies plagiarism and self-plagiarism as deviations from the norms of good conduct in the activity of communication, publication, dissemination and scientific popularization and Law no. 8/1996 provides through art. 197 para.(1) as a criminal offence the action to appropriate without any right, in whole or in part, the work of another author and presents it as his own intellectual creation. Thus, plagiarism is an act which infringes the patrimonial or moral rights of the author of the original work and which is likely to attract the liability, including criminal, of the one who is guilty of committing it. On the other hand, self-plagiarism is not likely to infringe the rights of another person, which is why its consequences will consist in the lack of originality of the work or even its lack of scientific value.

Consequently, if plagiarism is conceived and regulated as a mechanism that accompanies copyright protection, being likely to attract academic, civil or even criminal liability, autoplagiarism seems to be regulated as a protection mechanism against the lack of originality of a work. In both cases, however, the essential condition is that of the pre-existence of a work of intellectual creation that may constitute an object of copyright and which is infringed by reproduction without right.

Or, as previously shown, official texts of a legislative or judicial nature are expressly excluded by the provisions of art. 9 of Law no. 8/1996 on copyright protection, their reproduction may be made freely, without restrictions.

Consequently, the reproduction of a normative act or part of the content of a court decision will not be able to constitute plagiarism or self-plagiarism under any circumstances. Instead, the reproduction of such a part of the content of the court decision, by presenting a logical-legal reasoning or new concepts of interpretation of the law or the principles of law as the fruit of an activity of own creation and its consecration in a form likely to benefit the copyright protection will result in the lack of originality of the work, the sanction being rather a moral one.

4. Texts of national and foreign normative acts

We consider that, for the same reasons related to their nature and destination, regarding the normative acts and official texts of a judicial nature, the citation rules within the meaning of art. 35 of Law no. 8/1996 are not applicable either. The text imposes a copyright restriction on the use of a work previously made public, without the consent of the author and without payment of any remuneration, provided that it is in accordance with good practice and does not run counter to the normal operation of the work; and not to prejudice the author or the holders of the rights of use, in the cases listed by the evoked legal text. Obviously, however, this limitation can only concern a work that is the subject of copyright. However, as has been pointed out, texts of a legislative or judicial nature do not constitute an object of copyright, so that there is not even a right to be restricted. Mentioning the source of a legal reasoning or a way of interpreting the norms of law, by indicating the court decision, is not equivalent to the right of summons referred to in art. 35 of Law no. 8/1996 for the protection of copyright and related rights , but rather a way of avoiding the false originality of the intellectual creation and, in relation to the professional authority of the members of the professional body of that court, a validation of the argument contained in that judgment.

The capitalization of such texts, not protected by copyright, in doctoral theses raises in principle the same problems regarding the lack of originality or scientific value of the paper.

Starting from the principles deriving from the content of Law no. 206/2004 on good conduct in scientific research, technological development and innovation, through H.G. no. 681/2011 was approved the Code of doctoral studies, in which the doctoral thesis is defined as the original scientific paper developed by a doctoral student in doctoral studies, legal condition for obtaining a doctorate, the problem the originality of the thesis being resumed in the normative act, with the establishment of the obligation to mention the source for any material taken over.

In the case of doctoral theses in the legal field, the methodology will consist in using the research methods established in the field. In the literature it has been shown that legal scientific research is based on the use of a methodology, a set of methods and procedures with which the study of law in all its complexity takes place[12], and the most common are the comparative, historical, logical, sociological and quantitative[13].

Comparative and quantitative methods can be used to study the legal systems of different states with regard to certain legal institutions, which involves an analysis of the relevant case law and its systematization. In this context, the taking of reasoning contained in court decisions is inevitable, without this raising issues of originality, and the conclusions drawn may have some scientific value and may contribute to the improvement of national law. The historical method will also inevitably involve the taking over and exposing, at least in part, of the content of normative acts, national or foreign, in order to analyze the evolution of the jurisprudence of national or

[12] Ș. Deaconu, Legal Methodology, Hamangiu Publishing House, Bucharest 2013, p.16.
[13] N. Popa (coord.), E. Anghel, C.B. Ene-Dinu, L. Spătaru Negură, op.cit., P. 15.

supranational courts regarding the principles of law applicable in a matter. what logical method will be used to analyze the points of view expressed in the doctrine, as well as to present the author"s own conclusions.

Thus, the capitalization in doctoral theses of the texts not protected by copyright, respectively of the court decisions pronounced by national, foreign or supranational courts, as well as of the official texts from national and foreign normative acts will be able to be realized under a first aspect within the examination comparison of the different legal systems and jurisprudence of the courts belonging to them, as modeled by the effects of judgments handed down by supranational courts. In such a situation, it is essential to indicate the sources for each of the results of the analysis performed in order to verify the accuracy of the data obtained and the veracity of the conclusions presented, given that the lack of authenticity of the information presented risks a serious deviation from the rules the scientific research activity according to art. 2^1 of Law no. 206/2004.

Also, the capitalization of official texts of a legislative or judicial nature will be possible in the process of analysis and interpretation of the provisions contained in the incidental legal provisions and corroborated with the points of view expressed in the doctrine. In this case, too, the indication of the sources for the logical-legal reasoning or the interpretation of the various legal institutions contained in court decisions, either to strengthen an argument or to be challenged, appears to be mandatory, since, even if not enters the object of copyright and can be used freely, without restrictions, the condition of the originality of the doctoral thesis is an explicit one (art. 4 letter e) of the GD no. 681/2011 on the approval of the Code of doctoral studies) and may condition its scientific value. Taking over reasoning or interpreting various legal provisions or principles of law from court decisions and presenting them as the fruit of an intellectual activity of one"s own creation undermines the own contribution of the author of the doctoral thesis and his work lacks originality.

5. Conclusions

We consider that the judgment, at least the legal reasoning of the court decision, may be considered as work of intellectual creations, which sometimes meet the condition of originality. However, it will not in any case be the subject of copyright, being expressly excluded from protection by the provisions of Art. 9 let. b) of Law no. 8/1996 on copyright and related rights. Being excluded from copyright protection and taking into account that this exclusion is determined by the nature and purpose of these judicial texts, judgments enter the public domain from the perspective of intellectual property rights, are accessible to anyone, and logical-legal reasoning included in them they can be used freely, without restrictions.

However, the taking over in the doctoral theses of the reasoning from court decisions, either without indicating their sources or with such an indication, but in excess, will lead to a lack of originality of the doctoral thesis or will lack the work of the contribution. own of the author. In this context, another observation is required. Judgments do not have and cannot have scientific value, as they are not the result of an activity based on the methodology of scientific research in the field of legal sciences, but the result of an interpretation and application of legal provisions by the judge in relation to facts. However, this does not lead to a lack of scientific value of doctoral theses or other papers in which the object of research also involves an approach to jurisprudence in the field. The use of judgments, whether they belong to national or supranational courts, alone or as part of a consolidated case law, may confer scientific value on doctoral theses, insofar as the premises analyzed and the results obtained, subject to their validation, constitute an application of legal scientific research methodology.

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PROBATIVE VALUE OF HIGHER FORENSIC MEDICAL BOARD"S OPINIONS

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Abstract

There are situations in which the judicial bodies need the opinion of an expert in order to ascertain, clarify or assess facts or circumstances that are important for finding out the truth.

Forensic expert examinations fall into a specific category relative to other types of examinations as they can be carried out only by forensic medical institutions subordinated to the Ministry of Health.

The supreme scientific authority in the field of forensic medicine is the Higher Forensic Medical Board attached to the "Mina Minovici" Forensic Medicine Institute in Bucharest.

The mission of this board is to verify, assess, analyse and endorse from a scientific point of view, upon the request of judicial bodies, the contents and conclusions of various forensic medical documents performed by other subordinate public institutions, authorised by law to carry out fact-finding and expert examinations.

This article aims at clarifying the probative value in criminal proceedings of the opinions issued by this supreme authority, because there have been and are situations in judicial practice in which higher probative value has been rendered to such opinions, as well as situations in which its conclusions have been disregarded in a reasoned manner.

Keywords: *forensic medical expert examinations, opinions, Higher Forensic Medical Board, probative value, the expert examination reports.*

1. Introduction

Evidence is any element of fact which serves to establish the existence or non-existence of a crime, to identify the person who committed it and to know the circumstances necessary for the fair settlement of the case and which contributes to finding out the truth in criminal proceedings [article 97, paragraph (1), Code of Criminal Procedure]. Moreover, according to paragraph (2) of the aforementioned article, evidence is obtained in criminal proceedings by the following means: statements of the suspect or defendant, statements of the injured person, statements of the civil party or the party incurring civil liability, statements of witnesses, documents, expert examination reports or fact-finding reports, minutes, photographs, material evidence and any evidence that is not prohibited by law.

We notice that the evidence expressly referred to in the Code of Criminal Procedure also includes the expert examination reports. The performance of an expert examination is ordered when the opinion of an expert is required as well in order to achieve ascertainment, clarification or assessment of facts or circumstances that are important for finding out the truth in a case.

2. Forensic medical examinations

The regime of these examinations is regulated by Government Ordinance no. 1/2000[1] regarding the organisation of the activity and the operation of forensic medical institutions, as well as by the Regulation for the implementation of Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions, approved by Government Ordinance no. 774/2000[2]. Forensic medical examinations are carried out on living persons, corpses, biological products and *corpora delicti* in order to establish the truth in cases of crimes against life, bodily integrity and health of persons, or in other situations provided by law.

Forensic medical examinations are performed within forensic medical institutions and other structures with responsibilities in the field of forensic medicine, subordinated to the Ministry of Health, namely: forensic medical practices, county forensic medical services, forensic medical institutes.

If the judicial body that orders the expert examination finds that the forensic medical examination is incomplete, an order may be issued either to hear the forensic doctor who performed the expert examination or to carry out an additional examination. Furthermore, the criminal investigation bodies or the courts may request the endorsement of the expert report by the forensic medical document endorsement and control boards which operate within the institutes of forensic medicine. These boards verify, assess, analyse and endorse from a scientific point of view the contents and conclusions of the various forensic medical documents performed by the county

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[1] Published in the Official Gazette, Part I, no. 22 of 21 January 2000.

[2] Published in the Official Gazette, Part I, no. 459 of 19 September 2000.

forensic medical services[3], as laid down by the provisions of article 19 of the Regulation for the implementation of Government Ordinance O.G. no. 1/2000. If the conclusions of the forensic medical expert examination are contradictory, the endorsement and control board rules thereon and may formulate certain clarifications or completions. Moreover, in the event that the conclusions of the medical documents cannot be endorsed, the endorsement and control board recommends their total or partial redo and puts forward proposals in this respect or its own conclusions. After obtaining the endorsement of this board, new forensic medical examinations may be requested by the hierarchically lower forensic medical units only if the endorsement and control board has expressly recommended it where new medical or investigative data has come up which did not exist as at the date of the previous expert examinations.[4]

3. Higher Forensic Medical Board"s opinions

The supreme scientific authority in the field of forensic medicine is the Higher Forensic Medical Board attached to the "Mina Minovici" Forensic Medicine Institute in Bucharest. It is composed of several permanent members, namely: the general director and deputy director of the "Mina Minovici" National Institute of Medicine in Bucharest, the directors of forensic medical institutes in university medical centres, the heads of specialist departments within accredited faculties of university medical centres, the head of the morphopathology department at the "Carol Davila" University of Medicine in Bucharest and 4 consultant forensic doctors with specialist expertise, appointed at the proposal of the general director of the "Mina Minovici" National Institute of Forensic Medicine in Bucharest. The mission of this board is to verify, assess, analyse and endorse from a scientific point of view, upon the request of judicial bodies, the contents and conclusions of various forensic medical documents performed by other subordinate public institutions, authorised by law to carry out fact-finding and expert examinations. The Higher Forensic Medical Board can rule by verifying and endorsing from a scientific point of view also in the situations in which new expert medical examinations[5] have been performed or opinions have been issued by the endorsement and control boards having territorial jurisdiction.

If the Higher Forensic Medical Board finds the existence of contradictory conclusions between the first and the subsequent expert examination or other forensic medical documents, it may endorse, in whole or in part, the conclusions of either the former or the latter, and may formulate certain clarifications or completions. If the conclusions of the forensic documents cannot be endorsed, the Higher Forensic Medical Board recommends the total or partial redo of the works by putting forward proposals in this respect or own conclusions [article 27, paragraph (1) and paragraph (2) of the Regulation for the implementation of Government Ordinance no.1/2000[6]].

An important effect of the issuance of an opinion by the Higher Forensic Medical Board is the fact that the judicial bodies may not request the performance of other forensic medical examinations by the institutions that are hierarchically subordinated to it, unless new medical or investigative data has appeared.

Although it operates with the term of "opinion", where the Higher Forensic Medical Board may formulate its own conclusions and quash all other forensic medical documents drawn up by subordinated institutions and although the issuance of such an opinion results in the impossibility to carry out another expert examination, neither Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions, nor the Regulation implementing this ordinance makes any reference to the form of the opinions in question or to any mandatory information that should be included. The only regulatory act where we find a definition of this opinion is the Rules regarding the procedure for performing forensic medical examinations and other forensic medical documents[7] which in article 9, letter e) stipulates that *"forensic medical opinion means the document prepared by the Higher Forensic Medicine Board, as well as by the medical document endorsement and control boards, upon the request of judicial bodies, whereby the contents and conclusions of forensic medical documents are approved and recommendations are made to carry out new expert examinations or own conclusions are formulated."* However, these rules do not provide for the form of these opinions either. This legislative shortcoming has led to the (repeated) issuance by this Higher Forensic

[3] Article 25 of Government Ordinance. no. 1/2000 stipulates that these endorsement and control boards examine and endorse: a) fact-finding or forensic medical expert examination documents performed by the county forensic medical services in cases where the criminal investigation bodies or courts consider the endorsement; b) documents of the new expert examinations performed by the county forensic medical services before being sent to the criminal investigation bodies or to the courts.

[4] See in this respect the provisions of article 22 of the Regulation for the implementation of Government Ordinance no. 1/2000 regarding the organisation of the activity and the operation of forensic medical institutions.

[5] It is ordered to carry out a new expert examination report in case deficiencies, omissions and/or contradictory issues are found in previous expert examinations, as well as in the situation where the forensic medical document endorsement and control board recommends a new expert examination. The conclusions of a new expert examination are prepared on the basis of previous forensic medical findings or examinations, of the evidence placed on the case file, of the specifics of the case, of the new evidence included in the case file, as well as of the objections raised by the judicial bodies.

[6] Article 24, paragraph (1) and paragraph (2) of Government Ordinance no. 1/2000 stipulate provisions in the same regard.

[7] Published in the Official Gazette no. 459 of 19 September 2000.

Medical Board of opinions that completely quashed the conclusions of previous medical documents (fact-finding reports, expert reports, new expert reports), without too much explanation and without a concrete objective-scientific review of the analysed situation. The issuance of such opinions has also led the European Court of Human Rights to hold that the provisions of article 2 of the European Convention on Human Rights have been violated by the Romanian state. Thus, in the case of Eugenia Lazăr v. Romania the Court held in paragraphs 83 to 84 that the *Higher Board failed to reproduce the questions to which it was supposed to answer, failed to describe the operations that were supposed to be carried out as part of its control and failed to specify the specific reasons on which it relied to reach its conclusions*. Moreover, it pointed out that in the situation where the obligation to state the reasons for forensic medical documents was incumbent only on the institutions in charge of preparing the first findings and expert reports, not on the control boards, such approval aimed at strengthening the credibility of opinions and the efficiency of the entire forensic expert examination system was useless, because they had the power to completely change the conclusions of the institutions concerned. The Court took the view that the obligation to state the reasons for scientific opinions was all the more important in the case at hand, as the formulation of such an opinion by the supreme national authority in the field prevented lower-ranking institutes from carrying out new expert examinations and supplementing those that had already been carried out.[8]

The issuance of such opinions has also created problems in judicial practice at the national level. Thus, there have been situations in which the criminal investigation bodies or even the courts have given higher probative value to this opinion and the reason was that the document was issued by the highest national authority in the field of forensic medical expert examinations. Other criminal investigation bodies and courts have disregarded the conclusions of these opinions in a reasoned manner, taking into account the provisions of article 103 of the Code of Criminal Procedure, which enshrines the principle of free assessment of evidence.

In agreement with the latter judicial bodies, we, too, consider that these opinions issued by the supreme authority in the field of forensic medical expert examinations do not have a higher probative value than the other scientific evidence examined in a case. Thus, the judicial bodies may uphold in a reasoned manner any of the conclusions of the expert reports carried out in a case, regardless of whether they have been endorsed or not by the Higher Forensic Medical Board and implicitly to disregard such opinions. The provisions of article 103, paragraph (1) of the Code of Criminal Procedure supports this point of view and states that *the evidence does not have a value established beforehand by law and is subject to the free assessment of the judicial bodies following the evaluation of all the evidence examined in the case*. It follows from the aforementioned legal text that the assessment of evidence in criminal proceedings is governed by the principle of free assessment of evidence, according to which "judicial bodies have the right to freely assess both the value of each piece of evidence legally examined (relative to others) regardless of the procedural stage in which they are examined, as well as their credibility; the evidence does not have an a priori value established by the legislator, as its importance results from its assessment by the judicial bodies following the analysis of all the evidence legally and fairly examined in a case."[9]

Furthermore, as already shown, there are situations in which these opinions issued by the Higher Forensic Medical Board are incomplete and vague, without an objective-scientific analysis of the situation on which it must rule and without a concrete statement of reasons for its conclusions. Thus, the judicial bodies have the obligation all the more so to assess in concrete terms the scientific value of each medical document in a case. We consider that only a detailed, scientifically proven report, containing a reasoned solution in relation to possible contradictions between the other documents issued by lower-ranking institutions and answering in a detailed and reasoned manner all questions asked by the judicial bodies, is likely to be used as evidence in criminal proceedings.

The jurisprudence of the European Court of Human Rights also supports this view. Thus, in the case of Eugenia Lazăr v. Romania, in paragraphs 77-80, the European court held that "the court that ruled in the last instance gave credence to the opinion delivered by the Higher Board - although the judges of first instance considered it incomplete and requested a new opinion - on the ground that this document emanated from the highest national authority in the field of forensic medical expert examinations and that the latter, in the circumstances of the case, was prevented by the special law governing the activity of forensic medical institutes from carrying out a new expert examination in the absence of new elements. It necessarily follows from the reasoning pursued by the latter court that a piece of evidence acquires probative force when a new element cannot be substituted for it or when it cannot be countered by another piece of evidence having the same scientific value. ***Such a conclusion is in total contradiction with the procedural obligation implicitly contained in article 2 of the Convention, which specifically requires national authorities to take measures to ensure the gathering of evidence capable of providing a full and accurate account of the facts and an objective analysis of clinical findings, in particular of the cause of death***. Any deficiency in

[8] Within the same meaning see ECHR, decision of 7 June 2011 in the case Baldovin v. Romania, paragraphs 23-26.
[9] Mihail Udroiu, Procedură penală-Partea generală, C.H.Beck Publishing House, Bucharest 2018, p. 318.

the investigation that weakens its ability to establish the cause of death or responsibility risks leading to the conclusion that it does not meet this standard (see, mutatis mutandis, Slimani v. France, no. 57671/00, § 32, ECHR 2004-IX (extracts); McKerr v. United Kingdom, no.28883/95, § 113, ECHR 2001-III and Paul and Audrey Edwards cited above, § 71). Admittedly, by virtue of the principle of the free assessment of evidence which governs Romanian criminal proceedings, courts can disregard a piece of evidence which does not appear to them to be credible or conclusive. Such a possibility remains nevertheless purely theoretical if the judicial authorities are prohibited from ordering the performance of an expert examination outside the network of forensic medical institutes authorised by law and whose opinions are the only ones admissible as evidence in the context of a criminal trial or to ask these institutes *to reconsider their conclusions when they appear to them as being incomplete or insufficiently clear to enable them to make an informed choice and help them to make their decision*. Whether the present case constitutes an isolated case or whether it reflects a current practice of the "Mina Minovici" forensic medical institute of avoiding requests made to it by the judicial authorities in order to obtain the information they need in order to make objectively founded decisions in full knowledge of the facts, the Court considers that the very existence in the national legislation of provisions authorising the forensic medical institutes having competence to deliver opinions that avoid the requests of the judicial authorities and thus refuse cooperating with them whenever the needs of the investigation so require is hardly compliant with the primary duty of the state to guarantee the right to life by putting in place an effective legal and administrative framework capable of establishing the cause of death of an individual who was under the responsibility of health professionals."

Moreover, in the case *Baldovin v. Romania*, the European court concluded that the legislative framework established by the state to regulate the forensic medical activity did not have sufficient guarantees against arbitrariness to strengthen the trust of parties to proceedings in the act of justice and the credibility of the system as a whole.

Although the aforementioned cases were handled in 2010 and 2011 respectively, the Romanian state failed to fulfil its positive obligation to amend the legislative framework in accordance with the requirements of the jurisprudence of the European Court of Human Rights, therefore, the legislation applicable to these cases is currently the same.

The existence of a legal framework in the field of forensic medical expert examinations likely to allow the issuance of opinions by the supreme scientific authority in the field of forensic medicine which avoid the requests of judicial bodies and refuse cooperating with them whenever the needs of the investigation so require may lead to the occurrence of situations in which the clarification or assessment of facts or circumstances that are important in seeking the truth becomes impossible, thus diverting the criminal proceedings from its purpose, namely that any person who has committed a crime should be punished according to their guilt and that no innocent person should be held criminally liable.

In such a situation, we take the view that the regulatory acts regulating the activity of forensic medicine should stipulate what form the opinions issued by the highest national authority in the field of forensic expert examinations should take and what their concrete contents should be so that the judicial bodies can make a clear choice in assessing the evidence and help them make the right decision. In this respect, we consider that since such opinion can include own conclusions which differ from the conclusions of previous medical acts subject to assessment, it should take the form of an expert examination report, as provided by article 178, paragraph 4 of the Code of Criminal Procedure, namely ***introductory part***, which shows the judicial body that ordered the expert examination, the date when it was ordered, the last name and first name of the expert, the objectives to which the expert should answer, the date on which it was performed, the material on the basis of which the expert examination was performed, the proof of notification to the parties if they participated therein and gave explanations during the expert examination, the date of preparation of the expert examination report; ***expository part***, which describes the expert examination operations, methods, programmes and the equipment used; ***conclusions***, which answer the objectives set by the judicial bodies, as well as any other clarifications and findings resulting from the performance of the expert examination in connection with the objectives of the expert examination.

4. Conclusions

The criminal proceedings are governed by the principle of free assessment of evidence, which means that the evidence has no probative value established beforehand by the legislator and that there is no evidence that has the title of "queen", regardless of the authority from which it emanates. Therefore, the opinions issued by the supreme scientific authority in the field of forensic medicine do not have a probative value higher than the other scientific evidence examined in a case. Consequently, the judicial bodies may uphold any of the conclusions of the expert examination reports carried out in a case in a reasoned manner, regardless of whether they have been endorsed or not by the Higher Forensic Medical Board and implicitly to disregard such opinion in a reasoned manner.

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STAY OF EXECUTION OF SENTENCE - THEORETICAL AND PRACTICAL APPROACH

Alina-Marilena ŢUCĂ*

Abstract

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence.

The stay of execution of prison or life imprisonment sentence is precisely such a situation, as regulated by Section II, Chapter III "Other provisions regarding execution", Title V "Execution of criminal judgments" of the Code of Criminal Procedure.

The stay of execution of sentence is not a removal of the penalty applied to the convict, but merely a postponement of the moment from which it should begin, making up an exception to the rule of immediate execution of the criminal judgment. In order to avoid situations of unjustified stay of execution of sentence or even removal of execution of sentence, the legislator expressly and restrictively laid down the instances and conditions in which the convicted person may obtain the stay of execution of sentence.

Without claiming to be exhaustive, this study may serve as a basis for certain legal or practical clarifications in connection with the institution of stay of execution of prison or life imprisonment sentence.

Keywords: *sentence, stay of execution, convicted pregnant woman, state of illness, revocation of stay of execution*.

1. Introduction

"The criminal enforcement under the law begins with the determination of the sanction for the convicted person and takes place during the execution of the content of the criminal sanction, until it has been completely served or until it is considered executed under the conditions set out in the law. [...] The criminal enforcement is characterised by the fact that it is imposed by the state by the law of execution of sentences, under which the parties have an equal position only with regard to the exercise of rights, obligations and prohibitions established during the execution of criminal sanctions and during such time when, after the execution of the sanctions, the convicted persons must bear the effects of the sanctions."[1]

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence. The stay of execution of prison or life imprisonment sentence is precisely such a situation, as regulated by Section II, Chapter III *"Other provisions regarding execution"*, Title V *"Execution of criminal judgments"* of the Code of Criminal Procedure.

This procedure takes place after a court decision sentencing a person to imprisonment in a detention facility or to life imprisonment remains final, until the actual start of execution of sentence, while after the start of the execution of sentence another institution operates, namely the interruption of execution of sentence. Moreover, the provisions of article 519 of the Code of Criminal Procedure point to the possibility of staying the execution and of putting into place custodial educational measures for minors, consisting in admission to an educational establishment or a detention centre.[2]

There cannot be an order to postpone the execution of a penalty that is not likely to be enforced. In judicial practice it has been decided that, as long as the decision to convict the defendant is not final as at the date of formulating and hearing the application for stay of execution of sentence, the application being dismissed, there are no grounds for quashing the judgment, which is legal relative to the time of its delivery, even if in the meantime the conviction has become final.[3]

The stay of execution of sentence is not a removal of the penalty, but merely a postponement of the moment from which it should begin. Making up an exception to the rule of immediate execution of criminal judgments, the legislator expressly and

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[1] Ioan Chiş, Alexandru Bogdan Chiş, *Executarea sancţiunilor penale,* Universul Juridic Publishing House, Bucharest, 2015, p. 135.

[2] Within the same meaning see the provisions of article 184, paragraph 1 of Law no. 254/2013.

[3] Bucharest Court of Appeal, Second Criminal Division, *decision no. 313/1998,* in R.D.P., no. 1/2000, p. 144, apud Nicolae Volonciu coordonator, A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă, Noul Cod de procedură penală comentat, Hamangiu Publishing House, Bucharest, 2014, p. 1390.

restrictively laid down the instances in which the convicted person may obtain the stay of execution of sentence, precisely in order to avoid unjustified postponement or even the removal of execution.

2. Cases in which the execution of a prison or life imprisonment sentence may be stayed

As mentioned above, in order to avoid situations of unjustified stay of execution of sentence, the legislator has expressly provided for the cases in which this institution can operate. Thus, according to article 589 of the Code of Criminal Procedure, the stay of execution of prison sentence may take place in the following two situations: a) when it is found that the convicted person suffers from an illness, under the conditions of article 589, paragraph 1, letter a) and article 589, paragraph 2 of the Code of Criminal Procedure; b) if it is found that the convicted person is pregnant or has a child under the age of 1.

Unlike the previous criminal procedure code, according to the current regulation, the possibility to benefit from the stay of execution of sentence has been restricted, namely only two cases are provided, without recasting the third case provided by article 453, paragraph 1, letter c) of the 1968 Code of Criminal Procedure, referring to a situation in which the immediate execution of the penalty would have had serious consequences for the convict, the family, or the employer. This option of the legislator has been substantiated in the explanatory statement to the regulatory act based on the fact that this case is no longer consistent with the practical realities, since almost all court decisions for such applications have ordered their dismissal, and the current organisation of the activity of the National Administration of Penitentiaries allows to move detainees in special situations outside the place of detention by means of an administrative order.

2.1. State of illness of the convict

The first case in which the stay of execution of sentence may be ordered is stipulated by article 589, paragraph 1, letter a) of the Code of Criminal Procedure and considers the assumption in which, based on a forensic examination, it is ascertained that the convicted person suffers from an illness that cannot be treated within the healthcare network of the National Administration of Penitentiaries and that makes it impossible for the sentence to be immediately executed, if the specific characteristics of the illness do not allow its treatment in conditions of provision of permanent guard within the healthcare network of the Ministry of Health and if the court takes the view that the stay of execution and release do not pose a danger to public order. Moreover, paragraph 2 of the same article further provides that the stay of execution of sentence in case of illness cannot be ordered if the convicted person" illness is self-inflicted by refusing medical treatment or surgery, by self-aggression or other harmful actions, or if they evade the forensic examination.

The conditions that must be met in order for this instance of stay of execution of sentence to apply result from the aforementioned legal texts, more specifically:

a) to ascertain on the basis of an expert examination that the convicted person suffers from an illness[4];

b) the illness makes it impossible for them to execute the sentence immediately;

c) the illness cannot be treated within the network of the National Administration of Penitentiaries nor under permanent guard within the network of the Ministry of Health;

d) the illness is not inflicted by the convicted person by refusing medical treatment or surgery, by self-aggression or other harmful actions;

e) the convict has not evaded the forensic examination;

f) the release of the convict does not pose a danger to public order.

The circumstance that justifies the stay of execution of sentence may be ascertained only on the basis of a forensic examination carried out by the competent forensic service, however, the merits of the application cannot be assessed only on the basis of a forensic record or other medical document, even by specialist physicians or by physicians within the penitentiary healthcare network, but they can be considered when performing the expert investigation. In the judicial practice prior to the current Code of Criminal Procedure - practice which is still relevant - it was established that "the court may rule on the application to interrupt the execution of the prison sentence only on the basis of a mandatory forensic expert examination determining whether the illness from which the convicted person suffers makes it impossible for them to execute the sentence. If the convict refuses to appear for the forensic examination, the court may not order the interruption of the execution of the prison sentence on the basis of other medical documents."[5]

Furthermore, the convict"s state of health will be assessed upon hearing the application, so that a previous expert investigation carried out in another case, having the same subject matter, cannot be taken into account when solving the new case, since it is possible that their state of health changes and that new medical documents are submitted, so that a complete assessment of the convict"s health is required. To this end, in judicial practice it has been shown that "in order

[4] In the old regulation, the stay of execution of sentence could be ordered only in the situation where the illness from which the convict suffered was *serious*. The legislator's option to no longer use the term "serious" is justified, since it is not the seriousness of the illness that is relevant, but the finding of the impossibility of immediate execution of the sentence.

[5] High Court of Cassation and Justice, Criminal Division, *decision no. 5519/2005*, www.legalis.ro.

to solve the application for stay or interruption of the execution of the sentence on the ground that the convicted person suffers from an illness that makes it impossible for them to serve their sentence, a forensic expert examination must be carried out after bringing such application to court, during its hearing; a decision by which the ruling is delivered on the basis of a previous expert investigation carried out in another case concerning the same convict is against the law."[6]

If the convict applying for the stay of execution of sentence is unable to bear the costs of the expert investigation, where that is the only method provided by the legislator, whereby it can be verified whether the petitioner suffers from conditions that make it impossible for them to serve their sentence, we consider that the court should order the payment of the related fee from the funds of the Ministry of Justice, and that, if the application is rejected, they should be ordered to pay the amount. For this same purpose, the judicial practice points out that "the amount of the legal expenses advanced by the state to be borne by the convict whose application to interrupt the execution of the sentence has been dismissed includes the expenses incurred in carrying out the forensic examination."[7]

The expert investigation will be performed according to the Procedural rules regarding the performance of expert investigations, findings and other forensic work[8], which in article 30 stipulate that the forensic expert examination for staying the execution of the custodial sentence on medical grounds is carried out only by direct examination of the person by a committee composed of: a forensic doctor, who chairs the committee; one or more physicians who are at least specialist physicians depending on the conditions from which the examined person suffers, physician/physicians who will establish the diagnosis and therapeutic advice; a physician, representative of the healthcare network of the penitentiary department who, knowing the treatment possibilities within the network to which the representative belongs, determines together with the forensic doctor where to have the treatment applied for the condition concerned: within the healthcare network of the penitentiary department or within the healthcare network of the Ministry of Health. After performing a new expert investigation at the "Prof. Dr. Mina Minovici" Institute of Forensic Medicine in Bucharest for the stay or interruption of execution of custodial sentence on medical grounds, it is not possible to request or perform a new expert investigation at another hierarchically lower forensic unit.

If the committee that performs the expert investigation is not established in accordance with the aforementioned legal provisions, we consider that the expert report is unlawful and that a redo of the report is required. The previous jurisprudence has also ruled in this very sense, stating that "The committee that prepared the forensic report did not include a cardiologist, although a cardiologist"s participation was necessary given the nature of the numerous heart conditions mentioned in the appellant"s medical file. Consequently, it is necessary to carry out a new forensic expert investigation by having the convict and the medical documents examined by a cardiologist, then the expert investigation should conclude whether it is possible for the convict to execute the sentence, which is why the appeal is admitted by referring the case to the first court for retrial."[9]

The expert committee will determine whether the convicted person suffers from the illness mentioned in the application for stay or from another illness and if that makes it impossible for them to execute the sentence immediately. "The law does not distinguish between curable and incurable, mental or physical illnesses, nor does it impose the condition that the illness endangers the life of the convict, as established in practice, but only to render them unable to proceed to the immediate execution of the sentence."[10] If the expert report states that the illness found does not make it impossible to immediately serve the sentence, the application for stay appears to be unfounded and will be dismissed. Moreover, the same ruling is required where it results from the forensic report that the convicted person"s illness can be treated, while under permanent guard, within the network of the Ministry of Health. As stated in the doctrine, in this case "the decisive element is to ascertain the possibility of procuring that the convict is under permanent guard while in the public healthcare system, and then to allow the application to stay the execution of the sentence or life imprisonment if it is found that the illness cannot be treated under permanent guard within the healthcare network of the Ministry of Health."[11] For example, serious oncological diseases the treatment of which is incompatible with ensuring permanent guard given the

[6] Supreme Court of Justice, Criminal Division, *decision no. 3159/2000*, www.legalis.ro. Within the same meaning, see High Court of Cassation and Justice, Criminal Division, decision no. 4595 of 3 August 2005.

[7] Braşov Court of Appeal, Criminal Division, *decision no. 741 of 10 October 2008*, www.jurisprudenţa.org.

[8] The procedural rules regarding the performance of the expert investigations, findings and other forensic work were approved by the Order of the Minister of Justice no. 1134/C/2000, and by the Order of the Minister of Health no. 2254/2000 respectively.

[9] Supreme Court of Justice, Criminal Division, *decision no. 2028/2000*, www.legalis.ro. Within the same meaning, see criminal decision no. 256/12 June 2009 delivered by Vrancea Tribunal, available at www.jrisprudenta.org, which held upon hearing the appeal that "the judgment of the court rejecting the application for interruption of execution of sentence based on a forensic expert investigation carried out by a committee which did not include a specialist physician to look into the conditions invoked by the convict was wrong."

[10] N. Volonciu, (coordonator), A. Simona Uzlău, R. Moroşanu, V. Văduva, D. Atasiei, C. Ghighenci, C. Voicu, G. Tudor, T.V. Gheorghe, C.M. Chiriţă op. cit. p. 1392.

[11] Ion Neagu, Mircea Damaschin, *Tratat de procedură penală, Partea specială*, second edition, Universul Juridic Publishing House, Bucharest, 2018, p. 624.

specificity of the healthcare unit which should provide a sterile environment may fall under this category.

It has been correctly assessed in the national judicial practice that it is not enough to ascertain that an illness can be treated, from a theoretical point of view, in the healthcare network of penitentiaries and that it is necessary to verify if there are practically optimal conditions for treatment and therapy at the place of detention, giving precedence to article 3 of the European Convention on Human Rights. Thus, it was held that "The court of first instance made a fair assessment of the convict"s situation and by referring to article 3 of the European Convention on Human Rights it gave precedence to the compliance with those rules. It is found that the execution of the sentence must be stayed in order to give the convict a real chance to benefit from the cytostatic treatment, which is absolutely necessary to improve their health and to therefore prevent irreversible and serious consequences on their physical integrity."[12]

Also relevant in this regard is the jurisprudence of the ECHR whereby it was held that the detention of a person who is ill "may raise issues under article 3. Although this article cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the state to protect the physical well-being of persons deprived of their liberty by, among other things, providing them with the requisite medical assistance. A lack of appropriate medical care, and, more generally, the detention in inappropriate conditions of a person who is ill, may in principle amount to treatment contrary to article 3."[13] According to the jurisprudence of the same court, it was also ruled that "the state of health ... was a factor that had to be taken into account under article of the Convention with regard to custodial sentences. Although there was no general obligation to release prisoners suffering from ill health, article 3 required states to protect the physical integrity of persons who had been deprived of their liberty, notably by providing them with any necessary medical assistance."[14]

The state of illness must not be self-inflicted by the convicts themselves by refusal to undergo medical treatment or surgery, by actions of self-aggression or by other harmful actions, as provided by article 589, paragraph 2 of the Code of Criminal Procedure. This condition was not expressly provided by the prior regulation, but the need for such a provision was previously emphasised in the doctrine,[15] being inadmissible for the convicted person to self-inflict a state of illness or to worsen their condition specifically for the purpose of not serving the sentence.

Furthermore, if the convicted person evades the expert examination, the court may return to this evidence, in which case the application is rejected as unfounded, as expressly provided by the legislator, thus enshrining the previous rulings in the judicial practice in legislative terms as well.[16]

The ascertainment of the illness, as characterised by the features presented above, is not enough per se to order the postponement of execution of penalty, since the court is under the obligation laid down by the legislator to verify that the release of the convict will not pose a danger to public order. Although it operates with this notion, the legislator did not provide a legal definition of this concept, so we take the view that said danger is to be assessed by reference to the seriousness of the crime for which the conviction was ordered, the criminal history of the convict, their behaviour in society, family. Moreover, even in a situation where the court should consider that the release would cause concrete danger to public order, the provisions of article 3 of the ECHR, as well as the constant jurisprudence of this court must be taken into account, as we have shown above, where according to the ECHR, in certain situations, keeping a person who is sick in detention may constitute inhuman treatment. In most cases, the lack of concrete danger to the public order will implicitly result from the ascertainment of the convicted person"s illness. Thus, it was shown in the doctrine that "if the forensic report concludes that the convicted person suffers from an illness that makes it impossible for them to execute the sentence and cannot be treated in the healthcare system of the penitentiary or the Ministry of Health (in this case under permanent guard), the seriousness of the illness from which the convict suffers and which will prevent them from being capable of endangering public order is obvious."[17]

Regarding this condition (that the court should determine that the stay of execution of sentence and the release do not pose a danger to public order), the Constitutional Court of Romania also ruled by Decision no. 323 of 29 March 2007[18] delivered in settling an exception of unconstitutionality relied on before the Bucharest Tribunal, whereby it held that the criticised legal text was not contrary to the constitutional provisions enshrining the right to the protection of health and the right to physical and mental

[12] Piteşti Court of Appeal, Criminal Division, *decision no. 701 of 28 October 2010*, www.legalis.ro.

[13] ECHR, judgment of 17 June 2012 in the case Radu Pop v. Romania, paragraphs 104, 105.

[14] ECHR, judgement of 14 November 2002 in the case Mouisel v. France.

[15] Nicolae Volonciu, *Tratat de procedură penală. Partea specială*. Paideia Publishing House, Bucharest, 2002, p. 428.

[16] Judgement no. 1665 of 7 December 2007 delivered by Bucharest Tribunal, First Criminal Division (in R.D.P., no. 3/2009, p. 106-107), ruled that "the forensic expert investigation can be carried out only after the direct examination of the person concerned. Having regard to the conduct of the convict who evades the service of the sentence and has failed to appear on any court date, as well as to the fact that the documents submitted by him through his lawyers fail to prove an objective impossibility to appear before the court, it can be assessed that this evidence cannot be examined, because with his visit at the forensic unit the convict would reveal his location."

[17] Ion Neagu, Mircea Damaschin, op. cit. p. 625.

[18] Published in the Official Gazette no. 283 of 27 April 2007.

integrity of the person. In stating the reasons for its decision, the Court pointed out that, in the specific situation of the criticised legal text consideration was given to the possibility for the judge to weigh, on the one hand, the evidence requesting the protection of the convicted person"s health and physical integrity and, on the other hand, the need to protect the general interest from a possible danger which the postponement of the execution of the sentence could have generated, a danger materialised either by committing new crimes or by trying to evade the execution of the penalty or even by the reaction of the population who could have attempted to take revenge on the convict, beyond the bounds of justice.

If the application for the stay of execution of sentence is accepted for this case, the stay will be ordered for a fixed period of time, as expressly provided by the legislator, until the convict"s health improves and the sentence can be enforced. The expert report sometimes mentions the time interval considered necessary for the improvement of the health and the application of the treatment, therefore, in our opinion, in these situations it is necessary to postpone the execution of the sentence for that period of time. The period for which the stay will be ordered must be expressly mentioned in the operative part of the decision, so as to enable the enforcement court to take measures for issuing the warrant of execution of sentence at the end of the period, and if the warrant has been issued, to take measures for its carrying out, as set out in the provisions of article 591, paragraph 6 of the Code of Criminal Procedure, since the stay of execution of sentence cannot turn into a cause of total removal of the sentence. However, it is possible to admit several successive applications if the legal conditions are met. If the execution of the sentence has been previously stayed and the convicted person brings a new application for stay during the stay period and the court accepts it before the previous stay has expired, the subsequent stay will be ordered from the expiry date of the previous stay, not from the date when the decision becomes final.[19]

If the decision rendered does not set a period for which the postponement of execution of the sentence is ordered, according to article 591, paragraph 6 of the Code of Criminal Procedure, the judge designated for enforcement purposes is required to notify the enforcement court with a view to verifying the actuality of the grounds for stay. The Code of Criminal Procedure does not stipulate the obligation to have a forensic report prepared in this procedure, therefore, we estimate that it is possible to ascertain that the health has improved by means of medical documents.[20] If the enforcement court finds that the ground for stay has ceased, the judge in charge of enforcement is under the obligation to take measures for the issuance of the warrant of execution or for its carrying out.

2.2. Female convict"s state of pregnancy. Existence of a child under the age of 1

The second case provided by law to order the postponement of execution of the prison or life imprisonment sentence refers to a female convict who is pregnant or has a child under the age of 1 [article 589, paragraph (1), letter b) of the Code of Criminal Procedure].

The provisions of article 1, letter b) of the Code of Criminal Procedure, were subject to an a posteriori constitutional review in which the court of constitutional review allowed the exception of high unconstitutionality and ruled that the legislative solution contained in the provisions of article 589, paragraph (1), letter b), first phrase, second sentence of the Code of Criminal Procedure, which excluded a male convict who had a child under the age of 1 from the possibility of postponing the service of prison or life imprisonment was unconstitutional[21].In the recitals of the decision, the Constitutional Court found that, from the perspective of the right to care for their child - a fundamental component of the right to respect for family life enshrined in the provisions of article 26, paragraph (1) of the Constitution - a male convict who had a child under the age of 1 was in a situation similar to that of a female convict who had a child of the same age and that the difference in treatment between the two categories of convicted persons, in terms of recognition of the possibility to stay the execution of a prison or life imprisonment sentence, had no objective and reasonable justification. The court of constitutional review also held that by the Judgment of 3 October 2017, delivered in Alexandru Enache v. Romania, the European Court of Human Rights found that - although the institution of staying the execution of a custodial sentence, being of a criminal nature, is essentially different from parental leave, which is a measure under employment law - in the question of whether, during the first year of a child"s life, an imprisoned father was in a similar situation to that of an imprisoned mother, the criteria which had been set out in the cases of Petrovic v. Austria and Konstantin Markin v. Russia were fully applicable to the instant case. Indeed, the stay of execution of a custodial sentence has the primary aim of safeguarding the best interests of the child in order to ensure that it receives the appropriate care and attention during the first year of its life. However, even though there may be differences in their relationship with the child, both the mother and the father can provide such attention and care. Moreover, the Strasbourg Court observed that the entitlement to a stay of execution of sentence continued until the child reached the age of one year old, and therefore extended beyond the period following the mother"s pregnancy and birth.

[19] High Court of Cassation and Justice, Criminal Division, *decision no. 2661 of 24 May 2002*, www.scj.ro.
[20] Within the same meaning, I. Neagu, M. Damaschin, op. cit. p. 625.
[21] Romanian Constitutional Court, *decision no. 535 of 24 September 2019*, published in the Official Gazette no. 1026 of 20 December 2019.

Having regard to the decision of the Constitutional Court, the stay of execution of sentence for the care of a child under the age of 1 may currently be ordered also for imprisoned men, regardless of whether or not they are sole earners with respect to the minor.[22]

Unlike the first case of stay of execution of sentence, for the finding of which the legislator stipulates the obligation to carry out a forensic examination, for the stay of execution of sentence based on this ground the legislator did not stipulate the mandatory performance of an expert examination as the state of pregnancy can be demonstrated by any medical document issued by a specialised body. The existence of the child under the age of 1 of the convicted person can be demonstrated by the birth certificate showing that the convicted person is the mother of the child.

The nature and seriousness of the crime for which the conviction is ordered are not of interest for determining the applicability of this instance of stay, since a requirement is that the convicted person is not subject to the denial of the exercise of parental rights as accessory punishment in case the convicted person has a child under the age of 1, as this instance of stay is put into place solely in the interest of the minor, in order to ensure its right to be raised and protected by its mother in the first year of its life. Therefore, if the evidence examined in the matter at hand shows that this measure is not in the interest of better care for the child, the court is under no obligation to order the stay or interruption of execution of the sentence.[23]

The stay of execution of sentence will take place, in the case of the pregnant female convict, until the child is born or until the minor reaches the age of 1 year old respectively, assuming that the application relies on the provisions of article 589, paragraph (1), letter b), second sentence of the Code of Criminal Procedure. In the case of a pregnant female convict, it cannot be ordered from the beginning to stay the execution of the sentence until reaching the age of 1, since such order is issued after the birth of the child, where the female convict will have to make a new application for stay in this regard as the postponement does not operate automatically.

Upon the expiry of the period for which the execution of the sentence has been postponed, the enforcement court will take measures for issuing the warrant of execution of sentence or for carrying it out if the warrant has been issued. If no period of time has been set for stay in the situation of the pregnant female convict, the judge designated for enforcement purposes will carry out checks and will find out if the pregnancy ended by birth or miscarriage and will consequently take measures for issuing the warrant of execution or for its carrying out.

3. Procedural issues

3.1. Owner of the application

According to article 590 of the Code of Criminal Procedure, the application for stay of execution of sentence or life imprisonment may be made by the prosecutor and the convict. In the case of the convict, it can be made by him personally or through a lawyer.

If the application is made by a person other than the convict, we consider that the court should not reject it as being made by a person without standing to do so, without asking the convict they endorse it and if they do, the court will have to proceed to solving it.

The application may be withdrawn by the person who lodged it.

3.2. Court having jurisdiction

Article 590, paragraph 1 of the Code of Criminal Procedure provides that the court having jurisdiction to rule on the stay of execution of sentence is the enforcement court.[24]

If during the hearing of the application, the convicted person is arrested and placed in a penitentiary located within the territory of another court, the court having jurisdiction for handling the application is still the notified enforcement court. In this case, the application will be qualified as application for interruption of execution of sentence, but the enforcement court will remain competent to solve it as the first court notified.[25]

In the case provided in article 589, paragraph 1, letter a) of the Code of Criminal Procedure, the application for stay of execution of sentence on medical grounds is submitted to the judge designated for enforcement, along with medical documents. The judge in charge of enforcement verifies in closed session whether the court has jurisdiction, without summoning the petitioner and without the participation of the prosecutor, and orders, as the case may be, by means of a ruling, the decline of the jurisdiction over the matter or the performance of a forensic expert examination. After the forensic report has been received, the case is solved by the enforcement court. In accordance with the opinion previously expressed in

[22] The possibility for a father caring for a minor child up to the age of 1 to apply for the stay of execution of sentence is not found in the legislation of other states, since this right is mainly recognised to the mother. Therefore, in countries such as Italy, Austria, the Czech Republic, Finland, Estonia, Bulgaria, Slovakia, Lithuania, Liechtenstein, the possibility of staying the execution of a sentence can be granted only to a pregnant female convict or the female convict caring for a small child whose age differs from one state to another.

[23] High Court of Cassation and Justice, Criminal Division, *decision no. 1220 of 11 March 2003*, www.scj.ro.

[24] In accordance with the provisions of article 553, paragraph (1) of the Code of Criminal Procedure, enforcement court means the first court that tried the convict, regardless of whether the punishment was applied by this court or by the court of judicial review. Paragraph 2 of the same article stipulates that the decisions delivered in the first instance by the High Court of Cassation and Justice shall be executed, as the case may be, by the Bucharest Tribunal or the Military Tribunal.

[25] Supreme Court of Justice, Criminal Division, *decision no. 1794 of 3 April 2002*, www.scj.ro.

the doctrine[26], we consider that the application for stay of execution of sentence can be heard by the very person who acted as judge in charge of enforcement, as they are not in any situation of incompatibility.

The legislator no longer provided for a procedure by which the judge designated for enforcement should be notified in the situation where the application for stay of execution of sentence is based on the provisions of article 589, paragraph (1), letter b) of the Code of Criminal Procedure, in which case the enforcement court is notified directly. In case a court lacking jurisdiction is notified, the decline of jurisdiction will be made by means of a judgment following the public hearing with the summoning of the convict and the participation of the prosecutor.

3.3. Procedure for solving the application for stay of execution of sentence

As shown above, in case of stay of execution of sentence on grounds of illness, there is a preliminary procedure in which the judge in charge of enforcement verifies the provisions regarding the jurisdiction of the enforcement court and orders the forensic examination.

After the expert examination has been carried out, the judge designated for enforcement purposes will notify the court in order to solve the application.

This preliminary procedure is not applicable in the case of an application for stay of execution of sentence where the state of pregnancy or the existence of a child under the age of 1 is relied on, in which case the application is submitted directly to the enforcement court.

The procedure for solving the application for stay of execution of sentence is carried out in a public hearing, with the summoning of the convict and the mandatory participation of the prosecutor, in accordance with the provisions of article 597 of the Code of Criminal Procedure. The legal text also stipulates that the judge presiding over the court panel will take measures to have a court-appointed counsel designated in the cases set out in article 90 of the Code of Criminal Procedure.[27]

The judgement by which the court rules on the application for stay of execution of sentence may be appealed to the hierarchically higher court within 3 days from the communication thereof. The appeal is heard in public session, with the summoning of the convicted person and the mandatory participation of the prosecutor. The decision of the court solving the appeal is final.

3.4. Effects of the decision to accept the application

The decision to accept the application for stay of execution of sentence results in the release of the convicted person for the period set by the court, where the judgment is enforceable. If the warrant of execution of sentence has been issued, it remains valid, as the stay is not a cause for annulment or suspension of execution. The admission of the application for stay of execution of sentence does not have effects on the other provisions of the judgment, so that the other provisions can be enforced (for example the provisions on court expenses, special confiscation, civil obligations). During the stay of execution of sentence, the accessory punishment will be executed, considering that the provisions of article 65, paragraph 3 of the Criminal Code stipulate that "the accessory punishment of the prohibition of exercising certain rights shall be executed from the moment when the conviction becomes final until the main custodial sentence is executed or considered as having been executed."

The stay of execution of sentence constitutes a reason for suspending the course of the limitation period of sentence execution.

If, during the stay of execution of sentence, another warrant of execution of the prison sentence is issued to the convict"s name, it cannot be enforced before the stay period set by the court expires, or, as the case may be, before the cause of the stay has ceased [article 589, paragraph (6) of the Code of Criminal Procedure].

Furthermore, where the application for stay of execution of sentence is allowed, the court must impose on the convicted person the observance of several obligations. In this regard, article 590, paragraph 1 of the Criminal Code stipulates that during the stay of execution of sentence, the convict must comply with the following obligations:

a) not to go beyond the territorial limit set except under the conditions established by the court;

b) within the time limit established by the court to contact the police body designated by it in the decision to stay the execution of the prison sentence in order to be registered and to agree on the means of permanent communication with the supervisory body, as well as to appear before the court whenever summoned;

c) not to change their home without prior notice to the court that ordered the stay;

d) not to possess, not to use and not to carry any category of weapons;

e) for the case provided in article 589, paragraph (1), letter a), to report immediately to the healthcare unit where they are to undergo treatment, and for the

[26] Mihail Udroiu, *Procedură penală, Partea specială*, fifth edition, C.H.Beck Publishing House, Bucharest 2018, p. 753.

[27] Article 90 stipulates that legal assistance is mandatory: a) when the suspect or defendant is a minor, admitted to a detention centre or an educational establishment, when detained or arrested, even in a different case file, when the safety measure of medical admission was ordered relative to the same, even in a different case file, as well as in other cases provided by law, b) if the judicial body considers that the suspect or defendant could not defend himself, c) during the preliminary chamber proceedings and during the trial in cases where the law provides life imprisonment or imprisonment for more than 5 years for the committed crime.

case provided in article 589, paragraph (1), letter b), to care for the child under the age of 1.

Also, according to article 590, paragraph (2), the court may impose on the convict the compliance with one or more of the following obligations:

a) not to attend certain places or certain sporting, cultural or other public gatherings, as determined by the court;

b) not to communicate with the injured person or with their family members, with the persons with whom they have committed the crime or with other persons, as determined by the court, or not to approach them;

c) not to drive any vehicle or certain specific vehicles.

4. Revocation of the stay of execution of sentence

During the stay of execution of sentence, the convict is required to comply with the obligations imposed by the sentence by which the application was allowed. In connection with such obligations, the legislator also laid down sanctions in case of their breach. Thus, article 591, paragraph (4) of the Code of Criminal Procedure stipulates that in case of breach in bad faith of the established obligations, the enforcement court revokes the stay and orders the execution of the custodial sentence.

The police body designated by the court in the decision as being in charge of the supervision of the person relative to whom the execution of the sentence was stayed regularly verifies that the convict complies with their obligations and draws up a monthly report in this respect for the enforcement court.

The procedure for handling the revocation application is carried out according to the general rules regarding the execution provided by article 597 of the Code of Criminal Procedure, more specifically in public hearing and adversarial proceedings, with the summoning of the convict, the participation of the prosecutor and the designation of a court-appointed lawyer in cases of compulsory legal assistance, as set out in article 90 of the Code of Criminal Procedure.

The enforcement court rules by its judgment and may dismiss the application if it is found that the obligations have not been breached, or that they have been breached but not in bad faith, or may allow the application if the obligations have been breached in bad faith.

An appeal may be lodged against the judgment by which the application for revocation is handled within 3 days from communication. The hierarchically higher court rules on the appeal by final decision.

5. Comparative law issues

The **Italian Criminal Code** provides for two categories of stay of execution of sentence. Particularly, article 146 provides for the situations in which the stay of execution of penalty is mandatory, whereas article 147 provides for the cases of optional stay of execution of sentence.

In accordance with article 146 of the Italian Criminal Code, the execution of a non-monetary penalty is postponed: if it refers to a pregnant woman, if it refers to the mother of a child up to the age of 1, if it refers to a person proven to suffer from AIDS or a serious immune condition acknowledged according to article 286-bis of the Code of Criminal Procedure or another extremely serious illness due to which their state of health is incompatible with the state of detention, when the person is in a stage of the illness so advanced that they no longer respond to treatments and therapies provided in the penitentiary. The Italian legislator provided that the stay would not be ordered, or if ordered, would be revoked, in case the pregnancy is interrupted or the mother is declared deprived of her parental rights over the child, or if the minor dies, is abandoned or entrusted to others.

Unlike national law, the Italian Criminal Code also provides for certain optional cases of ordering the stay of execution of sentence. Consequently, article 147 of the Italian Criminal Code stipulates that the execution of the penalty may be postponed:

a) if an application for pardon has been submitted and the execution of the sentence must not be postponed according to article 146;

b) if a custodial sentence must be applied against the person who is in a state of physical infirmity;

c) if a custodial sentence must be applied against the mother of a child up to the age of 3.

In the latter case, if the mother is declared deprived of her parental rights over the child, or the child dies, is abandoned or entrusted to other persons, the revocation of the stay of execution of sentence will be ordered.

In **Spain**, the serious incurable disease of the convicted person is a reason for conditional release, without requiring the fulfilment of other conditions necessary to order the release, not even the execution of a certain fraction of the sentence, while being necessary to draw up a forensic report on to the condition of the convicted person.

In **Greece**, too, the convict"s illness is a reason for conditional release, without the need to meet the other conditions required for release. Thus, article 110 A of the Greek Criminal Code stipulates that conditional release is ordered regardless of whether or not the conditions laid down by article 105 and article 106 are met if the convict suffers from an acquired immunodeficiency syndrome or chronic renal failure and undergoes regular haemodialysis, or from drug-resistant tuberculosis or is tetraplegic or has undergone liver, bone marrow or heart transplantation, or from terminal stage malignant neoplasm, or from liver cirrhosis with disability of more than 67%. Moreover, the same code stipulates that release will be ordered for

convicted persons who are in a state of disability of more than 50% if the view taken is that detention in penitentiary would be extremely burdensome due to their inability to self-care. The fulfilment of the aforementioned conditions will be verified upon the request of the convict by carrying out a special expert investigation. If it is found that the convicted person suffers from one of the illnesses mentioned above, they will be conditionally released and the period elapsed from the date of release is calculated as actual time of execution of sentence.

In **Slovakia**, the Code of Criminal Procedure provides that the execution of a prison sentence may be postponed in the case of a pregnant woman or a woman who has a child under the age of 1. The law allows for the stay of a prison sentence by up to one year for other serious reasons as well, but a stay of more than 6 months is possible only in exceptional circumstances, especially if the service of sentence could have particularly serious consequences for the convicted persons or their families, which is assessed individually.

6. Conclusions

The completion of the activity of achieving the criminal justice goals involves immediate execution of final criminal judgments and continuity in the enforcement activity. However, there are also exceptional situations, where criminal enforcement is suspended as a result of the intervention of some impediments in the execution of the sentence. The stay of execution of prison or life sentence is precisely such a situation.

The stay of execution of sentence is an expression of the humane character of law, an institution whereby the legislator aims at addressing the issue of people in special situations, in situations of inferiority or helplessness, so that immediate deprivation of liberty does not cause serious consequences on the health of the convicted person or the child up to the age of 1.

The stay of execution of sentence is not a removal of the penalty applied to the convict, but merely a postponement of the moment from which it should begin. In order to avoid situations of unjustified stay of execution of sentence or even removal of execution of sentence, the legislator expressly and restrictively laid down the instances and conditions in which the convicted person may obtain the stay of execution of sentence.

The legislator also provided how the convicted person should be supervised, the obligations that they must comply with, as well as the sanctions that incur in case of non-compliance in the event that the stay of execution of sentence is ordered.

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THE LEGAL REGIME OF POSSESSION IN ROMAN LAW

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Abstract

Unlike modern legal doctrine, the Romans, practitioners by definition, saw in their possession an independent legal title. According to the Roman conception, subjective rights and states of affairs are not synonymous, and possession was a state of affairs (legally protected since the time of the republic.). As a result, they never perceived possession as an attribute of property, instead considering it only an outward sign of it. Being a simple state of affairs, in the first centuries of the Roman state the possession was deprived of legal protection. In time, however, with the evolution of the procedural realm, the legal protection of possession began to be guaranteed by the interdicts of the possessor who could place the possessor in a privileged position even towards the owner. In this sense, we mention that in the case of an action in claim, the possessor had the quality of defendant, and the owner had the quality of plaintiff. As the burden of proof fell on the plaintiff, the possessive defendant could defend himself by stating only: I possess because I possess. The article aims to follow the evolutionary path of possession from a simple state of affairs to an independent legal title whose legal protection has gained a wide scope.

Keywords: *possession, legal regime, state of affairs, attributes of property, Roman law.*

1. Introduction

In modern law, possession has a wide doctrinal exposition. The luxury of knowing the depths of this legal institution is due to a solid pre-existing construction that bears the signature of the Roman people. Contemporary jurists have assumed the role of adapting to the context of the era an already elaborated legal system. For this reason it is vital to analyze the extraordinary dimension of the Romans' creative effort to mould all these concepts, principles and institutions that underlie contemporary civil law and implicitly possession.

The specificity of the Roman law system consists in the fact that its very construction is the product of a long process of reporting to the needs of society. Roman law was an eminently procedural law, developed in permanent accordance with the requirements of practice, the legal innovations not having a legislative character. The protagonists of the process of elaborating the Roman law system were praetors, judicial magistrates who, based on the principles of fairness and good faith, in the absence of their legislative consecration, sanctioned new subjective rights, using procedural means, whenever they found that the plaintiff had a legitimate claim.

The architects of the Roman law system concentrated their creative resources around the idea of power. We can say that the very essence of Roman legal constructions was the representation of dominion in the legal realm. But the nuances that dominion endured in Roman times go beyond both the historical dimension and the matter of real estate rights.

Indeed, the Roman Empire imposed itself globally as an unstoppable military force and yes, they had a very clear representation of the concepts of ownership, possession, detention, but the materialization of power is not limited to these spheres. On the contrary, on closer inspection it can be seen that even interpersonal relationships revolved around the idea of power.

In this sense we mention the way in which the Romans defined, in ancient times, the family as the totality of goods and persons that were under the power of the same master (*pater familias*). Moreover, depending on the person or object on which it is exercised, the power of the head of the family had a different name. Thus: the power of the man over the woman was called *manus*, the power of the father over the descendants was called *patria potestas*, that of the master over the slaves *dominica potestas* and that of the master over other goods besides slaves, *dominium*[1]. There even was a type of power that the buyer exercised over the son sold by the *pater familas*, known as *mancipium*. For a long time, the rights that pater familias had over family members could be confused with the rights of the owner over his property. More precisely, just as the owner's right over his property had an absolute character, so could the *pater familias* dispose of the fate of those under his power according to his own will, and this included even the right of life and death over them.

Another example of the relevance that the idea of power had is portrayed in the matter of inheritance. Initially, the Romans did not accept the idea of transmitting the patrimony *mortis causa*, as the size of a person's patrimony meant the expression of his power in the community, and in these conditions, the power itself had an individual, non-transmissible character. Naturally, the non-transferability of power principle could not last, because it came in opposition to the principle according to which there can be no patrimony

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[1] Gaius, Institutiones, 1.49.; Emil Molcuț, Drept privat roman, Ed. Universul Juridic, București, 2011, p. 95.

without a holder. As a result of this contradiction, the Romans had to admit the transmission of the patrimony *mortis causa* and to create the systems of legal and testamentary succession. Regarding the legal succession (*ab intestat*) we mention the fact that the very name of the successor (*heres*) springs from the idea of power, *herus* meaning master[2]. The will also appeared as an expression of the unlimited power of the head of the family over the persons and goods under his power, as a legal act meant to ensure the transmission of the power of the pater familias to his descendants and the perpetuation of the property-power principle[3].

Returning to the subject of possession, its regulation also mirrors exactly the phenomenon of diversification of forms of domination. Currently, we find that possession is (both in law and in legal doctrine) grafted onto the property law, being often perceived as an attribute of ownership. Thus, in art. 916, the Romanian Civil Code defines possession as being the exercise in fact of the prerogatives of the property law over a good by the person who owns it and who behaves like an owner. Unlike modern legal doctrine, the Romans, practitioners by definition, saw in their possession an independent legal title. According to the Roman conception, subjective rights and states of affairs are not synonymous, and possession was a state of affairs (legally protected since the time of the republic.). As a result, they never perceived possession as an attribute of property, instead considering it only an outward sign of it.

Through this article we aim to follow the evolution of possession in Roman law, and how it has been in a perpetual adaptation to the requirements of practice, traversing a millennial trajectory from state of affairs, to state of affairs protected by law and even to a distinct legal title from that of ownership.

2. Content

2.1. Origins

Although the great Roman jurists often pointed out that the difference between ownership and possession is a fundamental one (*separata esse debet possessio a proprietate*[4]*; nihil commune habet proprietas cum possessione*[5]), we must not understand from this that there is no connection between the two concepts, but only that ownership and possession were, in the conception of the Romans, two distinct legal titles.

The fact that possession has evolved closely connected with ownership is undeniable. As an expression of the idea of power, the first concept elaborated by the Romans was that of property. Although it has been repeatedly stated that private property (ownership) has been the symbol of the individualistic spirit of the Romans since the beginning, in reality, for centuries, the Romans knew only collective property, either in the form of collective ownership of the gens or in the form of family property. Only after the founding of the Roman state, two new forms of property appear, namely the *collective property of the state* and the *quiritary property*, as expressions of the property-power. In the classical era, *provincial property* and *pilgrim property* were formed, and in the postclassical era, Emperor Justinian achieved the unification of the legal regime of property and thus a unique form of property was born, called *dominium* or *proprietas*[6].

The evolution of the institution of possession was synchronized with the transformations that took place in the matter of ownership, dissociating in time from it and acquiring its own identity. Thus, the genesis of possession is marked by the emergence of collective ownership of the state. The goods that became the property of the state were called *res extrapatrimonium* precisely because they could not be the object of private property[7]. In addition to the goods used by all the inhabitants of the state (*res publicae*), this category also included the territories conquered from enemies, known as *ager publicus*.

In order for these vast lands to prove their usefulness, the Roman state attributed them, for use, to the families of patricians (sometimes free of charge, sometimes in exchange for sums of money). Initially, the relationship between the state and the patricians who benefited from the use of these lands was as clear as possible, as each family received in use an area of land proportional to the labor force they could provide through its own members. In time, however, the size of the lands allotted to the patricians had expanded to such an extent that their cultivation by their own means had become impossible. For this reason, their sub-concession has become a common practice. These sub-concessions led to the emergence of new subjects of law in the reports concerning ager publicus, namely customers. As a result, serious problems arose and with them the need to regulate in detail the legal relations between the state, patrons and customers. The problems we are referring to concern the bad faith of customers who refused to leave the sub-conceded land. In the absence of concrete regulations on the legal relationship between them, the patrons were defenseless faced with the abuses committed by customers. To help patrons, praetors created a legal instrument called the *precarious interdict*. In this context, the term *possessio* is mentioned for the first

[2] Arangio-Ruiz, Istituzioni di diritto romano, Napoli, 1957, p. 513.
[3] See C. Fadda, Concetti fundamentali del diritto ereditario romano, Napoli, 1900.
[4] Dig., 43.17.1.2.
[5] Papinian, Dig., 41.2.12.1.
[6] C.St. Tomulescu, Index, Napoli, 3, 1972, p. 108.
[7] C. Stoicescu, Curs elementar de drept roman, Ed. Universul Juridic, București, 2009, p. 143.

time, as a state of fact protected by law[8]. Since the analysis of the legal protection of possession is the subject of a subsequent individual section, we consider it necessary to *a priori* establish the coordinates of the Roman possession.

2.2. The concept of possession and its constituent elements

Possession designates a state of affairs consisting in the material dominiom of an object, dominiom that enjoys legal protection[9].

Possessio civilis, or as the Romans called it, the true possession (thus delimiting the possessor from the holder), was that possession which met the two constitutive elements, namely *animus* and *corpus*.

Through the volitional element *animus*, the Romans designated the intention to keep a good for themselves[10]. But also in this aspect the Romans distinguished between the intention of the possessor to own the good exactly like an owner, which they called *animus domini* and the intention to possess a certain good without wanting to become the owner of it, which they called *animus possidendi*[11]. *Animus possidendi* has a wider scope than *animus domini*. Thus, the persons who had *animus possidendi* were: the owner, the possessor in good faith, the possessor in bad faith, the long-term tenant, the pledge creditor, the lessee and the seizure-depositor. Animus domini instead had only the owner and possessor of good or bad faith. As the intention to rule implies the existence of legal capacity, naturally, the incapable did not have the aptitude to be appointed owners.

Corpus was the material element of possession as it designated the totality of material acts by which the possessor used a good. By the *corpus*, the Romans understood not only the taking possession of the good, but also the establishment of the deeds by virtue of which the possessor was entitled to behave as an owner towards that good (deeds that could vary from the remote indication of the purchased fund to the handover of the keys to the acquired property)[12].

Although the possession was usually acquired personally by the person who met the two constituent elements, there were also situations in which one person could acquire possession for another person. Such situations concerned the possession *ex peculiariari causa*, acquired by the sons of the family or the slaves of the pater familias for him[13].

Over time, the issue of admitting the gaining of possession with the help of people outside the family has arisen. Initially, the refusal was categorical, as Gaius stated that *per extraneam personam nobis adquiri non posse*[14]. Since the classical era, the acquisition of possession through representation has become widespread, a number of people such as prosecutors, legal representatives of legal entities, guardians and curators can acquire possession for others. Moreover, at the end of the classical era, it was allowed to conclude a special mandate having as legal object the acquisition of possession of a good by the agent in the name and for the person of the principal.

2.3. Possessory interdicts. The legal protection of possession

What must be understood about the Romans is that in the elaboration of law process, theorizing occupied the last position. For this reason, the whole theoretical evolution of possession (from the various types of possession to the effects produced) expressed nothing but the result of the practical reforms carried out in the field of its legal protection. And when we talk about legal protection of possession, we refer especially to the *possessory interdicts*. Depending on the purpose, these possessory interdicts were of three kinds: to obtain, to retain or regain possession (*Sequens divisio interdictorum haec est, quod quaedam adipiscendae possessionis causa comparata sunt, quaedam retinendae, quaedam recuperandae*)[15].

- *Recuperandae possessionis causa* interdicts

Since these interdicts were issued in cases where the possession was a defective one (obtained precariously, clandestinely or by violence), they were of three kinds: the precarious interdict, the *clandestina possessione* interdict and the *unde vi* interdicts[16].

The *de precario* interdict represented the legal means by which the owner recovered possession of his property from the precarious holder (who had received the property as a loan). If the precarious holder refused to return the property upon request, the owner addressed the praetor in order to command the holder to hand over the good.

We began displaying the possessory interdicts with the *de precario* interdict because the very idea of legal protection of the state of affairs called possession is due to it. As it was said, the conceptualization of possession as well as the need to protect it arose in close connection with the lands conquered from enemies, lands called *ager publicus*. The *patrons*, persons to whom the state assigned land owned by the state as possessions, sub-granted them to the customers. As the patrons did not own those lands, they depended on the good faith of the customers regarding their recovery.

[8] J. Gaudemet, Studia et documenta historiae et iuris, Roma, 29, 1963, p. 339.
[9] E. Molcuț, Drept privat roman, Ed.Universul Juridic, București, 2011, p. 109.
[10] M. Cormack, Zeitschrift der Savigny Stiftung, Romanistische Abteilung, Weimar: 86, 1969, p. 105; Al. Minculescu, Precariul în dreptul roman, București, 1935, p. 62.
[11] R. Hutschneker, G. Iuliu, Curs de drept roman, București, 1932, p. 424.
[12] Dig.,42.2.3.1.
[13] Gaius, Inst., 2.89.
[14] Gaius, Inst. 2.95.
[15] Iustinian, Inst. 4.15.2.
[16] R. Monier, Manuel elementaire de droit romain, I, Paris, 1945, p. 394.

However, if the latter were in bad faith, they could easily refuse to leave the land at the request of the patrons, and they had no legal instrument to oblige them. This was until the creation of the precarious interdict by which, with the help of the state, the praetor ordered the client to restore the ownership of the land to the patron.

Although in modern doctrine only the function of protecting the possessor-owner that this interdict fulfilled was taken over, the reality is completely different. We see how the precarious interdict was created in order to protect the patron (a possessor, not necessarily an owner) from the potential abuses of the holders. The genesis of the legal protection of possession also contradicts an idea taken over by contemporaries, namely that Roman possession is confused with an attribute of private property. The *de precario* interdict not only arose in connection with public property but the possessory legal protection of the owner was later enshrined in classical law. The interdict ignited a series of procedural reforms, which in order to meet the requirements of the practice implicitly led to the extension of the scope of possession and the diversification of its forms to the point that it acquired a physiognomy similar to that of real estate rights[17].

The *de clandestinea possessione* interdict sanctioned that possession acquired secretly, in the ignorance of the owner. Although it did not have an extensive exposure in Roman jurisprudence, this interdict deserves its mention because it allowed the exercise of possession only by *animus*, in absence of *corpus*[18].

- The *unde vi* interdicts were the legal instruments through which the person deprived of the good by violence could address the praetor to regain both the good from which he was expelled, and its accessories[19]. As such, the expected effect of these interdicts was not only to restore the previous situation, but also to obtain the fruits of the good or damages[20]. Depending on the nature of the violence through which the dispossession was carried out, the Romans distinguished between the *unde vi cottidiana* interdict (characterized by the use of ordinary means of violence), subject to a limitation period of 1 year and the *unde vi armata* interdicts (meaning dispossession by violence committed by a group of armed men) who were not subject to this term of extinctive prescription.
- *Retinendae possessionis causa* interdicts

Addressed to both parties (both were equally plaintiffs and defendants to each other), the interdicts on the preservation (retaining) of an existing possession had a prohibitive character. In real estate, the interdict used was called *uti possidetis* and the one through which the possession of movable property was protected was called the *utrubi interdict*.

By the *uti possidetis* (as you possess) interdict the one who was in possession of the good at the time of issuing the interdict maintained his possession until (at least) the settlement of the action in claim. The condition for him to maintain his possession, however, was that the possession exercised by him should not be vitiated, i.e. obtained by violence, clandestinely or precariously. Otherwise, the opponent could easily oppose a *vitiosae possessionis* exception by overturning the grant of possession.

The *utrubi* interdict individualises itself from the *uti possidetis* interdict also by the moment when the possession was related. Thus, although both interdicts protect the unblemished possession, the one protected by the *utrubi* interdict is not necessarily the one who possesses the good at the moment of issuing the interdict, being able to be either one of the two opponents[21]. This is because the dominion was attributed to the one who had it in his possession for the longest period in the year before the interdiction was issued.

- *Adipiscendae possessionis causa* interdicts

Examples of such interdicts aimed at acquiring a possession that did not yet exist were the *Salvianum* interdict, the *sectorium interdict*, and the *quorum bonorum* interdict[22]. Through the Salvianum interdict, the owner of an estate could acquire possession of the things left behind by the settler as collateral for the payment of the rent. Through the *quorum bonorum* interdict the praetorian heir acquired possession of the succesion assets and the *sectorium* interdict came to the aid of the buyer of goods subject to forefeiture.

Typical of all the possessory interdicts was the fact that they had a temporary character, the recognition of the rights of the parties gaining a definitive character only by solving the in claim legal action.

2.4. Various types of possession

Depending on the legal protection they benefited from, the object on which they wore or the effects they produced, the Romans distinguished between several types of possession, as follows: *possessio civilis, possessio ad interdicta, possessio ad usucapionem, iusta possessio, bonae fidei possessio, possessio iniusta and possessio iuris*[23].

Possessio civilis is a concept detached from that of *possessio* with the takeover of the idea of legal protection of a state of affairs from public law to private law. This enshrines the very notion of domination in fact exercised over the property of a person, and not over the property of the state. This type of possession

[17] E. Molcuț, Evoluția funcțiilor posesiunii în dreptul roman, Revista Română de Drept Public nr.3, 2010, Ed. C.H.Beck, București, p. 98.
[18] Gaius, Inst., 4.153.
[19] C. Stoicescu, op. cit., p. 162.
[20] P.F. Girard, Textes de droit romain, ed. A 6-a, Paris, 1918, p. 287.
[21] Gaius, Inst. 4.151.
[22] Gaius, Inst., 4.146.-4.147.
[23] E. Molcuț, Evoluția conceptului de posesiune, In honorem Valeriu Stoica, Ed. Universul Juridic, București, 2018, p. 416.

leads to the acquisition of ownership by acquisitive prescription, as opposed to *possessio naturalis* of the holder who can never strive for such an acquisitive prescription. Specific to civil possession is that it has its origins in the sources of Roman civil law, and not in Praetorian law, which for a long time led to the exclusion of *ad interdicta* possession from its content.

Possessio ad interdicta meant possession protected by interdicts. Starting from the *de precario* interdict of the old era, in time, the legal protection of the possessors extended to the private domain. The possessory interdicts guaranteed the undisturbed possession. Thus, in the event that a third party, by his actions, inhibited or inconvenienced the possessor in exercising his possession over the good, the latter requested the praetor to issue on behalf of the third party an injunction ordering the cessation of any action in that direction.

Why were such interdicts seen as blessings for possessors? If we start from the premise that all owners are possessors, why not simply appeal to the legal action in claim? The answer is simple: the one who brought an action in claim was obliged to *probatio diabolica*, which meant that he had to prove the title deed of all those who previously owned the property. Such a burden proved itself to be cruel to the applicant. By appealing to the possessory interdicts on the other hand, the applicant was not subject to such harsh steps. In addition, if the owner himself was the defendant, he could simply defend himself by *saying I possess because I possess (possideo quia possideo),* without having to prove whether he was the owner or explain how in which he came into possession of the good.

The doctrine has rightly raised the question: how fair is the legal protection of possession as a legal title in its own right, given that the advantages of interdicts could benefit the possessor even if he is the one who stole a good?

In the effort to elucidate this dilemma, two theories were distinguished. The author of the first theory, Savigny[24], argued that through the mechanism of legal protection of possession was in fact protected the very social order consolidated on the idea of domination. Indeed, for a long time the Romans correlated the power of a person in society with the dominion that person exercised over things. In this context, depriving man of his goods or forcing him to justify his control over the goods were real attacks on the social position. It can be seen how possession was associated as an extension of personality, and the attack on possession was in fact an attack on the personality of the possessor. Precisely for this reason, Savigny said, the praetor was obliged to intervene in order to maintain social order to protect possession as a matter of fact (state of affairs).

Jhering[25] contradicts Savigny and argues in the second theory that possessory interdicts were not created to protect the personality of the possessor, who could ultimately be the thief himself, but to protect the legal right to property. It may seem a paradox: the right to property should be protected by the very lack of obligation to be proven by the owner. But it is not. From a statistical point of view, it is presumed (justifiably) that the number of possessors who are at the same time owners of the property is much higher than those possessors who stole the property from the ownership of a proprietor. Jhering therefore takes into account a presumption of lawful acquisition of property. According to Jhering, the same principle led to the legal protection of Roman possession. A contrary presumption would have tragic procedural effects: anyone could be accused at any time of stealing the property they own and the defendants would have to constantly prove their innocence in court by presenting evidence of legal acquisition of property. For these reasons, the Romans considered that it is not natural to oblige the one who owns a patrimony to be always ready to prove his quality of ownership in front of any accuser. All the more so as it was often extremely difficult, if not impossible, to prove the legal path taken by that property to its present dominion. Much more justified is the attribution of the burden of proof to the accuser (the plaintiff). Besides, due to the intervention of the praetors, the injust possession did not benefit of legal protection. Being procedurally consecrated, *possessio ad interdicta* was not included in the category of *possessio civilis*, until the time of Emperor Justinian who recognized it as legal possession.

Possessio ad usucapionem. As the name suggests, it was the possession that could lead to the obtaining of the legal right of ownership through acquisitive prescription. Of course, for such a result, in addition to the actual possession, it was necessary to meet all the other conditions of *usucapionem* (the good to be susceptible to such an acquisition, just cause, good faith and the fullfilment of the term).

Iusta possessio, iniusta possessio and *bonae fidei possessio* must be regarded as different sides of the same coin. *Iusta possessio* was civil possession, recognized by positive law and of course also benefited from legal protection[26]. At the opposite pole is *iniusta possessio*, as flawed possession (acquired by violence, clandestinely or precariously). This had the effect of lifting the legal protection of that person's possession. *Bonae fidei possessio* emerges from the legal conditions of civil possession, promoting the good faith of the possessor as an important element in the recognition of his mastery. Thus, possession in good faith is that in which the possessor is convinced that he has acquired the good from the owner or from a person capable of transmitting it by contract. Moreover, in the

[24] See F. K. Von Savigny, Das Recht des Besitzes: Eine civilistische Abhandlung, Viena, 1865.
[25] See R. von Jhering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Leipzig, 1866.
[26] G. May, Elements de droit romain, Recueil Sirey, Paris, 1925, p. 257.

category of bona fide possessors were also included the persons who occupied abandoned goods[27].

Possessio iuris or *quasipossessio* expresses the extension of the scope of possession from tangible property to property rights (patrimonial legal rights)[28]. Indeed, until the classical era, such a thing was inadmissible, since in the conception of the Romans only tangible goods could be susceptible of *corpus*. With the theorizing abstracting of real estate rights and especially of the right of servitude, the adaptation of the institution of possession to the new legal realities was necessary. Thus, through *quasipossessio*, the Romans admitted the possibility of exercising possession over some patrimonial legal rights.

3. Conclusions

Although it has never been confused with the legal right of ownership, we cannot deny that the legal regime of possession has evolved in close connection with the changes that have taken place in the matter of property. Thus, the word *possessio* was used for the first time in connection with the collective property of the state, out of the need to somehow protect the state of affairs in which the patrons found themselves in a legal relation to the customers.

Then, in relation to the *quiritary property*, the possession expressed the external form of the ownership. For this reason, it could sometimes be confused with the attributes of property (*usus, fructus* and *abusus*). However, this confusion can be easily dismantled. First, possessio being a state of affairs, could not be classified as an attribute of civil property, a state of law with a well-defined legal content[29]. Secondly, the proof of the fact that the Romans regarded the possession as a distinct legal title lies precisely in the equal manner of legal protection of the non-owner-possessor with that of the owner-possessor[30].

There existed an almost fraternal relationship between good faith possession and Praetorian property. The praetors recognized to the *bonae fidei possessors*, through the *actio publiciana*, a praetorian property right even when the acquisition was not made from the owner, assimilating this possessor with the one who obtained the property through acquisitive prescription[31]. Finally, even the *provincial property* was characterized by the attribution of a possession over lands in the provinces of the state to non-citizens.

In modern doctrine, possession may no longer be a major subject of interest, being seen rather as an instrument in understanding and deepening the legal right of ownership, but for the Romans this was not the case at all. Being flawless practitioners, without having too many theoretical concerns, they have dedicated themselves to shaping an identity specific to the concept of possession and this can be seen from the very path taken by it: from simple state of affairs, state of affairs protected by law , to a distinct legal title that in the time of Emperor Justinian acquired a physiognomy similar to that of real rights.

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ROMANIAN REGULATIONS ON DISCRIMINATION: A CRITICAL OVERVIEW

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Abstract

Discriminatory behaviour is often considered normality in the Romanian society and its consequences are easily accepted or ignored. Compared to other Member States of the European Union that have a tradition in respecting the principle of human dignity and the principle of equality of treatment, Romania still faces difficulties with regard to assimilating the importance of these principles and integrating their non-discrimination dimension. Despite the fact that Romanian law has implemented European norms in the matter of non-discrimination, the existence of a legal framework didn't come with achieving the purpose for which they have been introduced. In the absence of an effective enforcement mechanism and of a social context in this respect, the law hasn't brought the necessary changes regarding equality and dignity rights and, implicitly, to the personal and social life's dynamic. The article aims to present some critical analysis of the extent to which Romanian law contains sufficient, articulated and coherent legal rules in the field, applicable to both those protected and those having obligation to protect, to identify the aspects with regard to which the domestic legislative framework requires to be modified and to propose the lege ferenda amendments, so that its provisions would be a consistent support for the purpose of non-discrimination in Romania.

Keywords: *discrimination, dignity right, equal opportunities expert /technician, law, education.*

1. Introduction

In the context of Romania's accession to the European Union, the Council Directive 2000/43/EC of June 29th, 2000 implementing the principle of equal treatment between people irrespective of racial or ethnic origin[1] and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation were transposed in the national legislation.[2]

The Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations[3] and the Law no. 202/2002 on equal opportunities and treatment for women and men[4] are the main national normative acts adopted in order to prevent violation of the equality and dignity rights through discrimination.[5]

The Romanian society was not really prepared for such novelties in the year 2000 and now, after twenty years, even the national legislation provides for a certain level of protection of each human being's dignity, the respecting of the principle of equality of treatment, the mentality didn't evolve in a significant manner.

School, family, work, society in general are places where vulnerable persons' rights are ignored and infringed. In a lifetime, from bullying in schools to discrimination on various criteria in different social domains, including moral harassment at the workplace, to the inadequate treatment of seniors, infringements of the dignity are common. The discriminatory behaviour is accepted by the society, paradoxically often by those whose dignity has been violated.

The Government Ordinance no. 137/2000 and the Law no. 202/2002 have been modified, motivated by the legislator's will to improve the discrimination concept, to regulate special measures for promotion and protecting human being's rights, to stress the role of public institutions having competence in the domain and to impose more severe sanctions for the contraventions committed by the natural and legal persons who violate the legal rules that prohibit the discrimination. The last amendments were recently adopted through Law no. 167/2020, entered into force on 10 August 2020[6], which is the first Romanian regulation on discrimination in its form of moral harassment at the workplace, reshaping the relationships between employees, between employers

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[1] Published in The Official Journal of European Communities (OJEC) L series, no. 180 from June 19th, 2000.

[2] Published in The Official Journal of European Communities (OJEC) L series, no. 300 from December 2nd, 2000. The Treaty establishing the European Economic Community (1957 -1958) was the first community act which regulated the principle of equal pay for men and women for equal work or work of equivalent value: Article 119 of the Treaty. It is worth noting that the gender equality regulation has begun with this Article 119 and has evolved over the years on the legal base granted by this only one principle applicable at work. Moreover, starting with the gender equality in the labour domain, the non-discrimination as a general issue in various fields and on different criteria has becoming of particular concern for the European legislative bodies.

[3] Republished in The Official Gazette, Part I, no. 166 from March 7th, 2014.

[4] Republished in The Official Gazette, Part I, no. 326 from June 5th, 2013.

[5] In the labour field, where the discriminatory behaviour is regularly manifested, the European law has been implemented and a numerous number of normative acts, including legal rules on the discrimination prohibition, have been adopted.

[6] Published in the Official Gazette no. 713/7 of August 2020.

and employees at work, based on the respect of the dignity right[7].

The aim of our study is to analyse the extent to which the above mentioned normative acts guarantee their goals' achievement and to find out parts of the legislation that may be modified in order to safeguard the protected rights.[8] Beyond a general analysis of the legal framework, the article aims to emphasise the long way from the rules of law to the real life and to design some possible solutions to connect theory with practice.

2. Aspects of Romanian legislation on discrimination: *equal opportunities experts/ technicians*

2.1. The current legal framework

In our day by day life, we are witnesses or even subjects to discrimination on gender, meaning that a man or a woman are treated less favourable or in a disadvantageous way with the violation of their dignity.

Contrary to the collective perception, it is important to underline that subject to discrimination may be a woman, as well as a man. The Law no. 202/200 is addressed equally to them being intended to regulate the equality of opportunities and treatment between women and men.

In the meantime, discrimination against women is one of the most frequent and visible types of discrimination. The discrimination of women is a phenomenon, despite of the existence of European and national regulations having as purpose to protect their rights.

In the juridical literature, the role of legislation in changing the women's lives was very suggestively expressed. At the end of a very consistent research of a numerous European and domestic regulations regarding women's rights and equal treatment in the labour domain[9], two of the author's[10] legitimate questions are: "what role ought the law fulfil: to make women's "*double work norm"* easier, to create better conditions for doing the same family activity which is unpaid and peripheral to the labour market, to emphasize and perpetuate the stereotypes regarding the predilection of women for domestic life? Or instead to completely change this state of affairs, enshrining not false equal opportunities, which the majority of women cannot exploit as long as taking care of their family is considered their "*natural obligation*", but a real equality, based on real opportunities? *"*

The author considers that "the difficulty of finding an answer comes from the maintaining of the unbalanced distribution of domestic and household tasks within the family, from the type of education women receive from a young age, from the cultural pattern they are exposed to and from the expectations of society, which still differ by a wide margin regarding women and men. The role of legislation seems only secondary in relation with other parts of social life, especially education ."

As what we are concerned, we totally agree with the points of view above.

In our opinion, the legal framework in the domain, even if it could be substantially improved, grants to a certain extent legal tools against discrimination. Education, family, balance, roles are key words in order to go forward in real life with the existing legal framework. In other words, the respecting of the right to dignity and of the right to equal treatment is not necessary weakened by a law level of regulation, but by a law level of awareness, respecting and application of the legislation in force. Holders of rights and obligations from the juridical point of view, each of us must acknowledge that every human being has the right to dignity and the right to equal treatment, what these rights consist of, why it is demanding to observe the other's rights, why to expect our own rights be recognized and how to defend ourselves in case these rights are infringed.

Taking into consideration the particularities of the rights protected through non-discrimination regulations, their efficiency is dependent on the legal measures and actions promoting and applying equal opportunities and equal treatment.

De lege lata, a solution was granted by the Romanian legislator through the *Law no. 178/2018[11] that amended the Law 202/2002.*

The *Law no. 178/2018 has introduced in the field of* equality of chances and treatment between women

[7] See Bejan, Felicia The First Romanian Regulations on Moral Harassment, Agora International Journal of Juridical Sciences, vol. 14 No 2/2020, p. 32 and the following.

[8] Regarding some particular aspects of discrimination, see Anghelescu, Carla Alexandra, Boroi, Gabriel, The prohibition of discrimination of art. 14 of the European Convention of human rights in matters of inheritance and affiliation regarding the provisions of the New Civil Code Challenges of the Knowledge Society, CKS-eBook, Nicolae Titulescu University Editorial House, Bucharest, 2013, p. 153 and the following and Bejan, Felicia, Equal Treatment of Young People and Seniors: "Pleading" for a Special Law on Age Discrimination, Challenges of the Knowledge Society, CKS-eBook, Nicolae Titulescu University Editorial House, Bucharest, 2018, p. 197 and the following.

[9] The Labour Code regulates under the paragraph 2 of the Article 5 a general prohibition of discrimination: „any direct or indirect discrimination towards an employee, discrimination by association, harassment and victimization, based on race, national origin, ethnic origin, colour of the skin, language, religion, social origin, genetic characteristics, sex, sexual orientation, age, political options, disability, non contagious chronic disease, HIV infection, political options, family conditions or responsibilities, union membership or activity, belonging to a disfavoured category criteria shall be prohibited." The paragraph 5 of the same article specifies that discrimination is defined as being „any type of behaviour based on one of the criteria stipulated in the paragraph 2, aiming to or resulting in the violation of dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment."

[10] Dimitriu, Raluca, The presence of women in the labour market, Universul Juridic, 19 of December 2017, p. 2, https://www.universuljuridic.ro/, accessed on March 2021.

[11] Published in the Official Gazette no. 627/ 19 of July 2018. Law no. 178/2018 introduces also a new concept in the field, respectively gender violence – act of violence directed against a woman or, as the case may be, a male, based on gender.

and men, *two aspects that may generate changes in mentalities and practices:*

a) *there were created two special occupations in the field: expert in equality of chances* and *technician in equality of chances;*[12]

b) the law provides that public authorities and institutions, as well as private companies having more than 50 employees have the possibility to hire an *expert in equality of chances* or a *technician in equality of chances* or may assign to an existing employee certain related attributions, in order to promote and ensure the applicability of the non-discrimination and equality legislation at the work place.[13]

According to Article 2 paragraph 5 of the Law no. 202/2002, as it was modified by the Law no. 178/2018, the main attributions corresponding to *expert/technician in equality of chances* occupation are*:*

a) shall analyze the context within which the gender discrimination phenomenon occurs and evolves, as well as non-compliance with the principle of equal opportunities between women and men and recommends solutions that lead to the compliance with this principle, in accordance with the law;

b) shall make recommendations/ observations/ proposals with the purpose of preventing/ managing/ remedying the context of risk which might lead to the non-compliance of the equal opportunity and treatment principle between women and men, while respecting the principle of confidentiality;

c) shall propose measures ensuring equal opportunities and treatment between women and men, evaluates their impact on women and men;

d) shall elaborate action plans regarding the implementation of the equal opportunity principle for women and men which will include at the very least active measures to promote equal opportunities and treatment between women and men and the elimination of both direct and indirect discrimination by the gender criterion, measures to prevent and fight work place harassment, measures regarding the equality of treatment in the case of remuneration policy, promotion and filling decision-level roles within a company;

e) shall elaborate, evaluate and implement programs and projects in the domain of equal opportunities and treatment between women and men.

Moreover, Methodological Norms for application of the Law 202/2002, as it was modified by the Law 178/2018,[14] were approved by Romanian Government in 2019.

The implementing norms lay down active prevention measures and action plans[15] which the employers have the obligation to develop.

2.2. A more effective legal regime: *de lege ferenda* proposals

The Romanian legislator's *will to create occupations as experts and technicians in equality of chances has the potential to play a key role in changing the* perspective regarding *"protection*" of women.

As it was shown in the doctrine[16] "women have been the constant subject of "*protection*". They are often offered social assistance, helped through charities, living through an experience of being treated as helpless beings [...], experience whose nature increases and reproduces their disadvantageous position, instead of contributing towards a real partnership in developing values and society along men. "*Protective*" politics, which emphasize the women's position as a victim, and not as a partner, end up in perpetuating the stereotype that envisions women as belonging to the social group who needs assistance, who consume resources without producing anything, who are rather inclined to request help from their community rather than offer it."[17]

What the Law 178/2018 brings new is *"the possibility"* to have concrete measures to prevent, combat and eliminate all forms of gender discrimination in some spheres of public life in Romania.

In our opinion, the impact of the provisions of the *Law no. 178/2018 in terms of results could be significantly increased if some amendments will be adopted.*

Thus, *de lege ferenda the Article 2 paragraph 4 should be modified as follows:*

"*the central and local* public authorities and institutions, civil and military, as well as private companies *having more than 50 employees have the obligation* to identify an existing employee and to assign certain attributions in the domain of the equal opportunity and treatment principle between women and men through the job description, on the basis of their knowledge *and* training in the field.

Within the existent budget, the employer *may choose to fulfil this obligation* by hiring an *expert* or a *technician in equality of chances*.

The employers *having less than 50 employees may have the possibility* to assign certain related

[12] Regarding the occupation of expert in equal opportunities, it is considered that is necessary to implement rigorous regulations on professional standards which those experts ought to fulfil such that their expertise be real.

[13] Article 2 paragraph 3 and paragraph 4 of the Law no. 202/2002.

[14] Published in the Official Gazette no. 333/ 2 of May 2019.

[15] According to the Article 3 paragraph 1 of the Methodological Norms the action plans "will be developed by the designated person empowered in the field of equal opportunities and treatment between women and men or, where appropriate by the expert/technician in equal opportunities, in consultation with the human resources department. Finally, they will get approval from the trade unions in case that they are formed at the level of the entity, and later on will be forwarded to management for approval." The Methodological Norms also provides that, in case of designating of an existing employee to carry out these duties "the employer shall consider the need to identify training opportunities, within the limit of the existing and approved budget for expenditure on this destination."

[16] Dimitriu, Raluca, ibidem, p. 2.

[17] Dimitriu, Raluca, ibidem, p. 2.

attributions to an existing employee or may hire an *expert or technician in equality of chances* in order to promote and ensure the applicability of the non-discrimination and equality legislation at the work place, on the basis of their knowledge *and* training in the field".

Our legislative proposals are based on the following reasons:

- although more than two years have passed from the coming into force of the legal rules stipulating the possibility of having an employee or an expert/technician in the field, few companies and institutions choose to integrate this into their organization; we consider this reaction time could be shortened through stipulating an imperative obligation for employers in this regard, within a special period of time;

- the most decision-making positions in institutions and companies are occupied by men, especially in the public institutions; the women's *under-representation can justify poor application of the legal provisions, as their interests are not represented*[18] *until an inclusive and diverse leadership will be achieved, an imperative character of the analyzed legal rules is required;*

- the proposal does not necessarily exceed the annual budget, taking into consideration that the law shall allow the employers to assign these competences to an existing employee, after completing a specialization training in the domain; on the other hand, the amount of money invested for this purpose *by the employers is worth its value: will improve the work conditions and the working relations, will have important* social and economic consequences**,** *reflected in the results of the activity, whether financial or otherwise;*

- it is compulsory for the expert/technician /existing employee, as the case may be, to fulfil high professional standards, based on specialized studies/experience in the field;

- the proposals stipulate a different legal regime on the base of the number of employees, the expert/technician or similar being compulsory for employers having more than 50 employees and voluntary for employers having less than 50 employees.

Apart from the advantage of safeguarding the rights of women and men without discrimination, another benefit of a new legislative framework in this respect is the educational side. Implicitly, the mentality of the employers and of the employees will evolve, taking a serious equality path. Otherwise, our society will lose the opportunity to make real changes, remaining in the half-measurement area.

Studying the application of the analyzed legal provisions between 2018-2021 and relating this study to the objective of the legislator, those to mitigate and eliminate the discrimination between women and men, the adoption of imperative legal rules in domain is the most realistic legislative answer in order to guarantee the law's goals fulfilment.

Furthermore, in order to achieve a society *"free of discrimination*", the model of experts can be extended from labour to education, health, culture and information, policy, participation in decision making, supply and access to goods and services and other social fields regulated by special laws[18] and to all criteria provided for by the national legislation in force.[19]

3. Conclusions

Women represent more than half of the World's population, reduced most often to the family role and responsibilities, irrespective of their capacities, studies, skills, efforts, merits, creativity, needs or aspirations.

Against this background, their professional life, independence, social relationships, family relationships, life quality are severely affected. The discrimination issue is about dignity and equal opportunity, and about economic life, social life, own development, choices and decisions, as well.

In the Commission Communication *A Union of Equality: Gender Equality Strategy 2020-2025* it is pointed out that "44% of Europeans consider that the most important role of a women is to take care of her home and family" and that "women in the EU spend 22 hours per week on care and house hold work, while men spend only 9 hours"[20] Also, women's incomes in Europe are lower on average by 16% compared to men and they have difficulties in accessing and maintaining jobs.

Despite of the slow progress, The European Union's representatives have an optimistic look toward the future of equality, being decided to integrate it in all of its activities.[21]

As far as our country is concerned, although Romania has implemented European Directives,

[18] According to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -Union of Equality: Gender Equality Strategy 2020-2025, "women are 7,5% of board of chairs and 7,7% of CEO's in the EU's larger listed companies, p. 14.

[18] The Law no. 202/2002 on equal opportunities and treatment between women and men, republished, as it was amended, provides for the measures to promote equal opportunities and treatment between women and men in all spheres of public life in Romania, the labour market, participation in decision making, education being areas which general legal regime is laid down in special chapters.

[19] The discrimination criteria are stipulated by the Article 2 of paragraph 1 of the Ordinance no 137/2000: „discrimination is understood as any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life."

[20] The Commission Communication- Union of Equality: Gender Equality Strategy 2020-2025, ibidem, pp. 6-12.

[21] In accordance with the Article 8 of the Treaty on the Functioning of European Union.

women's discrimination persists and there is still a long way to go. To prevent and eliminate it in social, political, economic, cultural fields, focused measures and actions are needed, aimed at changing attitudes, opinions, mentalities.

A new behaviour comes with education. To have trained experts in equality and non-discrimination or similar is, in our opinion, the *sine qua non* condition in succeeding the practice of equality.

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- Treaty establishing the European Economic Community;
- The Treaty of Lisbon;
- Charter of Fundamental Rights of The European Union;
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- Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation;
- Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discriminations;
- Law no. 202/2002 on equal opportunities and treatment for women and men;
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MALPRACTICE AND CIVIL LIABILITY OF THE HEALTHCARE PROFESSIONALS

Cristian-Răzvan CERCEL[*]

Abstract

The issue of the medical malpractice and the liability of the healthcare professionals is more current than ever, given that the medical activity has been put to the test in the context of the COVID-19 pandemic. Thus, taking into account that the treatment and the medical interventions are exercised directly on the patient, it is necessary to establish the type of liability of the healthcare professionals and whether there are certain limits of the liability for the application of innovative treatment or whether, on the contrary, the application of other treatment schemes than those approved by the international medical forums is likely to attracts the liability of the healthcare professionals.

At the same time, this paper aims to present the national legal framework that defines the essential requirements and limits of liability of the healthcare professionals. At the same time, in relation to the case law and doctrine, this paper will seek to establish the main obligations of the healthcare professionals to patients and the nature of these obligations.

In the end, the opinions expressed over time in the doctrine regarding the basis of liability of the healthcare professionals, whether it is a contractual liability or a non-contractual liability, or a special liability, are presented comparatively.

Keywords: *malpractice, non-contractual civil liability, healthcare professionals, harm, health unit.*

1. Introduction

The medical law, in a general sense, can be defined as a branch of the law consisting of legal rules of domestic, European and international law, which regulated the patrimonial or non-patrimonial social relations that are established between the subjects of medical law, usually between the healthcare professionals (doctor, pharmacist, dentist etc.) or public or private health units and patients.

In the doctrine[32], the medical law has been defined as: 'discipline of thinking between medicine and law, supports the realisation of the right to health of the human, based on the fact that the human being is intangible, and the respect for life goes to the respect for death. The medical law becomes a meeting place for the ideal legal, moral or technical rules, with the concrete medical realities'. The work of the doctor involves the protection of the patient's life, while respecting their rights, especially regarding their dignity. Thus, there was a need to enact rules to protect the patient for situations in which the healthcare professionals or the health units, due to a professional error committed in the exercise of the medical act, cause harm to the patient.

One of the most controversial issues, widely debated, both in doctrine and in national or French case law is related to the legal nature of the medical liability.

Many authors consider that this is a contractual liability, others that it is about a non-contractual eminent liability, and other others consider that we may be close to a contractual or non-contractual civil liability, depending on the contractual circumstances of the case.

In any case, as a rule, the legal relationship between doctor and patient is governed by the principle of *intuitu personae*, because the patient has the right to freely choose their doctor, but also the health unit in which to be cared for.

Last but not least, a special importance is also represented by the liability of the health units for the acts of the healthcare professionals, based most of the times on the liability of the principal for the act of the agent.

For starters, the main applicable national legal provisions will be analysed, and then the issues related to malpractice and medical liability will be presented in detail.

2. Legislation applicable to the medical legal relationship

2.1. National legal framework

The domestic legislation related to the medical law has been codified from the level of the Romanian Constitution. The right to health protection is guaranteed by the Constitution, and according to Art. 34 of the fundamental law *the State is obliged to take measures to ensure hygiene and public health, and the organisation of the health care and social insurance system for illness, accidents, maternity and recovery, control of medical professions and paramedical activities are established by law*.

Then, by Law No. 95/2006 *on the reform in health care*[33] ('***Law 95/2006***') a title that is distinct from the civil liability is enshrined, namely Title XVI, entitled '*Civil liability of the healthcare professionals*

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[32] A.T. Moldovan, *Dreptul medical – ramură distinctă de drept*, in '*Dreptul*' nr. 7/2006, p. 139.

[33] Published in the Official Gazette of Romania No. 372 of 28th April 2006 with the subsequent amendments and supplements.

and providers of medical, sanitary and pharmaceutical products and services'.

At the same time, another normative act of special importance is represented by Law No. 46/2003[34] *on the right of the patients* ('***Law 46/2003***'). Law 46/2003 is considered '*the central pillar of the legal construction on professional malpractice, a true axiological summum of the noblest ideals that guide the activity of every practitioner in the medical field*[35]'.

At the level of the common law, the Civil Code provides in Art. 1357-1371, the civil liability for one's own action, and in Art. 1373, the liability of the principal for the act of the agent, for those situations in which the liability of health unit for the action of the employed health care professional may be involved.

2.2. The legal relationship of medical law

Like any other legal relationship, the medical legal relationship includes the three structural elements: content, object and subject. The structural elements of the medical legal relationship represent certain particularities depending on the applicable legal rule; criminal, administrative or civil.[36] Given the research material of this paper, the rules of civil law will be considered below.

2.2.1. General aspects

The medical legal relationship is a social, volitional legal relationship that is established between persons who have a special quality and to whom the law imposes a certain conduct, without which the legal relationship could not exist.

'*The main objective of the relationship between doctor and patient is to provide medical care, perform interventions or treatment appropriate to the established diagnosis, which involves a high level of professional and scientific trust, patience, discretion, but also respect for their rights to information, security, confidentiality*'[37].

2.2.2. The content of the medical legal relationship

In general terms, the content of the civil legal relationship is given by all the subjective civil rights and civil obligations that the parties to that legal relationship have[38]. Thus, the medical legal relationship also includes all the rights and obligations that the parties to the legal relationship have or are held, regardless of whether or not they arise from the legal rules of the domestic or international medical law.

For example, the main rights of the patients are contained in Law No. 46.2003. We will present below, by way of example, a number of the rights and obligations of the patients and the healthcare professionals.

Rights of patients: the right to medical information, the right to receive the best quality medical care, without any discrimination, the right to confidentiality of information etc.

Obligations of patients: the obligation to inform correctly and completely the healthcare professionals about the symptoms or disease, the obligation to inform the healthcare professionals about any changes in connection with the disease for which treatment is offered, the obligation to follow exactly the doctor's recommendations, the obligation to respect the dignity of the healthcare professionals, the obligation to pay the contributions to the health insurance fund etc.

Rights of healthcare professionals: the right to exercise the professional freely and independently, the right to refuse a patient, when the law allows it, the right to establish medical treatment according to his/her knowledge, the right to remuneration etc.

Obligations of healthcare professionals: the obligations to maintain professional secrecy, the obligation to respect the dignity of the patient, the obligation to inform the patient about the real health status and on the risks of the prescribed treatment etc.

2.2.3. The object of the medical legal relationship

The object of the medical legal relationship is the conduct of the parties, i.e. the concrete action or inaction to which the parties are entitled or which they must comply with.

2.2.4. The subjects of the medical legal relationship

One of the subjects of the medical legal relationship is the **patient**. According to Art. 1 letter a) of Law 46/2003, the patient is a healthy or sick person who uses health services.

On the other hand, the subjects of the medical relationship are also the individuals who provide medical services, respectively the doctor, the dentist, the pharmacist, the nurse, the midwife, etc. or legal persons directly or connectedly involved in the provision of medical care and services, such as public or private health units, as providers of medical services, manufacturers of medical equipment, medicinal substances and medical materials etc.

2.3. Obligation of means or obligation of result

The legal relationship between the doctor and his/her patient is the classical example of obligations of means. The obligations of means are the obligations which consist in the duty of the provider to make every effort to achieve a certain result, without committing to the intended result in itself.[39].

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[34] Published in the Official Gazette of Romania No. 51 of 29th January 2003 with the subsequent amendments and supplements.
[35] L.B. Luntraru, *Răspunderea civilă pentru malpraxisul profesional*, Ed. Universul Juridic, Bucharest, 2018, p. 164.
[36] A. Sas, *Răspunderea civilă medicală – Răspunderea civilă delictuală*, Fiat Iustitia nr. 2/2009, p. 79.
[37] L.B. Luntraru, *op. cit.*, p. 165.
[38] G. Boroi, C.A. Anghelescu, *Drept civil. Parte generală. Ediția a II-a revizuită și adăugită*. Ed. Hamangiu, Bucharest, 2012, p. 53.
[39] G. Boroi, C.A. Anghelescu, *op. cit.*, p. 70.

If has also been shown that '*starting from the adage Non est in medico semper relentur ut aeger (no doctor can always guarantee that his/her patient will recover), the qualification of the doctor's obligations as obligations of means appears to be obvious*'[40].

Specifically, the healing of the patient does not depend exclusively on the science, skill or diligence of the doctor, being often determined by factors and circumstances that are not covered by the actions of the healthcare professionals, such as: insufficient evolution of medicine to establish the exact diagnosis, the medication assigned to the patient does not produce the expected result.

However, both in practice and in doctrine, the opinion was outlined in the sense of the need to divide the obligations of the doctor into obligations of means and obligations of result. Thus, it is estimated that '*whenever the doctor assumes a certain provision, the result of which does not depend on the relativity of the medical act, then the generic obligation of care will be the result*'.[41] The examples are: the obligation to make a dental prosthesis or orthosis, the obligation of the doctor to draw up the consultation sheet/record of the patient, as well as the obligation to make a test: blood, urine, etc. In such hypotheses where the desired result is obtained without risk, without the intervention of random external factors, the expected result is the exclusive responsibility of the debtor, therefore, of the healthcare professionals.

Regarding two of the obligations of the doctor, the doctrine outlined opposing opinions, meaning the obligation of security and the obligation to inform the patient.

On the other hand, some authors considered that the obligation of information and the obligation of security are predominantly obligations of result[42], and on the other hand, other authors considered that they are predominantly obligations of means[43].

2.3.1. Obligation of security

The content of this obligation includes the duty, to preserve during the medical act the physical and mental integrity of the patient, by his/her doctor.

Although the nature of this obligation has long been debated, especially in the French doctrine, in the sense that there have been authors who have stated that it is not a real obligation, but a component of the obligation to care for the patient, as far as we are concerned, we consider that the obligation of security is an autonomous obligation, but ancillary to the obligation to care for the patient.

Without initiating the issue of the explicit or not reference of this obligation, we appreciate that it cannot have as source the Government Ordinance No. 21/1992 *on consumer protection*[44] ('***GO 21/1992***') unless we admit that the legal relationship between doctor and patient is contractual, and the patient is a consumer, and the doctor is a service provider.

However, we appreciate that we cannot equate the medical contract with a real consumer contract.

As mentioned above, the obligation of security is ancillary to the obligation to care for the patient, and by virtue of the principle *accesorium sequitur principallem*, we consider that the obligation of security is in principle and obligation of means. Although the obligation is performed by a professional, it cannot be qualified as an obligation of result, because random factors in the medical activity must be taken into account, which can aggravate the health status of the patient. Consequently, the fault of the professional in fulfilling the obligation must be proven, because the healthcare professionals cannot guarantee the preservation of the physical and mental integrity of the patient. In fact, this solution is also natural, because a random factor is related to the behaviour of the patient that can contribute to the unfavourable evolution of his/her health status.

Finally, certain nuances must be admitted in relation to those set out above. The obligation of security may acquire the valance of an obligation of result when the healthcare professionals show recklessness, incompetence, inability or ignorance, by disregarding risks unanimously known and accepted at the level of the medical community or at the current level of scientific research.

At the same time, even in case of improper use of medical devices, sanitary materials or medical products, it can be noted that the obligation of security is a result.

2.3.2. Obligation of information

Perhaps one of the most important obligations of the healthcare professionals, especially of the doctor, is the obligation of information. In the literature, the obligation of information is perceived as an obligation inherent in the exercise of a profession, therefore a professional one.

The healthcare professionals must inform the patient exhaustively, in relation to the level of knowledge existing at that time, about the various investigations, treatments or preventive actions to be carried out. At the same time, the healthcare professionals have the role, based on this obligation, to

[40] L.B. Luntraru, *op. cit.*, p. 171.

[41] F.I. Mangu, *Răspunderea civilă a personalului medical și al furnizorilor de produse și servicii medicale, sănătate și farmaceutice. Teză de doctorat*. *Rezumat*. Universitatea de Vest din Timișoara. Facultatea de Drept și Științe administrative. Timișoara. 2010, p. 5.

[42] V. L.R., *Discuții privitoare la răspunderea civilă pentru încălcarea obligației medicale de informare a pacientului*, in Dreptul nr. 2/2013, p. 103-123; L.R. Boilă, L.B. Luntraru, *Repere teoretice și practice privind definirea obligației civile de securitate. op. cit*., p. 82-103, in L. Pop, I.F. Popa, S.I. Vidu, *Curs de drept civil. Obligații*. Ed. Universul Juridic, Bucharest, 2015, p. 403.

[43] F.I. Mangu, *op. cit.*, p. 6.

[44] Published in the Official Gazette of Romania No. 212 of 28th August 1992 with the subsequent amendments and supplements and republished.

inform the patient about the urgency of an intervention, as well as the consequences or risks to which they are exposed in case of a refusal.

Of course, the obligation of information will be made in relation to the known or objectively predictable risks, assumed by a certain medical procedure, and not on the fortuitous risk, i.e. accident, unpredictable at the date of information and unknown by the doctor[45].

Moreover, this obligation is not limited to the initial time of the consultation, for example, but must be fulfilled throughout the relationship between doctor and patient. In other words, the healthcare professionals must keep the patient informed of the evolution of their health status throughout the monitoring and inform them of any changes that occur.

The obligation to inform the patient in order to obtain the consent for performing certain medical acts is stipulated in Law 95/2006. However, simply signing the consent is not enough to consider that the obligation has been fulfilled.

The healthcare professionals must ensure that the patient understand the information provided. Therefore, according to Art. 660 para. (2) of Law 95/2006, '*the doctor, the dentist, the nurse/midwife are obliged to present to the patient the information at a scientifically reasonable level for their understanding*'. Specifically, the information must be correct, clear and appropriate to the level of knowledge of the patient.

In principle, it has been expressed in the French doctrine the opinion that the obligation to inform is an obligation of means, the healthcare professionals having the obligation to make every effort to inform the patient about the risks of the medical procedures to be applied, in which case the doctor, for example, will be absolved of liability.

As far as we are concerned, we appreciate that the result of which the doctor is bound to is to obtain the informed consent of the patient, given in full knowledge of the facts.

This, the liability of the healthcare professionals will be engaged in the situation where the patient has not been informed in any form in advance, as well as in the situation where the information was not correct, clear and adequate.

In the event of a dispute, the healthcare professional or health unit must prove that the information has been provided correctly. The proof can be made by any means of proof.[46] Therefore, the obligation of information is a relative obligation of result.

Usually, the non-fulfilment of this obligation leads to a specific moral harm, which is based on the inadequate psychological training of the patient. This can be combined with the harm consisting in the loss of a chance to avoid the harm resulting from the realisation of the risk of the medical act[47].

3. Malpractice

According to Art. 653 paragraph 1 letter b) of Law 95/2006, the act of malpractice is 'the professional error committed in the exercise of the medical or medical and pharmaceutical act, generating harm to the patient, involving the civil liability of the healthcare professionals and the provider of medical, sanitary and pharmaceutical products and services'.

The fault is the one that characterises, from the point of view of form, the guilt with which the medical malpractice is objectified, the legislator speaking about professional error, negligence or recklessness.

The error can be committed either by action or omission, and the burden of proof lies with the harmed party. The simple error without patrimonial or non-patrimonial consequences cannot be classified as an act of malpractice. For example, the mere misdiagnosis is not in itself an error, but if this leads to improper treatment of failure to perform surgery, then the error may be an act of malpractice.

4. The legal nature of medical liability

When the legal conditions are met, the liability of the doctor, dentist, pharmacist, nurse and midwife may be jointly and severally, if applicable, with what of the health unit in which they operate, being applicable the provisions of the Civil Code regarding the liability of the principal for the act of the agent.

The issue of the classification of civil liability for medical malpractice has been and is discussed in direct relation to the opinions regarding the nature of the legal relationship between the patient and the healthcare professionals and sometimes between the patient and the health unit where they work.

Several opinions have emerged in the literature. In a first opinion, it was considered that the civil liability of the healthcare professionals can be either contractual or non-contractual, depending on the health network (public or private) where they work. In a second opinion, it was shown that the medical civil liability is always a non-contractual liability, and in the end there were authors who considered, without distinguishing between the public or private health unit[48], that the liability is strictly contractual[49].

4.1. Contractual liability

As we have shown in the previous paragraphs, in classifying the legal nature of the medical liability as a

[45] F.I. Mangu, *op. cit.*, p. 7.
[46] L.B. Luntraru, *op.cit.*, p. 185.
[47] *Ibidem.*
[48] I. Anghel, F. Deak, M. Popa, *Răspunderea civilă*, Ed. Științifică, Bucharest, 1970.
[49] V. Fl. I. *Malpraxisul medical. Răspunderea civilă medicală*, Wolters Kluwer, Bucharest, 2010, p. 116-245; I. Turcu, *Dreptul sănătății. Frontul comun al medicului și juristului*, Wolters Kluwer, Bucharest, 2010, p. 158, in L. Pop, I.F. Popa, S.I. Vidu, *op. cit.*, p. 400.

contractual liability, some authors make the distinction according to whether the healthcare professionals is part of the public or private health network.[50]. Thus, it was unjustifiably considered that, in the case of private forms of practicing medicine, the liability is a contractual one, and in the rest of the cases, it is a question of non-contractual liability.

On the other hand, there were authors who considered that '*the rule on the provision of healthcare/medical care is, from a legal point of view, the contract of healthcare/medical care concluded between doctor, dentist and patient, regardless of the system in which the doctor carries out his/her activity, publicly or privately*'[51]. Consequently, it is considered that the healthcare professionals will be held liable according to the rules of the contractual civil liability in any situation.

In support of this opinion, it was appreciated that the legal obligation to provide medical care or specialised care is conditioned by the meeting of the agreement of the patient with that of the competent healthcare professional, and thus the healthcare contract is established.

However, two exceptions are known within this concept, when the liability of the healthcare professionals towards the harmed patient will be of a non-contractual nature. The first hypothesis concerns the situation of the patient who is in a state of clinical emergency, being unconscious, therefore unable to express his/her consent, and the second, when the patient does not have the necessary discernment to express a valid consent.

We cannot agree with this opinion, because the choice of the doctor and the expression of informed consent is only an individual act of acceptance of the medical decision. Thus, the obligations of the healthcare professionals are not contractual obligations, but legal obligations expressly and imperatively provided by law.

At the same time, we appreciate that the liability could not be a contractual one, because the violated obligation is a legal obligation, of a general nature, which belongs to all persons in the health system and not only to a certain doctor or persons. Moreover, the obligations of the healthcare professionals are imperative from which they cannot be derogated, or in the case of contractual civil liability, the non-liability clauses as allowed, as a rule. Thus, it would be difficult to conceive that these non-liability clauses would be allowed in terms of the relationship between doctor and patient. The rules established by law in the field of medical law protect a general interest to protect the entire population from those diseases that could pose a danger to public health.

4.2. Non-contractual liability

It has traditionally been held in doctrine and case law, rightly, that the relationship between the healthcare professionals and the patient is an extra-contractual relationship, and in case of non-fulfilment of obligations by the healthcare professionals, the non-contractual liability will be engaged. This conception is based on the argument that life, health, physical and mental integrity cannot be the subject of a convention, being null and void.

4.3. Professional liability

Last but not least, the idea that the medical civil liability is neither non-contractual nor contractual, but a specific professional liability of the healthcare professionals, which intervenes for harms caused by a professional error, has emerged relatively recently[52].

The opinion is also shared by other authors[53] who consider that the liability regime for medical malpractice transcends the classic distinction between non-contractual liability and contractual liability, because we are witnessing a process of decontractualisation of these obligations, being, therefore, a liability of the professionals called medical civil liability.

5. Exemptions from liability

Finally, regardless of the type of liability (contractual, non-contractual, professional), the provisions of Art. 654 paragraph 2 letters a) and b) exhaustively provide for the exonerating causes of liability:

- when the working conditions in which the healthcare professionals carry out their activity are non-compliant, respectively if they have had an insufficient endowment with the diagnostic and treatment equipment or a nosocomial infection has occurred;
- random factors that have led to complications and risks in the techniques used or adverse effects;
- hidden defects of the sanitary materials, medical equipment and devices, medical and sanitary substances used;
- when the healthcare professionals act in good faith in emergency situations, as long as the competencies granted are respected.

6. Conclusions

In the current context, the medical liability is still a topical issue. The national and international doctrine and case law is constantly evolving, bringing new arguments to support the nature of the medical legal relationship. As we have shown in detail in this paper,

[50] V.I. Albu, *Răspunderea civilă contractuală pentru prejudiciile nepatrimoniale (daunele morale)*, Dreptul nr. 8/1992, p. 32; I.F. Popa, Răspunderea civilă medicală, in Dreptul nr. 1/2003, p. 46, in *ibidem*.

[51] F.I. Mangu, *op. cit.*, p. 3.

[52] L.R. Boilă, *Răspunderea civilă delictuală subiectivă*, Ed. C.H. Beck, Bucharest, 2009, p. 326.

[53] L. Pop. in L. Pop, I.F. Popa, S.I. Vidu, *op. cit.*, p. 403.

we appreciate that the legal relationships between patients and healthcare professionals are extra-contractual relationships resulting from the law and not from a convention concluded between the subjects of the legal relationship.

Moreover, the national case law leans towards the same solution, taking into account the regulations in force.

The acts of medical malpractice are among the most diverse, and the settlement of disputes aimed at awarding damages resulting from these medical errors is a real challenge for the courts. This is also due to the constant evolution of medicine.

Therefore, we are convinced that both the current regulations at national and international level, as well as the regulations that will appear, will lead to the creation of medical law as a distinct branch of law.

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THE EFFECTS OF THE ASSIGNMENT OF THE DEBT WITHIN THE FORCED EXECUTION

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Abstract

Enforcement, considered as a component part of the civil process, must provide the participants with the guarantees they benefit from at the trial stage, obviously, adapted to the context and specificity of this procedure. The enforcement appeal represents the legal mechanism through which both the creditor and the debtor can submit to the analysis of the court, more precisely, the enforcement court, the irregularities produced in this procedural stage. The assignment of the claim that is the object of the forced execution produces specific effects in this procedural stage considering also the special regulations existing in this matter, determined by the specifics of the enforceable title underlying the request for enforcement.

Taking into account the fact that the assignment of the claim determines the change of the creditor's person, it is understandable that the effects produced are major for the debtor, but also for the forced execution, viewed as a whole. Next, the institution of the assignment of the debt, as it is regulated by the Romanian Civil Code, will be briefly presented, but also its effects, in forced execution, by reference to the time when the assignment takes place and by reference to the notification or non-notification of the debtor regarding the assignment, in one of the ways provided by law.

Keywords: *assignment, debt, notification, execution, enforcement.*

1. Introduction

The Civil code regulates in the content of article 1566 assignment of the claim as a way of transmitting the claim. Thus, the assignment of a claim is the agreement by which the assigning creditor transmits to the assignee a claim against a third party, the debtor. Being a contract, the assignment of a claim must meet the general conditions of validity of any contract.[1]

Following an assignment of a claim, according to art. 1568 Civil Code, the following are transferred to the assignee: a) all the rights that the assignor has in connection with the assigned claim; b) the guarantee rights and all the other accessories of the assigned claim. Therefore, although apparently, in the case of the assignment of a claim, only the active subject of the legal relationship changes, as will be shown below, effects may also occur on the object of the assignment when it concerns a claim arising from a credit agreement with a consumer.

2. Opposability of the assignment to the debtor

The legislator provided a condition to ensure the enforceability of the assignment to the debtor, taking into account the fact that the debtor is not a party to the contract by which the claim was transmitted.

According to art. 1578 Civil Code, the debtor is required to pay the assignee from the moment he either accepts the assignment by a document with a certain date, or receives a written communication of the assignment, on paper or in electronic format, showing the identity of the assignee, identifies reasonably assigned the assigned claim and the debtor is required to pay the assignee. In the case of a partial assignment, the extent of the assignment must also be indicated. Before accepting or receiving the communication, the debtor can only be released by paying the initial creditor.

The acceptance of the assignment by the debtor, through a document with a certain date, or the notification of the debtor regarding the assignment of the receivable occurred, determines the effects of the assignment also towards the debtor, and not only towards the parties of the assignment contract. Before carrying out the formalities of opposition, according to art. 1575 Civil Code, the assignment of debt produces effects between the assignor and the assignee, and the latter can claim everything that the assignor receives from the debtor. It should be noted that the transferee cannot claim payment from the assigned debtor directly, but has the possibility to request from the transferor everything he receives from the assigned debtor, in theory, the voluntary payments made by the debtor. The latter conclusion follows from the fact that, as regards the relationship between the transferor and the transferee, the effects occur from the time the transfer is concluded, so that after that time the transferor could no longer request a possible enforcement of the debtor.

Following the completion of the aforementioned enforceability formalities, the debtor may oppose to the assignee all the means of defense that he could have invoked against the assignor. Thus, he can oppose the payment made to the assignor before the assignment has become opposable to him, regardless of whether or

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[1] Gabriel Boroi, Mona-Maria Pivniceru, Carla Alexandra Anghelescu, Bogdan Nazat, Ioana Nicolae, Tudor-Vlad Rădulescu, Civil Law Files, 3rd Edition, Hamangiu Publishing House 2018, Bucharest.

not he is aware of the existence of other assignments, as well as any other cause of extinction of obligations occurred before that moment (art. 1582 Civil Code).

3. Assignment of a claim occurred prior to the start of the enforcement procedure

The assignment of a debt can take place both before the beginning of the debtor's forced execution, but also after. In the first case, respectively of the assignment of the claim prior to the beginning of the forced execution, in the national jurisprudence it is often encountered the case when, by way of contesting the execution, the debtor invokes the lack of creditor quality of the assignee. In such situations, two opinions emerged. Before submitting to the attention of the two opinions, as a preliminary point, it must be pointed out that contesting the lack of creditor status of the assignee, in relation to the lack of enforceability, is equivalent to contesting the enforcement itself, and the deadline for filing the enforcement appeal is the one provided by art. 715, paragraph 1, Code of Civil Procedure[2].

Returning, the first of the opinions materializes in the rejection as unfounded of this criticism considering the arguments that will be presented below. Thus, it is considered that, without requesting the annulment of the assignment of a claim, between the assignor and the assignee it is valid and produces its effects, the main effect being that of transferring the claim from the assignor's assets to that of the assignee. Therefore, since the transfer of the claim has taken place, the new creditor is the transferee. Reference is also made to the fact that the non-opposability of the assignment to the assigned debtor does not amount to the non-existence or invalidity of the assignment. Considering that according to art. 645 paragraph 1 of the Code of Civil Procedure, the debtor and the creditor are parties in the enforcement phase, it is unfounded to invoke the annulment of enforcement acts performed based on the enforcement request made by the current creditor, even in the absence carrying out the formalities of opposability of the assignment of claim against the debtor. Furthermore, also as an argument in the sense of rejecting the enforcement appeal for this reason, respectively the lack of creditor status of the transferee, are the provisions of art. 704 Code of Civil Procedure, according to which failure to comply with the enforcement itself or any act of execution attracts the nullity of the illegal act, as well as of the subsequent execution acts, the provisions of art. 174 and the following being applicable accordingly. According to art.175 paragraph 1 of the Code of Civil Procedure The procedural act is struck by nullity if by non-compliance with the legal requirement an injury has been brought to the party which cannot be removed except by its abolition. In most cases, the debtor cannot prove an injury caused by the failure to carry out the formalities opposable the assignment, prior to the start of the enforcement procedure, given that he does not prove that he wished to pay or paid the outstanding debt to the initial creditor, respectively, to the assignor. According to art. 1578 Civil Code, before accepting or receiving the communication, the debtor can only be released by paying the transferor. Moreover, even if the debtor proves such payment of the debt to the assignor, he could invoke by way of the enforcement appeal the provisions of art. 1582 paragraph 1 of the Civil Code, whose provisions have been seen previously.

It should be mentioned that, within this opinion, there is not considered to be a case of nullity, unconditioned by the existence of an injury, among those provided in art. 176 Code of Civil Procedure

In this situation it should be pointed out that according to art. 1580 Civil Code, when the assignment is communicated together with the action filed against the debtor, he cannot be ordered to pay the costs if he pays by the first term, unless, at the time of the assignment, the debtor was already late. Based on this principle, it could be concluded that if the debtor is communicated for the first time the assignment of the claim together with the enforcement documents[3], and the debtor pays within a reasonable time at this time, he could no longer be obliged to the eventual execution expenses incurred, a conclusion which is in contradiction with the provisions of art. 670 of the Code of Civil Procedure, which, in essence, does not absolve the debtor from the payment of enforcement costs even if he has executed the obligation immediately or within the term granted by law. It should be noted, however, that in the latter situation, the legislator provided that the debtor will be required to bear only the expenses for the enforcement acts actually performed, as well as the

[2] According to art. 715 Code of Civil Procedure, Unless otherwise provided by law, the appeal regarding the actual enforcement may be made within 15 days from the date when:

1. the appellant has become aware of the enforcement act he is challenging;

2. the interested party has received the communication or, as the case may be, the notification regarding the establishment of the seizure. If the attachment is established on periodic income, the term of appeal for the debtor begins at the latest on the date of the first withholding of this income by the seized third party.

3. the debtor contesting the enforcement itself has received the enforcement order or the summons or from the date on which he became aware of the first enforcement order, in cases where he has not received the enforcement order and the summons or enforcement is made without summon.

[3] According to art. 667 and art. 668 Code of Civil Procedure 1) If the request for execution has been approved, the bailiff will communicate to the debtor a copy of the conclusion given under the conditions of art. 666, together with a copy, certified by the executor for conformity with the original, of the enforceable title and, unless the law provides otherwise, a summons (2) Communication of the enforceable title and summons, unless the law provides that the execution is made without summons or without communication of the enforceable title to the debtor, it is provided under the sanction of nullity of execution. The debtor will be summoned to fulfill his obligation, immediately or within the term granted by law, with the indication that, otherwise, enforcement will continue.

fee of the bailiff and, if applicable, the creditor's lawyer, in proportion to the activity of these.

In the second outlined opinion, it is noted that the lack of enforceability before the start of enforcement, does not give the transferee the right to request enforcement of the debtor, lacking the status of creditor. Therefore, not being a creditor, the transferee does not have a certain, liquid and due claim against the debtor on the basis of which to request enforcement. Also, in the enforcement appeal is invoked, in many cases, the nullity of the decision approving the forced execution based on art. 666 paragraph 5 point 4 or 7 of the Code of Civil Procedure, the impediment consisting precisely in the lack of the quality of creditor of the one who formulated the request for forced execution. Considering the chronological order of solving the request for approval of the forced execution, respectively, of a possible contestation to the execution, obviously, if the court invested with the request for approval of the forced execution rejects the request in the absence of proof of communication of the assignment of the claim to the debtor, this aspect could no longer be the subject of the enforcement appeal for the simple reason that in the absence of the approval of the enforcement it is not possible to proceed with the procedure, the debtor not being notified about the start of the enforcement. On the other hand, if the court of execution admits the request for approval of the forced execution, this fact does not determine an inadmissibility of the invocation of the lack of creditor quality of the one who initiated the forced execution, by way of contesting the execution, the provisions of art. 712 par. 3 Civil Procedure Code[4], being edifying in this case.

Regarding the fact that the enforcement court invested with solving the request for approval of enforcement could analyze whether the debtor was notified of the transfer, during the Meeting of the presidents of the civil sections of the courts of appeal - Court of Appeal Cluj, 13-14 October 2016 and the meeting of the representatives of the Superior Council of Magistracy with the presidents of the civil sections of the High Court of Cassation and Justice and the courts of appeal - Pitești, November 14-15, 2019, it was established that the enforcement court is obliged to verify the assigned debtor, under the sanction of rejecting the application for approval pursuant to art. 666 paragraph (5) § 4 C. proc. civ., at least in the event that the assignment of the debt was concluded after the entry into force of the new Civil Code. The right to claim payment from the assigned debtor cannot be justified in the transferee's patrimony, as a right really relative to the assigned debtor, in the absence of a prior communication, reason for which, in case of an assignment before the bailiff, the proof of communication the assignment must be submitted to the enforcement file. In its turn, the enforcement court, in order to ascertain the quality of the assignee of the current creditor of the assigned debtor, must have it at its disposal, in the file formed for the approval of the forced execution, together with the enforcement request, the enforceable title and the assignment. In the absence of notification to the debtor, not having the right to claim payment, although the claim was assigned to him, the assignee has even less the right to claim a forced payment, through the enforcement procedure initiated by notifying the bailiff.

4. Assignment of a claim during enforcement

In the second situation analyzed, the assignment of the claim occurs during the enforcement, the hypothesis being that in which the original creditor started the enforcement, and subsequently the assignment of the claim occurred, the assignee taking over as creditor. In this case more clarification is needed. Thus, if the approval of the enforcement was admitted in relation to the original creditor, respectively the assignor, a new approval of the enforcement would not be necessary, taking into account the person of the transferee, without any legal provision imposing this. Moreover, High Court of Cassation and Justice, by a decision of the panel for the resolution of certain legal issues[5], established that the amendment of the original parts of the legal act constituting an enforceable title does not affect the substance of the enforceable title, the assignee's position being that of a true private successor, which thus takes over all the rights that the assignor had in connection with the claim.

However, the opposite opinion was also presented in the doctrine, in the sense that it is necessary to approve the forced execution also in relation to the new creditor[6].

On the other hand, with regard to the possible formulation of an enforcement appeal requesting the annulment of the enforcement acts performed in relation to the person of the transferee, it should be noted that the formulation period will start to run from the moment the debtor will be notified of the first enforcement acts in which the new creditor is mentioned. This conclusion is undoubtedly clear from the provisions of art. 715 Code of Civil Procedure. Even if this ground of appeal concerns enforcement itself, it cannot be ignored that the debtor was not notified of the change of the person of the previous creditor.

[4] Also, after the beginning of the forced execution, those interested or injured can request, by way of the contestation to the execution, also the annulment of the conclusion by which the request for approval of the forced execution was admitted, if it was given without fulfilling the legal conditions.

[5] HCCJ, Panel for resolving legal issues, Decision no. 3/14.04.2014 (Official Gazette No. 437/16.06.2014).

[6] Curierul Judiciar Magazine, no. 11/2019, Assignment of bank receivables in the forced execution phase of debtors. The need to go through a new procedure for approving the forced execution by the new creditor, Asist. univ. dr. Răzvan Scafeș, Faculty of Law, University of Craiova.

Another aspect is to establish whether the opposability of the assignment is achieved through the very notification issued by the bailiff and in which the name of the assignee is mentioned. Considering the provisions of art. 1578 paragraph 1 letter b) of the Civil Code, it is noted that from the notification it is necessary: to be able to identify the entity of the assignee and, reasonably, the assigned claim and to ask the debtor to pay the assignee. Therefore, if the notice issued by the bailiff contains all these elements and is sent in writing to the debtor, even if the summons does not emanate from the creditor, it could produce the effects of a notification on the assignment of the claim, respectively the opposability of the assignment to the debtor. However, the aspects previously analyzed in the case of the assignment before the start of the forced execution, are valid, in the sense that in this case at least one execution act was issued, respectively the summons / notification of setting up the seizure, and at the time of issuance, the assignment was not opposable to the debtor.

If the writ of execution consists of a credit agreement for consumers and the provisions of Emergency Ordinance no. 50/2010 are applicable, there are other effects and rules for notification of the assignment of the claim resulting from this contract, rules presented in Article 70[7]. Therefore, the rules in the case of the assignment of a claim arising from a credit agreement granted to a consumer are different, precisely for the purpose of effective consumer protection. First of all, it is noted that the legislator has established who can be the assignee, only receivables resulting from non-performing credit agreements for which the creditor declared the early maturity or initiated the foreclosure procedure, can be assigned to entities carrying out the activity of debt recovery. Therefore, if the assignment of a debt occurred during the forced execution, then the assignee may also be an entity whose object of activity is the recovery of receivables. Also regarding the entities having as object the activity of debt recovery, the legislator established the fact that it is forbidden to charge commissions, interest and penalty interest, except for the legal penalty interest, by them[8].

Regarding the notification of the assignment of a debt to the debtor, there are special rules resulting from the provisions set out above. All these rules are issued in order to protect the consumer. Infringement of any of the above rules may be invoked by way of an enforcement appeal in support of the assignee's lack of creditor status.

It should also be mentioned that although according to art. 713 second paragraph of the Code of Civil Procedure[9], regarding the forced executions started after the entry into force of Law no. 310/2018 by which amendments were made to the Code of Civil Procedure, in principle, no criticism can be made on the merits of the right contained in the writ of execution, this does not mean that the debtor could not invoke the lack of creditor status of the assignee because the writ of execution is not represented by the assignment contract.

5. Conclusions

The assignment of the claim that is the object of the forced execution produces effects both on the level of the material law, but also on the level of the procedural law, if the forced execution was started for the recovery of the claim and if a possible opposition to enforcement was formulated. Compliance with the formalities of opposability of the assignment of debt to the debtor is necessary both to respect the rights of the

[7] (1) In cases where the credit agreement itself or only the receivables resulting from a credit agreement are assigned, the consumer has the right to invoke against the assignee, any means of defense to which he could resort (2) Credit agreements and receivables resulting from them may be assigned only to creditors, as defined in art. 7 pt. 5. (3) By exception from the provisions of par. (2), receivables resulting from credit agreements may also be assigned to entities whose object of activity is the issuance of securitized financial instruments based on a portfolio of receivables, in accordance with the provisions of Law no. (4) By exception from the provisions of par. (2), the receivables resulting from the non-performing credit agreements, for which the creditor declared the early maturity or initiated the enforcement procedure of the consumer, may be assigned to entities carrying out the debt recovery activity, as defined in art. 7 pt. 17. Further, according to art. 71 (1) The consumer is informed about the assignment provided in art. 70. The assignment, individually or within a receivables portfolio, becomes opposable to the consumer by the notification addressed to him by the assignor. (3) The assignment shall be notified by the assignor to the consumer, within 10 calendar days from the conclusion of the assignment contract, by registered letter with acknowledgment of receipt. (4) The notification shall be written in writing, in a clear, visible and easy-to-read language, the font used being Times New Roman, minimum size 12, on paper, and shall mention at least the following: a) name and contact details , including the telephone number, fax, e-mail of the creditor, of the entity that will collect from the consumer the amounts for the repayment of the credit after the assignment, as well as and, as the case may be, of its representative in Romania, b) the name of the original creditor from whom the claim was taken over, c) the date on which the assignment was made; d) the amount of the amount due and the documents attesting this amount, e) the accounts in which the payments will be made. (5) In addition to the obligations provided in par. (4), the entities carrying out the debt recovery activity shall warn the consumer about: a) the term in which the consumer contacts the entity carrying out the debt recovery activity. This period may not be less than 5 working days from the date of receipt of the notification by the consumer, b) the consumer's right to send to the entity carrying out the debt recovery activity a complaint of the existence of the debt or its amount within 30 calendar days c) the consumer's right to receive a reply within 15 calendar days to the appeal, d) the consumer's right to go directly to court if he disputes the existence of the debt or its amount; that the non-challenge by the consumer, within 30 calendar days, of the debt does not constitute an acknowledgment of the amount by him and does not deprive the consumer of the right to go to court (6) Representatives of the entities carrying out the activity of debt recovery declines its identity and, where appropriate, legitimizes itself when addressing consumers.

[8] Art. 71² letter b) Emergency Ordinance no. 50/2010: It is prohibited: b) the collection of commissions, interests and penalizing interests, except for the legal penalizing interests, by the debt recovery entities.

[9] If enforcement is effected on the basis of an enforceable title other than a judgment, grounds of fact or law regarding the substance of the right contained in the enforceable title may be invoked in the enforcement appeal only if the law does not provide in relation to that enforceable title a procedural way for its abolition, including a common law action.

assigned debtor, but also to avoid legal action, especially enforcement appeals, which generate other costs for the parties, but also, possibly, the delay in clarifying the legal situation between the parties.

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TRANSMISSION OF JUDICIAL DOCUMENTS ABROAD

Georgiana COMAN[*]

Abstract

Due to the multitude of legal relationships involving parties domiciled in different countries, it has been necessary to regulate the way in which summonses and procedural documents are to be transmitted in the event of disputes. Thus, in order to create the appropriate means for judicial and extrajudicial documents to be served or transmitted abroad to reach their addressees in a timely manner, at global and, later, european level, regulations and conventions have been adopted that established the way of transmitting the procedural documents to the party domiciled in a country other than the one in which the trial takes place. There are also express provisions in this regard at national level in the Code of Civil Procedure. All these steps were necessary to respect the right to free movement of persons, and procedurally, to respect the principle of adversarial proceedings and the right of defense of the parties. It is necessary to analyze the situation of summoning the parties and transmitting to them the procedural documents, in a civil litigation (in its broad sense), pending before the Romanian courts, in which at least one of the parties has established its domicile abroad, in view of the Regulation (EC) No 1393/2007 and the 1965 Hague Convention.

Keywords: *abroad, transmission, Regulation (EC) no. 1393/2007, judicial, documents*.

1. Introduction

The need to ensure the right of defense for all parties to the process also implies their legal summons, as well as the transmission of all procedural documents. At the level of the European Union, at present, there is Regulation (EC) no. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (hereinafter referred to as the Regulation). At the international level, the 1965 Hague Convention[1] (hereinafter referred to as the Convention) is the main act adopted in the field of the communication of judicial documents to parties domiciled in another country. Also, if there are no conventional links between the two countries between which the notification procedure is to take place, international legal assistance in civil and commercial matters may be granted on the basis of international courtesy, subject to the principle of reciprocity.

In Romania, the law no. 189/2003 regarding the international legal assistance in civil and commercial matters was adopted, art. 2 paragraph 2 of the normative act indicating that the provisions of this law do not prejudice the provisions of European Union law, bilateral or multilateral conventions to which Romania is a party, completing the situations not regulated by them.

2. Transmission of judicial documents according to Regulation (EC) no. 1393/2007

2.1. Field of application

Article 1, paragraph (1) of the Regulation sets out its scope, whether in civil or commercial matters, where a judicial or extrajudicial document must be transmitted from one Member State to another in order to be served. It does not apply, in particular, to tax, customs or administrative matters, nor to the State's liability for acts or omissions in the exercise of official authority (*acta iure imperii*). Also, the Regulation does not apply if the address of the person to whom the document is served is not known. This last provision is an important one, but it should not be assimilated to the situation in which the address of the addressee of the act is indicated, but it is no longer current or incomplete. In my opinion and taking into account the provisions of Article 7 (2) of the Regulation, I believe that the receiving agency should take all necessary steps to identify the addressee as soon as possible, according to the means at its disposal.

With regard to the temporal application of the Regulation, it should be mentioned that it will apply until 1 July 2022, when it will be replaced by Regulation (EU) 2020/1784.

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[1] Signatory states: Albania, Andorra, Argentina, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Chile, China, People's Republic of , Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Republic of, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Mauritius, Mexico, Monaco, Montenegro, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Moldova, Republic of North Macedonia, Romania, Russian Federation, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia.

2.2. Purpose of the Regulation

An important objective considered in the adoption of the Regulation and resulting from it is that the service of documents must be effected as soon as possible from the moment of the receipt of the request by the receiving agency (for example, the art. 7 of the Regulation[2]). Also in connection with the need to ensure the communication of judicial documents as soon as possible, Article 6 paragraph (1) of the Regulation provides that on receipt of the document, the receiving agency shall send an acknowledgment of receipt to the transmitting agency as soon as possible. within seven days of receipt, by the fastest means of transmission, using the standard form set out in Annex I. Therefore, the speedy communication of judicial documents, but also the knowledge as soon as possible of the situation and stage of communication of documents by the transmitting agency is vital for the functioning of this form of cooperation between Member States.

2.3. How to apply the Regulation

The Regulation provides for several means of communication between Member States. Thus, a first way of communication, and which will be emphasized in this paper, is through transmission agencies and receiving agencies (art. 4-11). According to art. 2 paragraphs 1 and 2 of the Regulation, each state has the obligation to designate the transmitting and receiving agencies involved in the procedure for transmitting / receiving the documents to be notified[3]. In the case of Romania, the courts of first instance are the receiving agencies, and the transmitting agencies can be any court. Identification of the competent receiving agencies can be done by accessing the portal https://e-justice.europa.eu/home.do.

Other means of communication provided for in the Regulation are the following:

• by consular or diplomatic route (art. 12);
• through diplomatic or consular agents (art. 13);
• through courier services (art. 14);
• notification or direct communication (art. 15).

Considering the hypothesis in which, in a litigation pending before the Romanian courts, one of the parties is domiciled in another state of the European Union and it is necessary to communicate the summons and the procedural documents to this party (request for summons, documents filed in evidence by the other party), the court has several possibilities. According to the Code of Civil Procedure[4], persons who are abroad, if they have their domicile or residence known, will be summoned by a written summons sent by registered letter with declared content and acknowledgment of receipt, receipt of delivery of the letter to the Romanian Post, in the content of which will be mentioned the documents to be sent, taking the place of proof of fulfillment of the procedure, unless otherwise provided by international treaties or conventions to which Romania is a party or by special normative acts. If the domicile or residence of those abroad is not known, the summons is made according to art. 167[5]. In all cases, if those abroad have a known representative in the country, only the latter will be summoned. Article 14 of the Regulation also provides that each Member State is free to serve documents directly by courier to persons residing in another Member State, by registered letter with acknowledgment of receipt or equivalent. Therefore, the manner of communication of summonses and procedural documents is left to the discretion of each court.

Specifically, in the event that the court, as the transmitting agency, wishes to communicate the procedural documents through the receiving agency of the country in whose territory the addressee resides, it will transmit the documents, accompanied by a request drafted using the standard form provided in Annex I to the Regulation (art. 4). The form shall be completed in the official language of the Member State of destination or, if there are several official languages in the Member State concerned, in the official language or one of the official languages of the place where the notification or communication is to be made, or in another language which the Member State concerned has indicated that it

[2] 1. The receiving agency shall itself serve the document or have it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State. 2. The receiving agency shall take all necessary steps to effect the service of the document as soon as possible, and in any event within one month of receipt. If it has not been possible to effect service within one month of receipt, the receiving agency shall: (a) immediately inform the transmitting agency by means of the certificate in the standard form set out in Annex I, which shall be drawn up under the conditions referred to in Article 10(2); and (b) continue to take all necessary steps to effect the service of the document, unless indicated otherwise by the transmitting agency, where service seems to be possible within a reasonable period of time.

[3] 1. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'transmitting agencies', competent for the transmission of judicial or extrajudicial documents to be served in another Member State. 2. Each Member State shall designate the public officers, authorities or other persons, hereinafter referred to as 'receiving agencies', competent for the receipt of judicial or extrajudicial documents from another Member State.

[4] Article 155 (1), point 13.

[5] Art.167 Code of Civil Procedure-Summons by advertising:

(1) Where the plaintiff considers, with reasons, that, although he did everything in his power, he was unable to find the defendant's domicile or other place where he could be summoned according to law, the court may approve his summons by publicity. 2) The summons by publicity is made by displaying the summons at the door of the court, on the portal of the competent court and at the last known address of the summoned person. In cases where it deems it necessary, the court shall also order the publication of the summons in the Official Gazette of Romania or in a widely circulated central newspaper. (3) Once the summons is approved by publicity, the court shall appoint a curator from among the bar's lawyers. art. 58, which will be summoned to the debates for the representation of the defendant's interests. (4) The procedure is considered fulfilled on the 15th day from the publication of the summons, according to the provisions of par. (5) If the summoned person appears and proves that he was summoned by publicity in bad faith, all procedural documents that followed the approval of this summons shall be annulled and the plaintiff who requested the summons by publicity shall be sanctioned. according to the provisions of art. 187 para. (1) pt. 1 lit. c).

accepts. It should be noted that the documents and all documents submitted are exempt from legalization, as well as from any other equivalent formality.

If the transmitting agency wishes a copy of the document to be returned to it, together with the certificate provided for in Article 10, it shall send the document to be served in duplicate.

Regarding the advantages of communication through the Regulation, they cannot be ignored because they aim at the certainty of receipt of the documents by the addressee. Unlike the transmission of documents by postal / courier services, the transmission of documents with the help of the receiving agency should ensure either the transmission of documents or the reasons why transmission was not possible, in any case being necessary to complete the form annexed to the Regulation. On the other hand, in the form for carrying out the transmission procedure, the receiving agency will have to complete the way in which the procedure for transmitting the documents was carried out. In this connection, it should be noted that in turn, the transmitting agency, when issuing a request for transmission of documents to the receiving agency, will have to indicate how it wishes to transmit with the choice between several variants: according to the legal provisions in force in the state in which the documents are to be transmitted, according to the legal provisions in the state of origin or according to another modality, this being to be specified (art. 7).

With regard to the disadvantages of transmitting legal acts through the Regulation, the costs of such a procedure could be included, with each Member State to which the Regulation applies having the possibility to charge its own costs. These costs are obviously borne by the interested party, in particular the applicant. Although, according to art. 11 paragraph 1 of the Regulation, the service of judicial documents from a Member State may not result in the payment or reimbursement of taxes or expenses incurred for the services provided for this purpose by the receiving Member State, according to the second paragraph the claimant shall pay / reimburse other costs occasioned by:

• recourse to a judicial officer or a competent person in accordance with the law of the Member State addressed;

• the use of a particular method of service.

Therefore, in countries where the receiving agency are certain judicial officials (such as France, Belgium, the Netherlands), there is a possibility for them to charge certain costs for carrying out the procedure for transmitting the documents, costs which will have to be advanced with the service request. A possibility to sanction the plaintiffs who do not understand to cover the costs generated by the transmission to the defendant of the procedural documents, is contained by the provisions of art. 242 paragraph 1 of the Code of Civil Procedure, according to which the court may order the suspension of the trial.

If the case is still in the preliminary proceedings, a trial date may be established for which the applicant shall be ordered to pay these costs, and if not, the trial shall be suspended. I consider that the summons could not be annulled accordingly to the provisions of art. 200 of the Code of Civil Procedure, not being an irregularity of the summons. It should also be mentioned that the choice of the method of transmission of the procedural documents to the party located on the territory of another country, belongs to the court, the plaintiff cannot dispute this aspect and imposes another method.

Another disadvantage could be that, although the receiving agencies have at their disposal the possibility of automatically translating the forms (receiving the application or performing / not performing the procedure) into one of the official languages of the State from which the transmitting agency originates, it often happens that they do not translate those forms and thus make it difficult for the transmitting agency to use translation services to see if the documents have been communicated or, on the contrary, to find out why the documents were not communicated.

It is also necessary to pay attention to the provisions of Article 19 of the Regulation[6], so that if the court orders the transmission of documents in accordance with the provisions of the Regulation, if the

[6] Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and the defendant has not appeared, judgment shall not be given until it is established that: (a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation; L 324/84 EN Official Journal of the European Union 10.12.2007 and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend. 2. Each Member State may make it known, in accordance with Article 23(1), that the judge, notwithstanding the provisions of paragraph 1, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled: (a) the document was transmitted by one of the methods provided for in this Regulation; (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document; (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities or bodies of the Member State addressed. 3. Notwithstanding paragraphs 1 and 2, the judge may order, in case of urgency, any provisional or protective measures. 4. When a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiry of the time for appeal from the judgment if the following conditions are fulfilled: (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal; and (b) the defendant has disclosed a prima facie defence to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment. Each Member State may make it known, in accordance with Article 23(1), that such application will not be entertained if it is filed after the expiry of a time to be stated by it in that communication, but which shall in no case be less than one year following the date of the judgment. 5. Paragraph 4 shall not apply to judgments concerning the status or capacity of persons.

defendant summoned in this manner does not appear, the case may be delayed.

If the domicile of the party is not known, then the court will proceed within the meaning of the provisions of art. 167 Code of Civil Procedure, in the sense of appointing a curator according to the provisions of art. 58 Code of Civil Procedure and summoning the party by posting at the court door, on the court portal and possibly by publishing the summons in the Official Gazette of Romania or in a widely circulated central newspaper. If the last address is known, then the part is to be cited at that place as well. Although the summons is intended to make known to the defendant the existence of the dispute, if he has an unknown domicile in another country, the question arises as to how effective those measures are.

However, the provisions of art. 156 of the Code of Civil Procedure, according to which the persons who are abroad, cited according to art. 155 para. (1) points 12 and 13, for the first trial term, will be notified by summons that they have the obligation to choose a domicile in Romania where all the communications regarding the process will be made to them. If they do not comply, the communications will be made to them by registered letter, the delivery note to the Romanian post of the letter, in which the documents to be sent will be mentioned, taking the place of proof of fulfillment of the procedure. I thus consider that, regardless of the manner of communication of the first summons to the party abroad, through the Regulation or directly according to the provisions of art. 155 paragraph 1 point 13 of the Code of Civil Procedure, if the provisions of art. 156 of the Code of Civil Procedure, then, the following summons may be sent by registered letter, the delivery note to the Romanian Post of the letter, in which the documents to be sent will be mentioned, taking the place of proof of fulfillment of the procedure. Therefore, any costs determined by transmission the summons or procedural documents to the foreign party may be limited. Also in connection with the eventual costs generated by the summoning and transmission of the procedural documents according to the Regulation, taking into account the provisions of art. 451 paragraph 1 of the Code of Civil Procedure[7], they may be included in the category of court costs, and in the event of finding the procedural fault of the party abroad, it may be ordered to pay these costs.

On the other hand, as regards the transmission of judicial documents through the Regulation, it also provides protection for the addressee. Thus, according to Article 8 of the Regulation, the receiving agency informs the addressee (using the standard form set out in Annex II) that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into a language which the addressee understands or into an official language of the Member State of destination. When the receiving agency is informed that the addressee refuses to receive the document, it shall immediately inform the transmitting agency by means of the certificate referred to in Article 10 and return the application and the documents whose translation is requested. It should be noted that the receiving agency cannot refuse to send the documents to the addressee taking into account the reason that they are not translated into one of the languages indicated in Article 8 of the Regulation, but has the obligation to inform the addressee about the possibility of refusing receipt their.

If the service of documents has been effected or, on the contrary, could not be effected, the receiving agency shall draw up a certificate of completion of these formalities using the standard form set out in Annex I, which shall be sent to the transmitting agency together with a copy of the act notified or communicated, where Article 4 (5) applies.

As regards the possibility for courts to choose how to communicate judicial acts, the Court of Justice of the European Union has ruled, with reference to Regulation (EC) No 1348/2000, that, in view of its purpose, in order to ensure the effective communication of documents, one or more of the means of communication provided for in this Regulation (repealed by Regulation (EC) No 1393/2007) may be used[8]. It was also noted that there is no hierarchy between the means of communication provided by the Regulation

3. Service of judicial documents in accordance with the 1965 Hague Convention

3.1. Field of application

According to Article 1 of the Convention, it applies in civil or commercial matters, in all cases where a judicial or extrajudicial document must be transmitted for service abroad. The Convention does not apply if the address of the addressee of the document is not known. In the case of States which are, at the same time, both signatories to the Hague Convention and also to which the Regulation applies, in accordance with Article 20 (1) of the Regulation, in matters falling within its scope, it shall prevail.

Romania acceded to the Convention by adopting Law no. 124/2003.

3.2. How to apply the Convention

Unlike the Regulation, in the case of the Convention each state has the obligation to designate a

[7] The court costs consist of the judicial stamp duties and the judicial stamp, the fees of the lawyers, of the experts and of the specialists appointed under the conditions of art. 330 para. (3), the amounts due to witnesses for travel and losses caused by the need to be present at the trial, the costs of transport and, where appropriate, accommodation, as well as any other expenses necessary for the proper conduct of the proceedings.

[8] Case C-473/04 Plumex v Young Sports NV.

central authority to deal with the receipt of requests for notification and transmission and to proceed with their execution. At national level, according to art. 2 of Law 124/2003, the Ministry of Justice is the central authority designated to receive and transmit requests for notification or communication abroad of judicial or extrajudicial acts in civil or commercial matters. Therefore, if it is desired to transmit certain judicial documents to a party located in the territory of a Member State to the Convention, the court will request the Ministry of Justice to transmit the documents to the central authority of the other Member State. In this case, the requesting agencies and the requested agencies do not have a direct interaction, as in the case of notification made under Regulation (EC) No 1393/2007.

If the court orders the transmission of judicial documents according to the Hague Convention, then it will send to the Ministry of Justice a request in accordance with the model form annexed to the convention, without the need to over-legalize the documents or any other equivalent formality. The request must be accompanied by the document to be served or a copy thereof. The request and the document shall both be furnished in duplicate.

According to Article 5 of the Convention, the central authority of the requested State shall itself serve the document or shall arrange to have it served by an appropriate agency, either – a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed. It is also provided that the document may at any time be handed over to the addressee who voluntarily accepts it.

In connection with the language in which the document to be communicated is to be drafted, the central authority may request that the document be drafted or translated into the language or one of the official languages of its country.

Once the document has been communicated to the addressee, the requested authority shall complete a certificate in the form of the model annexed to the Convention, which it will send to the requesting authority and indicate the form, place and date of fulfillment and the person to whom it was delivered, the reasons which have prevented service (art. 6).

4. Conclusions

Summoning the parties and transmitting the procedural documents to them is a vital component of a process. Therefore, regardless of the legal way of transmission that the court chooses, it must be an effective one, in order to ensure the parties the right to defense and the settlement of the process in an optimal and predictable term. To this end, in order to meet the current needs of European justice systems, Regulation (EU) 2020/1784, which will repeal Regulation (EC) No 1393/2007, will establish a framework for judicial cooperation aligned with the digital strategy of the single market. of the EU, the documents to be transmitted between the receiving and transmitting agencies through a secure and reliable decentralized IT system.

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FISCAL MEASURES ADOPTED BY ROMANIA IN THE COVID-19 CONTEXT IN ORDER TO HELP COMPANIES AVOID INSOLVENCY

Corina Georgiana COSTEA (CIOROIU)*

Abstract

The Covid-19 pandemic has been affecting for more than a year all countries' economies, by generating an overall sanitary crisis. In order to prevent the spreading of the Covid-19 virus, countries across the world have limited or even forbidden temporarily several economic activities, which has led to a financial blockage in some industries, especially in the touristic industry. In response to the devastating economic effects, the Romanian Government has adopted several measures and fiscal mechanisms for companies, aiming at preventing their insolvency and therefore revitalizing the national economy.

Keywords: *fiscal measures, insolvency, COVID-19 pandemic, national economy, global economy*.

1. Introduction

The COVID-19 pandemic has generated a sanitary crisis across the world. Therefore, public authorities have been constrained to adopt several measures in order to limit the impact of the COVID-19 virus spreading. Each country has developed its own policy of measures depending on the severity of the pandemic. Because of the necessity of limiting the pandemic's consequences, countries across the world have been limiting social activities, imposing national and regional quarantines. These national policies have had a strong impact on the economy since some of the measures have included limitations or even temporary bans of some economic activities. Whilst these measures have helped the prevention of the virus' spreading, they have also severely affected the economy and the business environment. This paper analyses the measures adopted by the Romanian Government to limit the pandemic's impact upon the national economy and help companies avoid imminent insolvency. The importance of this matter could be justified by the fact that these measures support the efforts made by struggling businesses to overcome their financial distress or state of insolvency. The lack of measures adopted by the Romanian Government could result in a general economic blockage and could easily cause the "death" of the majority of small and medium businesses. This paper also intends to analyse effective measures that have been adopted by other countries and therefore identify the best practices that have had a positive impact. All measures adopted by the Romanian government in order to limit the spreading of the COVID-19 virus have affected, directly or indirectly, a large majority of businesses, which have been unable to keep up with claims' payment, including budgetary claims. As a consequence, the Romanian fiscal authorities have collected a lower rate of taxes. In relation to this matter, a set of measures has been needed not only to support businesses, but also to increase the rate of tax collection.

2. Measures adopted by the Romanian Government to support companies during the established state of emergency

The Romanian legislator has adopted numerous mechanisms and measures in response to the devastating effects upon the economy. However, this paper shall only analyze the measures that are relevant regarding preventing companies' insolvency, especially the fiscal measures and mechanisms, since fiscal authorities are the permanent creditor of every business.

2.1. The Emergency Situation Certificate (ESC)

The state of emergency has been established in Romania by the Decree no. 195 of 16th of March 2020[1], which has only mentioned the possibility of affected companies to obtain the ESC. The Government Emergency Ordinance no. 29/2020 regarding some economic and fiscal-budgetary measures[2] had provided clarifications upon the utility of the ESC and the entities that could request its release. Therefore, the ESC is a document issued by the Ministry of Economy, Energy and Business Environment, at the request of economic operators whose activity had been totally or partially interrupted based on decisions issued by the competent public authorities. It must be mentioned that the authorities had issued several military ordinances, interrupting totally or partially several economic activities, such as: (i) educational institutions, units whose activity is the serving and consumption of food and alcoholic / non-alcoholic beverages, (ii) the activity of every entity organizing events that involve the participation of over 100 persons in open spaces, (iii)

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[1] Published in the Official Journal no. 212/16.03.2020.

[2] Published in the Official Journal no. 230/21.03.2020.

the activity of dentals clinics, (iv) retail sale of goods and services in shipping centers (with few exceptions), (v) cultural, scientific, artistic, religious, sporting, entertainment or gambling activities, (vi) transport services, (vii) entities that organize collective physical activities, (viii) any other entities that organize and carry out activities involving the formation of groups of more than 3 persons. The ESC had been issued in two forms: (i) Type 1 (blue), issued for the entities mentioned above, whose activity had been totally or partially interrupted, as a result of decisions adopted by the competent public authorities during the declared state of emergency and (ii) Type 2 (yellow), issued for applicants who, based on their declaration on own responsibility, show that they recorded a decrease of income of at least 25% in March 2020 compared to the average income recorded in the two previous months. The type 2 ESC had been issued for companies which were indirectly affected by the COVID-19 pandemic. One of the main advantages of the ESC is the fact that, according to article X of the Government Emergency Ordinance no. 29/2020, entities which have obtained it have had the possibility to postpone payments for utility services (gas, electricity, water, telephone and internet services etc.), and also rental payments for registered offices and secondary offices. However, these measures had been limited to a period equal to the established national emergency state, which has lasted for two months, until the 16th of May 2020. The timeframe granted by the authorities to obtain the ESC had been limited and it cannot be obtained in this moment, but its utility is not limited in time, since it is required for accessing several other benefits, such as facilities for loans granted by financial institutions. Nevertheless, the biggest advantage of obtaining an ESC is the fact that it could be used by its holders to invoke the *force majeure* in ongoing contracts. To the author's knowledge and research, no other state has adopted this measure in this form. One particularity derives from the fact that the simple ownership of an ESC is sufficient to create a *relative presumption of force majeure*. The civil law in Romania does not regulate a *presumption* of force majeure. According to art. 1.351 para. (2) of the Civil Code[3], "*Force majeure is any external event, unpredictable, absolutely invincible and inevitable*" and according to para. (1), "*Unless the law or the parties don't stipulate otherwise, liability shall be removed when the damage is caused by force majeure or fortuitous case*". "The effect of the case of force majeure consists in the total elimination of the civil liability for the damages caused by the non-execution of the (contractual – n.n.) obligations due to the force majeure event."[4] However, the *presumption* of a case of force majeure does not operate in every contractual relationship, since the Romanian law regulates that the contractual parties are able to exclude or limit the cases of force majeure. This is the main reason why owning an ESC generates a *relative presumption* of a force majeure case and not an *absolute presumption.* Also, according to art. 1.634 para. (1) of the Civil code, "*The debtor is liberated when its obligation cannot be executed due to a case of force majeure (…) occurring before the debtor is put in delay*." In order to establish if the relative presumption of force majeure case operates in a certain case, the party that invokes the pandemic as a force majeure case should clarify if the contract excludes the removal of liability in such cases and if it stipulates limits in time or events. Except the facility granted by the authorities regarding the request of an ESC, companies have the possibility of requesting a notice of force majeure from the Chamber of Commerce, in accordance with art. 4 para. (1) letters j) and i) from the Law no. 335/2007 of Chambers of Commerce from Romania[5]. "However, the two documents should not be confused, being issued by different authorities, under different conditions and having different scope and legal effects."[6] The Romanian jurisprudence has shown that "For the exoneration of liability to occur, it is not sufficient that the event is external to the will of the parties and unpredictable, but it also must not have been reasonably prevented and overcome."[7] The european jurisprudence has shown that "The notion of force majeure contains an objective element and a subjective element. The objective element concerns unusual and foreign circumstances to the person concerned, while the subjective element is related to the obligation of the person concerned to protect himself from the consequences of the event, taking appropriate measures, without accepting excessive sacrifices."[8] The possibility of obtaining a notice of force majeure is regulated across many countries. "The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact."[9]

[3] Law no. 287/2009, published in the Official Journal no. 505/15.07.2011.

[4] Niță Carolina Maria, Răducan Gabriela, *Consecințele pandemiei generate de coronavirusul SARS-Cov-2 în raporturile contractuale*, Revista Pandectele Române nr. 2/2020, www.sintact.ro.

[5] Published in the Official Journal no. 836/06.12.2007.

[6] https://www.pwc.ro/en/romania-crisis-centre/legal/force-majeure/force-majeure-and-emergency-situations-in-the-context-of-covid-1.html.

[7] Bucharest Court of Appeal, section VIII administrative and fiscal dispute, Civil Sentence no. 7478/ 09.12.2011.

[8] Order of the General Court (First Chamber) of 22 June 2011, Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission, case T-409/09, ECLI identifier: ECLI:EU:T:2011:299.

[9] Sophia Tang, *Coronavirus, force majeure certificate and private international law*, March 1, 2020, https://conflictoflaws.net/2020/coronavirus-force-majeure-certificate-and-private-international-law/.

2.2. Providing facilities for loans granted by financial institutes to certain categories of debtors

Another measure adopted by Romania in response to the effects of COVID-19 pandemic, which has affected many small and medium entreprises, is the adoption of the Government Emergency Ordinance no. 37/2020 on granting facilities for loans granted by credit institutions and non-banking institutions to certain categories of debtors.[10] While these measures also apply to natural persons (consumers), authorized natural persons, liberal professions and other categories of debtors, this subsection shall only approach small and medium enterprises. According to this normative act, debtors, as they are defined by Article 1 letter b), may request the suspension of due claims related to loans, representing installments of capital, interest and commissions, for up to 9 months, but no longer than the 31st of December 2020. Consequently, the maximum credit period may be exceeded by a period equal to the duration of the suspension of the payment obligation. The interest due by debtors corresponding to the due amounts whose payment is suspended according to art. 2 shall be capitalized at the balance of the credit existing at the end of the suspension period. The capital thus increased shall be paid in installments for the remaining period until the new maturity of the loans, after the suspension period. The normative act, in its first version, requested that debtors should justify their financial difficulties by providing an ESC issued by the authorities, which was the main condition that debtors, other than natural persons (consumers), should had fulfill, along with the condition of not being the subject of an insolvency proceeding. However, since the effects of the COVID-19 pandemic upon the business environment have lasted an unexpected amount of time, causing a systemic risk of insolvencies, the Government has issued the Ordinance no. 227/2020 for the modification and the completion of the Government Emergency Ordinance no. 37/2020[11], which has prolonged the timeframe of this facility until the 15th of March 2021. Because the ESCs have been issued for a limited period of time, debtors had been required to present a declaration on own responsibility instead of an ESC. For these debtors to benefit from the facilities regulated by GEO no. 37/2020, as modified by GEO no. 227/2020, certain conditions must be fulfilled by the requestors: (1) to send a written request to the credit institution or to the non-banking institutions; (2) to present a declaration on own responsibility regarding the decrease of by at least 25% of the average monthly income from the last 3 months prior to the request for suspension of payment obligations by reference to the similar period of 2019 or 2020; (3) the debtor shall not be the subject of an insolvency proceeding ; (4) the loan has not reached its maturity and the credit / non-banking institutions has not declared the early maturity at the 30th of December 2020; (5) debtors requesting the facilities shall not be in arrears on the date of their request. Debtors who have initially benefited from this facility were able to file another request, if both requests did not surpass the maximum period of 9 months of payment suspension. Similar measures have been adopted by countries across the world. For instance, according to the International Monetary Fund research[12], most countries which regulated moratoriums have extended this facility to a maximum period of 6 months: Bulgaria (6 months), Croatia (3 months), Czech Republic (6 months). Countries such as Italy and Cyprus have extended the moratoriums for a larger period, which is justified by the fact that the effects of the COVID-19 pandemic were more severe due to the impact on tourism. This facility regulated by most countries is especially important for businesses having a reduced rate of liquidity. "The slowdown of economic activity caused by the COVID-19 outbreak and related lock-down measures implemented to tackle the health crisis have led to severe difficulties for companies to meet their financial obligations."[13] By stimulating companies' liquidity through measures suitable for different types of difficulties, fiscal authorities are able not only to support the business environment overall, but also collect a higher rate of taxes, helping to avoid the systemic risk of insolvency.

3. Fiscal mechanisms adopted in order to help companies avoid financial distress and insolvency

One of the most important measures adopted by the Romanian Government in order to avoid the systemic risk of insolvency are found in Article VII of the Government Emergency Ordinance no. 29/2020. According to Article VII para. (1), for the fiscal obligations due starting with the 21st of March 2020 and not paid until the 25th of December, authorities have not calculated and instituted interest and penalties for the delay, by derogation from the Fiscal Procedure Code, approved by Law no. 207/2015[14], with subsequent amendments and completions. Furthermore, according to para. (2), unpaid fiscal obligations in this period of time have not been considered to be due. This measure has been extremely helpful, especially for companies whose activities have been restricted, most of them

[10] Published in the Official Journal no. 261/30.03.2020.
[11] Published in the Official Journal no. 1331/31.12.2020.
[12] https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19#I.
[13] Apedo-Amah, Marie Christine; Avdiu, Besart; Cirera, Xavier; Cruz, Marcio; Davies, Elwyn; Grover, Arti; Iacovone, Leonardo; Kilinc, Umut; Medvedev, Denis; Maduko, Franklin Okechukwu; Poupakis, Stavros; Torres, Jesica; Tran, Trang Thu, *Unmasking the Impact of COVID-19 on Businesses : Firm Level Evidence from Across the World. Policy Research Working Paper*, no. 9434. World Bank, Washington, DC, October 2020, p. 9, https://openknowledge.worldbank.org/handle/10986/34626.
[14] Published in the Official Journal no. 547/23.07.2015.

having faced the risk of insolvency. The Romanian law considers a company to be in a state of insolvency when it has an insufficiency of available cash to pay its undisputed, liquid and enforceable debts. By postponing the due date of fiscal obligations up until the 25th of December 2020, Romania has achieved the direct avoidance of small and medium enterprises. In the meantime, since the due date of fiscal claims had been delayed, fiscal authorities had also suspended or delayed the enforcement of budgetary claims. However, these safeguard measures are no longer applicable in this very moment, and the pandemic does not seem to end soon. "Smaller firms tend to face more severe financial constraints during COVID-19 even in advanced countries."[15] This is why, starting with the date on which these facilities were no longer in force, authorities have had to regulate new mechanisms to come in distressed companies' support.

3.1. Simplified rescheduling of budgetary obligations

Since the instauration of the state of emergency in the 16th of March 2020 in Romania, small and medium enterprises have faced difficulties in paying budgetary taxes. The authorities have raised the issue that these companies also face the risk of accumulating new debts, which could bring them in a state of insolvency. Therefore, in order to provide opportunities for an economic recovery, the Government Emergency Ordinance no. 181/2020 on some fiscal-budgetary measures, for amending and supplementing some normative acts, as well as for extending certain deadlines[16] has been issued. This normative act allows debtors to reschedule their budgetary debts for a period of maximum 12 months, without providing any guarantees, as long as the due date of these debts begins with 16th of March 2020. According to Article 1 para. (1), both main and accessory fiscal obligations may constitute the subject of simplified rescheduling. However, debtors intending to access this fiscal mechanism need to fulfill several conditions: (1) to file a request until the 30th of September 2021; optionally, debtors may propose a rescheduling program; (2) to not be the subject of an insolvency proceeding; (3) to not be dissolved; (4) to not have budgetary debts that were due before the date on which the national emergency state was instaured; (5) to not have been held liable according to insolvency and fiscal regulations; (6) to have filed all fiscal declarations. It needs to be mentioned that the possibility of rescheduling budgetary claims has been regulated in the Code of fiscal procedure since 2015; however, the classic rescheduling of budgetary claims regulates debtors' obligation to provide guarantees when the claims surpass an amount of 20.000 lei (approx. 4.000 euros). The mechanism of simplified rescheduling of budgetary claims does not require debtors to provide guarantees. Moreover, one of the greatest advantages of this facility is the fact that debtors may request a differentiated payment of the installment rates. This possibility is especially suitable for seasonal businesses, whose repayment capacity is higher in certain periods of the year. However, each monthly rate must be at least equal to 5% of the total amount due. The fiscal authorities analyze the debtor's request in 5 business days from the date of its registration, issuing a decision of payment rescheduling or a decision of rejection of the debtor's request, as the case may be. If the debtor's request is approved, the decision of payment rescheduling shall establish the amount and terms of payment of the installment rates. Since the installments' due date is modified by the fiscal authorities' decision, for the amounts that are subject of the rescheduling, the enforcement proceedings shall not begin or shall be suspended, as the case may be. However, debtors are still obliged to pay current fiscal claims, along the debts that are rescheduled. This fiscal mechanism has helped debtors to stabilize their financial state and to consolidate their business' ongoing concern principle, reducing the risk of systemic insolvencies. Several countries have adopted a similar fiscal mechanism, or have even extended the suspension of tax payments. For example, Hungary has regulated a fiscal mechanism that allows debtors to reschedule or even extend deferred payments.[17] In Latvia, the tax administration is entitled to reschedule or postpone the performance of the delayed tax payments for a period of up to three years.[18] According to the author's research, countries across the world have adopted fiscal facilities that were available for a limited amount of time, but were subsequently prolonged.

3.2. Restructuring of budgetary claims

One of the most complex fiscal mechanism adopted by the authorities consists of a restructuring of budgetary claims, based on the Government Emergency Ordinance no. 6/2019 on the establishment of fiscal facilities.[19] Initially, in 2019, authorities had issued this normative act for debtors who registered budgetary debts of more than 1.000.000 lei (approx. 200.000 euros), and that were due on the 31st of December 2018. However, this fiscal facility had been available for a very short time, starting with the 8th of August 2019, until the 25th of September 2019. The deadline for submitting an intention of restructuring budgetary claims by debtors has then been extended to the 31st of October 2019. Concerns of a new virus spreading rapidly worldwide had already began at that

[15] Ibidem 14, p. 10.
[16] Published in the Official Journal no. 988/26.10.2020.
[17] CIAT/IOTA/OECD (2020), Tax Administration Responses to COVID-19: Measures Taken to Support Taxpayers, OECD, Paris, https://read.oecd-ilibrary.org/view/?ref=126_126478-29c4rprb3y&title=Tax_administration_responses_to_COVID-9_Measures_taken_to_support_taxpayers.
[18] Ibidem.
[19] Published in the Official Journal no. 648/05.08.2019.

point. Thus, the fiscal facility had been once more extended to an amount of time, starting with the 1st of February 2020 until the 31st of July 2020, the latter date being furtherly extended until the 30th of September 2020. The pandemic and the length of the restrictions imposed by authorities had generated the need for the repeated extension of the deadline of this particular fiscal mechanism. At this time, the deadline for debtors intending to access this mechanism is the 30th of September 2021, but may be extended once more, depending on the evolution of the sanitary crisis. Initially, this fiscal mechanism had been applied to companies owing more than 1.000.000 lei that were due. However, because small and medium enterprises had also needed alternatives to restructure their budgetary debts, the simplified rescheduling of debts not providing enough time for some SMEs, the authorities have eliminated the limit of at least 1.000.000 lei in budgetary debts and therefore the scope of the law had extended to any debtor, regardless of the amount of due budgetary claims. According to Article 1 para. (1), the purpose of the law is avoiding the opening of insolvency proceedings of certain categories of debtors, except for public institutions. Of course, several conditions must be fulfilled by debtors in order to access this fiscal mechanism: (1) to not meet the conditions to access the classic payment rescheduling regulated by the Code of fiscal procedure; (2) to present a restructuring plan and a private creditor test, prepared by an independent expert; (3) to not be the subject of an insolvency proceeding; (4) to not be dissolved; (5) to have submitted all fiscal declarations, according to their fiscal vector; (6) to fulfill the private creditor test, in accordance to this normative act. The private creditor test is also defined in the Law no. 85/2014 on pre-insolvency and insolvency proceedings, according to which it is a method to compare the manner in which budgetary claims may be satisfied by reference to a diligent private creditor in a pre-insolvency or reorganization proceeding and the manner in which they may be satisfied in a bankruptcy procedure; this comparison is based on a valuation report prepared by a chartered valuator, member of ANEVAR (Romanian National Association of Chartered Valuators), appointed by the budgetary creditor, and addresses inclusively the duration of a bankruptcy proceeding by comparison to the proposed payment schedule; the event in which the private creditor test confirms that the amounts which the budgetary creditor would receive in a pre-insolvency or reorganization proceeding are higher than the amounts it would receive in a bankruptcy proceeding, shall not be deemed to be an event of state aid (Article 5 point 71). The GEC no. 6/2019 however provides a slightly different definition of the private creditor test, since the subject of a restructuring plan should not simultaneously be in an insolvency proceeding. Therefore, in the fiscal perspective, the private creditor test is an independent analysis, performed based on the premises considered in the debtor's restructuring plan, which shows that the state behaves similarly to a private creditor, sufficiently prudent and diligent, which would obtain a higher recovery degree of receivables in the version of restructuring compared both with the version of enforcement and the opening of the bankruptcy proceeding. If debtors fulfill all the requirements, they need to file a notification regarding their intent to benefit from this fiscal mechanism, and to address an independent expert drafting the restructuring plan and the private creditor test. After receiving the debtor's notification, the competent fiscal body verifies if the debtor has fulfilled its declarative obligations according to the fiscal vector until the respective date, performs the settlements, compensations, and any other operations necessary in order to establish with certainty the budgetary obligations that may be subject to restructuring. This particular fiscal mechanism presents numerous similarities with the insolvency proceedings and with the judicial reorganization proceedings, in means of filing an intention to benefit from these mechanisms, fulfilling the private creditor test in some cases, the suspension of enforcements proceedings, applying the so-called *haircuts* translated in cutting a part of the due debts, under the condition of successfully executing the restructuring plan and, of course, the restructuring plan itself. However, the restructuring plan prepared by the debtor needs to approach and detail information regarding: (1) the causes and the extent of the financial difficulty, as well as the measures implemented to overcome them; (2) its patrimonial state; (3) information regarding the causes why the debtor cannot benefit from the classic payment rescheduling in accordance with the Code of fiscal procedure and (4) presenting planned restructuring measures having clear deadlines, ways to restructure budgetary claims, as well as relevant economic-financial indicators to demonstrate the debtor's viability restoration. The normative act exemplifies several restructuring methods which may be integrated in the restructuring plan. One of the greatest advantages provided by this fiscal mechanism is the fact that the restructuring plan may establish a reimbursement period of 7 years which, in some conditions, may be extended with 3 more years, reaching a total of 10 years. Moreover, the restructuring plan may also establish a cancellation of up to 50% of the main budgetary claims, under some conditions, except those concerning the main budgetary and ancillary obligations representing State aid to be recovered. The independent expert drafting the restructuring plan also needs to supervise the debtor's activity and the execution of the plan, periodically drafting and submitting reports to the debtor and the fiscal body. Also, the head of the competent tax authority may designate one or more persons to carry out the supervision of the plan's execution; in the author's opinion, the other person besides the independent expert drafting the restructuring plan could be the members of the management and / or supervisory bodies in the company that is subject of the fiscal

restructuring proceeding. During the restructuring plan's unfolding, if the supervisors find that the debtor has not fulfill an obligation in due time, they shall notify the debtor, granting a reasonable amount of time for adjustment which may be extended for justified reasons, but no longer than 6 months. If debtors face yet again difficulties during the restructuring plan's unfold, they may modify the initial restructuring plan but under some conditions such as to do so before the unfulfillment takes place and to present an adjusted restructuring plan and a private creditor test. For the budgetary obligations contained by the restructuring plan, the competent fiscal authorities shall suspend or shall not begin enforcement proceedings. Clearly, this fiscal mechanism is highly flexible and consists of a valuable instrument for the business environment. Nevertheless, as considered in the insolvency law, the claims that are subject of the restructuring plan are considered to be historical claims and, since this fiscal mechanism ensures the debtors' ongoing concern principle, debtors will likely generate current claims, which are to be paid according to the documents they derive from and at specific terms, which means that debtors should have a high reimbursement capacity or liquidate a part of its patrimony, in order to be able to meet all assumed obligations. In cases in which debtors may not carry out the restructuring plan as foreseen, the fiscal restructuring plan shall fail. The plan's failure generates the fiscal authorities' obligation to file a request of opening the insolvency proceeding against the debtor. This provision of the law may be considered as a sanction applied upon the debtor for the restructuring plan's failure, since the debtor itself had suggested its planned recovery measures in the first place. Even if the debtor would become the subject of an insolvency proceeding in this scenario, it may notify its intent of accessing the judicial reorganization proceeding, having one last chance to try to recover from financial distress. However, the judicial reorganization proceeding is extended to an initial period of 3 years, without having the possibility to surpass a total period of 4 years, while this fiscal mechanism provides an initial period of maximum 7 years, which may extend up to a total of 10 years. Considering these aspects, it is without a doubt that the fiscal mechanism of restructuring budgetary obligations is more flexible and could ease the debtor's financial distress, meaning that if the debtor may not execute the restructuring plan, its recovery chances are uncertainly low in the scenario of converting to the judicial reorganization proceeding.

4. Conclusions

This paper has analysed some of the mechanisms adopted by Romania in order to avoid systemic insolvency among small and medium enterprises, greatly affected by the COVID-19 pandemic and numerous measures of businesses' activity limitation or restriction. Since the pandemic has had a worldwide impact, each country has adopted an economic policy in response to the negative effects upon the business environment. In the author's opinion, Romania has been adopting economic and fiscal mechanisms that are suitable to each type of business, regardless of its size. These mechanisms concerned debtors' temporary incapacity of fiscal obligations and loans' reimbursement, the situation of their ongoing contracts, as well as other aspects which may have consisted of a difficulty risking becoming a state of insolvency. The author believes that the effects of the COVID-19 pandemic upon the economy are yet to unfold but, when the fiscal mechanisms presented in this paper (any many others) shall no longer apply, numerous businesses would file for insolvency. This is why the author believes that these mechanisms should apply for an extended period of time, calculated in years. It is yet uncertain how long will the pandemic last and, even if it comes to an end in the near future, its effects upon the economy would last for years, which is why the fiscal mechanisms presented in the second section of this paper should become permanent. Another reason would be the fact that the mechanism of budgetary obligations' restructuring is perfectly compatible with the preventive composition, a special proceeding aiming at the prevention of the state of insolvency. Of course, in addition to the mechanisms presented in this paper, Romania has adopted numerous other measures and mechanisms for businesses affected by the effects of the COVID-19 pandemic, which may form the subject of further research work given the fact that corporate recovery from financial distress or insolvency is a general topic of interest.

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ASSIGNMENT OF THE CONTRACT. A SPECIAL CASE IN THE MATTER OF THE INSURANCE CONTRACT

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Abstract

Special situations may arise in the relations between the contracting parties, which may lead to a substitution of the party in the insurance relations - the assignment of the insurance contract

With regard to the assignment of the insurance contract, each party may substitute a third party for its insurance relations. The general provisions on assignment, namely those provided by Art. 1315 and Art. 1316 of the Civil Code and those of Art. 1566-1586 Civil Code on the assignment of debt, the special provisions of Art. 2212 Civil Code in the matter of the insurance contract, together with the provisions of the special legislation, such as Law no. 190/1996 on the mortgage contract for real estate investments, provide the regulatory framework necessary to carry out the operation.

In terms of insurance, in accordance with the provisions of Art. 2212 of the Civil Code – "Assignment of insurance", the insurer may assign the insurance contract only with the written consent of the insured.

The doctrine has shown that the assignment contract inserted in an insurance contract can be consensual, but it is necessary, ad probationem, that the agreement of the other party regarding the assignment take the written for

The concrete legal conditions under which the assignment of the insurance contract may occur will be analyzed subsequently, with various solutions of the courts being commented upon in context.

Keywords: *assignment of insurance, insurance contract, insurance indemnity, written consent, substitute a third party*.

1. Introduction

The purpose of this work is to provide an overview of the institution of the assignment of the contract.

The general and special legal provisions governing the institution of the assignment of the contract and the insurance allowance, the legal nature of the assignment operation, the formal conditions of the contract and legal conditions such as the inalienability clause or the need for the indemnity beneficiary s consent, will be reviewed and commented on.

Some of the particularities of judicial doctrine and practice will be brought up in a predominantly jurisprudential approach.

Finally, without the pretence of exhausting the subject, some conclusions will be drawn, based mainly on the judicial practice analyzed.

1.1. Gouverning rules

In carrying out this legal operation, general provisions regarding the assignment will have to be taken into account, respectively those provided by Art. 1315-1316 of the Civil Code (assignment of the contract), those of art. 1566-1586 of the Civil Code (assignment of debt), as well as the special provisions regarding the insurance contract included in Art. 2212 of the Civil Code - provisions, which restate and reinforce some of the already in force provisions in general matters regarding the assignment.

Under the provisions of Art. 1315 of the Civil Code on the assignment of a contract, a party may substitute a third party in the relations arising from a contract only if the services have not yet been fully performed, and *the other party agrees* to it. There are exempted specific cases provided by the law. The assignment contract must be concluded in the form required by the law for the validity of the pre-existing legal act. (art. 1316 Civil Code).

The assignment of the debt is regulated, as a general rule, by the provisions of Art. 1566-1586 of the Civil Code.

In terms of insurance, in accordance with the provisions of Art. 2212 of the Civil Code – "Assignment of insurance", the insurer may assign the insurance contract *only with the written consent of the insured.*

In what follows we ll referr to som proof for and form of assignment contracts, some courts decided that, in the absence of a receivable assignment contract effectively concluded, other documents may not stand for such agreement. Such documents may have the effects of a contract on behalf of a third party beneficiary but, in the absence of a specification of such *de jure* ground for an action, courts may not exceed the limits of their mandate. At the same time, the filing of an indemnity claim in which the indemnity beneficiary specifies the payment manner is not equivalent to o receivable assignment, since there is no legal relationship between the service unit and the insurer. The (partial) payment by the beneficiary indicated in the indemnity claim can be equivalent to a receivable assignment. If the receivable assignment is a liberality, it must meet the requirement of authentic form. If the receivable assignment is a sale and purchase operation, in order to be valid, it should have been performed in exchange for a price set in money. Otherwise, the

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contract is absolutely null, at least in terms of the sale and purchase, since it lacks an essential element in relation to which the parties need to reach an agreement (Art. 1295 of the 1864 Civil Code).

1.2. Legal nature. Assignment or subrogation?

In the doctrine, in a relatively recent study on the assignment of a debt, it was highlighted that the valences of the conventional subrogation clauses inserted in an insurance contract represent a controversial aspect[1]. Taking some opinions previously expressed in the doctrine, it has been shown that, in addition to the legal subrogation, the insurer can agree with the insured that a conventional subrogation is made, even before the payment of the indemnity[2]. On the other hand, it has been disputed that such an agreement concluded prior to the payment of the indemnity would have the value of a conventional subrogation, and it has been argued that such a legal act is, in fact, an assignment of a debt[3]. Finally, it was concluded that such a stipulation, which occurred prior to the payment, could only constitute a *possible assignment of a debt or a promise of subrogation*[4].

In the judicial practice it was considered that the legal nature of the agreement concluded by the plaintiff and the intervener, prior to the promotion of the action, is a subrogation agreed by the creditor, under Art. 1594 para. 1 of the Civil Procedure Code. It has thus been stated, by case-law, that the plaintiff, being the beneficiary of the insurance under the subrogation agreed by the creditor, is the one entitled to compensation as a result of the occurrence of the insured event, a solution justified also by the fact that the transferee mentioned that he had no longer a reason to appeal to the policy transferred in his favour, communicating to the transferor a notification by which he had agreed to subrogate it to his rights in respect of the collection of the insurance indemnity[5].

1.3. The condition of the written form

In the case of the insurance contract, its conclusion by simple agreement of will is valid, but *the written form* of the contract is required *ad probationem*.

Starting from this legal reality, the doctrine has shown that the assignment contract inserted in an insurance contract can be consensual, but it is necessary, ad probationem, that the agreement of the other party regarding the assignment take the written form[6].

1.4. Assignment of the contract by the insurer

The assignment of the contract by the insurer is possible under the conditions of Art. 2212 of the Civil Code, respectively only with the written consent of the insured.

The insurance contract was concluded by the insured, who had the option of choosing the insurer, an option that he must keep and whose modification depends on the consent of the insured. Therefore, the provision of Art. 2212 of the Civil Code - in the meaning of the need for the written consent of the insured to operate the assignment - is fully justifiable.

The exception to the rule is contained in the provisions of Art. 2212 para. 2, in the sense that the written agreement is not required when an assignment of insurance portfolios occurs between insurers, an operation subject to special regulations.

1.5. Assignment of the contract by the insured

According to the content of Art. 2112 of the Civil Code - special provision in the matter of the insurance contract - there is no possibility of the assignment of the insurance contract by the insured.

In relation to the general legal provisions on the assignment of the contract, however, the operation is possible in the event of a written agreement of the contracting parties in this regard. The written agreement is claimed by the corroborated provisions of Art. 1315 and 1315 of the Civil Code, which impose the double condition that the services have not been fully executed, and that the other party consents to the transfer.

Although not expressly provided for in the Civil Code in the matter of the insurance contract, the institution of the assignment of the insurance contract at the initiative of the insured is stipulated in other special legal provisions[7].

Thus, Art. 16 of the Law no. 190/1999 on the mortgage loan for real estate investments stipulates that, in case of mortgaging a building, the borrower (the insured - in our case) will conclude an insurance contract covering all its risks, a contract in which the lender will appear as the beneficiary of the insurance policy. The rights of the insured arisen from the insurance contract will be assigned in favour of the mortgagee for the entire period of the loan for real estate investments, following that, if the compensations granted exceed the amount of the remaining mortgage to be repaid and the other amounts due to the lender, the difference is granted to the beneficiary of the loan or his heirs. In accordance with the provisions of Art.

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[1] Laura Retegan, *"Cesiunea de creanță în raport cu alte operațiuni juridice triunghiulare",* study published in Studia Universitatis Babeș-Bolayi Jurisprudentia" no. 3/2009, July-September 2009.

[2] C. Alexa, V. Ciurel, A.M. Mihăilescu, *Asigurări şi reasigurări în comerţul internaţional*, All Publishing House, Bucharest 1992, p. 107.

[3] I. Sferdian, *Subrogaţia asigurătorului în drepturile asiguratului*, in „Dreptul" no. 12/2002, p. 71-72.

[4] J. Flour, J.-L. Aubert, É. Savaux, *Droit civil. Les obligations. 3. Le rapport d'obligations*, Sirey, Paris 2007, p. 269.

[5] In this regard, Decision no. 666/24.04.2015 delivered by the Bucharest Court of Appeal, 5th Civil Section. The court decision is available on www.rolii.ro.

[6] Elena-Cristina Savu, "Contractul de asigurare", C.H. Beck Publishing House, Bucharest, 2018, p. 164.

[7] See in this regard "Dreptul contractelor civile și comerciale. Teorie, jurisprudență, modele", authors Vasile Nemeș and Gabriela Fierbințeanu, Hamangiu Publishing House, version 2020, p. 714.

18 of the same regulatory document, the insurance contracts provided for in Articles 16 and 17 shall be concluded with an insurance company, and the lender shall not have the right to impose on the borrower a specific insurer.

Regarding the issue of taxation of the insurer, the judicial practice, with some exceptions, seems to make the provisions of the above-mentioned Art. 18 effective. Thus, in judicial practice it was also decided that the clause contained in a loan agreement, according to which the borrower has the obligation to conclude an insurance contract with an insurance company approved by the bank, is not abusive. The Borrower had challenged the validity of that clause, stating that it violated the provisions of Art. 18 of the Law no. 190/1999, the law forbidding the bank to impose on the borrowers the insurance company, all the more so to choose it. The borrower also claimed that, given that a party of the insurance contract is the debtor, as well as that all insurance costs are borne by him, he must freely choose his insurance company.

In a broader comment on that judgment[8], it is stated that the court asked to examine the validity of the clause found that "that clause - a clause contained in *an insurance of credit, guarantees and financial risks* - is only the application of the legal text provided for by Art. 16 of the Law no. 190/1999. Thus, according to Art. 16 para. (1) of the Law no. 190/1999, "*in case of mortgaging a construction, the borrower will conclude an insurance contract covering all the risks related to it. The insurance contract will be concluded and renewed, so as to cover the entire duration of the credit*". Next, para. (2) of the same article states that "*The rights of the insured arising from the insurance contract provided for in para. (1) shall be assigned in favour of the mortgagee for the entire period of validity of the mortgage loan agreement for real estate investments.*" The court also found that "the provision of Art. 12.2 of the contract does not violate the provisions of the Law no. 193/2000 and is not abusive, as it does not impose an excessive obligation on the consumer. This is because the plaintiffs have a legal and contractual obligation to conclude *an insurance policy*, and it is assigned to the Bank precisely in order to benefit from any sums of money that would be paid in case of a *force majeure event* that would lead to the destruction or serious damage of real estate. *The mortgage loan agreement* without securing the mortgaged real estate by concluding an insurance policy, would no longer have the same efficiency for the protection of the only guarantee received by the Bank. In the event of a possible accident, the amount collected by the transferee insured (bank) will take the place of the real estate, and, in case of non-payment, it will go to the insured amount in order to satisfy the guarantee. The court dismissed the arguments of the parties regarding the abusive nature of this contractual rule, as the debtor's lack of a guarantee was irrelevant in this situation. Under loan agreements, the bank's obligation to hand over the amount of the borrower exists and is executed even from the beginning of the contract, and, therefore, there is also the risk of non-payment by the borrower. This is also the reason for establishing the guarantees in the borrower's patrimony, respectively the recovery of the borrowed money. The contractual balance referred to by the plaintiff must also be related to the specifics of the *mortgage loan agreement*. Thus, the plaintiff states that she does not benefit of any protection in the event that the insured risk occurs, the bank benefiting entirely from the insurance, even though the plaintiff pays the insurance premium. It is true that, in this situation, the bank benefits from the insurance, but the court must take into account the very contract concluded between the parties, namely the mortgage loan contract. Under this contract, the lender lends the borrower *only* as a result of securing the contract by mortgaging a real estate. Or, if that real estate is destroyed, then the guarantee remains without effect. This is precisely the reason why the bank is required to conclude a real estate insurance contract. It is the lender's method of securing the investment as best as possible"[9].

The solutions are not yet uniform, and there is a practice to the contrary. Thus, in a case involving *credit insurance, guarantees and financial losses*, the court gave effect to the insured's claim and found the abusive nature and the partial *nullity* of the clause included in the credit agreement regarding the borrower's obligation to conclude an insurance contract with a company approved by the bank[10].

1.6. Assignment of the insurance indemnity

Pursuant to the provisions of Articles 1566-1586 of the Civil Code regarding the assignment of a debt, in the absence of a clause expressly stipulated in the insurance contract prohibiting such assignment or making it conditional on compliance with a certain procedure for exercising the rights arising from the assignment, the assignment of rights carried out by the insured may occur. The provisions of Art. 1568 paragraph (1) of the Civil Code stipulate that the assignment of the debt transfers to the assignee all the rights that the assignor has in relation to the assigned debt as well as the guarantee rights and all other

[8] Art. 12.2 of the respective contract provided the following: "The insurance policy will be assigned in favour of the Bank and its original will be deposited at the Bank's office mentioned in the first paragraph of the Contract. The assignment can be made by mentioning by the insurance company of the expression "*full assignment in favour of the Bank*" on the policy or by written notification from the Insurer certifying the assignment".

[9] In this regard, see the Civil Decision no. 17519 of December 8, 2014 delivered by the Timișoara Court, Second Civil Section, available on idrept.ro.

[10] For such a solution of judicial practice see Civil Decision no. 309 of February 16, 2017, delivered by Bucharest Court of Appeal, the 5th Civil Section, published on idrept.ro, a practice solution quoted also in "Civil and Commercial Contract Law. Theory, Caselaw, Models", authors Vasile Nemeș, Gabriela Fierbințeanu, Hamangiu Publishing House, version 2020, p. 673.

accessories of the assigned debt, the legal procedure for the assignment of this debt being notified to the defendant for payment. Pursuant to Art. 1570 of the Civil Code, the assignment that is prohibited or limited by the agreement with the debtor does not produce effects regarding the debtor, unless: a) the debtor has consented to the assignment; b) the interdict is not expressly mentioned in the document establishing the debt, and the assignee did not know and should not have known the existence of the interdict at the time of the assignment, c) the assignment regards a debt that concerns a sum of money. In the event of an assignment of a future debt, the document must include the elements enabling the assigned debt to be identified. The debt shall be deemed to have been transferred from the time the assignment contract is concluded (Art. 1572 of the Civil Code).

1.7. The agreement in the case of insuring the good that is subject of a mortgage loan agreement or a leasing contract

In the case of assignment of rights from the insurance contract to the mortgagee, the payment of compensation to the insured is conditioned by the agreement of the bank, a provision that is usually found as a standard clause in property insurance contracts.

The legal practice has confirmed that, in the case of a clause for the assignment of rights regarding the compensation, in order to legitimize its legal standing and, at the same time, to be able to obtain the compensation for himself, the insured must present the written consent of the beneficiary regarding the right to compensation arising from the contract.

Thus, in a solution of judicial practice it was noted that, "as long as the insurance contract provides for a beneficiary designated by the insured to receive the compensation, the respondent may not pay any compensation without the express written consent of the beneficiary .... Since the written agreement of the banking unit in favour of which the compensation rights are assigned has not been submitted to the case file, it cannot be argued that in this case C.B. appropriated the action of the insured plaintiff ..... Given that the plaintiff has not proved her legal standing in this case, even if she is a party to the invoked insurance contract, the rights arising from it are assigned in favour of C.B., so that the court will reject the appeal declared by the judicial liquidator"[11].

However, there have also been contrary solutions, considering that "the insertion of the bank into the insurance policy as beneficiary gives active procedural legitimacy to claim compensation only to it and not to the plaintiff in the case in question (the insured), even if there were notifications, submitted to the case file, concerning the bank's agreement to pay the plaintiff directly. As the legal conditions provided for in Art. 36 of the new Code of Civil Procedure for bringing this action to court were not met, the courts of first instance and appeal, in relation to the statements from the insurance policy, and the general conditions of the contract, held that the plaintiff did not have legal standing in the case, the beneficiary of the payment being expressly indicated as U.C. T Bank and dismissed the action on this plea"[12].

1.8. Status of assignment of mortgaged and privileged debts – except insurance agreement

A case in which the validity of the assignment of rights arising from the credit insurance contract for real estate investments is not conditioned by the will of the contracted insurance company, is that of the assignment provided by the provisions of Art. 24 of the Law no. 190/1999. Art. 24 of the Law no. 190/1999 on mortgage credit for real estate investments regulates the possibility of assigning mortgaged and privileged debts, from the portfolio of an institution authorized by law, to another financial institution authorized to operate on the capital markets. The assignment will only concern the mortgaged debts in the portfolio held, which have common features regarding their nature, origin and risks. The notification of the assignment will be made for opposability and not for its validity. As a result of this operation, the transferee acquires, in addition to the mortgage right related to the mortgage loan for the real estate investments, also the rights arising from the insurance contract for the property that is subject to this mortgage. The opposability of the assignment of the rights arising from the insurance contract is carried out, towards third parties, by registration in the Electronic Archive for Security Interests in Movable Property, and towards the insurer, by letter with acknowledgement of receipt or through bank collecting officers agent or legal receivers.

1.9. Inalienability clause. Case-law approaches

In judicial practice, the courts have been referred to in countless cases with sue petitions in which the compensation was requested by the transferee. Specifically, the insured, who was the holder of a casco insurance contract, proceeded to assign the debt to the service unit repairing the vehicle damaged in a car accident and for which the insurance company had opened a claim for damages file and owed compensation.

To the extent that in the insurance contract there was a contractual provision regarding the prohibition of the assignment of the debt or its conditioning by the agreement of the insurer, the solutions of the courts varied.

1.10. The conditions provided by Art. 1570 paragraph 1 of the Civil Code. Interpretation

The judicial practice has also stated that the situations inserted in the content of Art. 1570 para. 1 of

[11] In this regard, see the Civil Decision no. 13 of 13.01.2015 delivered by the Cluj Court of Appeal, second Civil Section, available on www.rolii.ro.

[12] In this regard, see the Civil Decision no. 43 / 04.02.2015 delivered by the Iași Court of Appeal, the Civil Section, available on www.rolii.ro.

the Civil Code are independent, and do not constitute conditions that must be met cumulatively. Consequently, although the assignor carried out the assignment without first seeking the debtor's consent, it was stated that the assignment would produce effects in respect of the debtor. In that case[13], regarding the inalienability clause, it was shown that the provisions of Art. 1570(1)(c) of the Civil Code are applicable, so that the assignment produces effects towards the debtor, since at issue is a debt that concerns sums of money. The situations inserted in the content of Art. 1570 para. 1 are independent, not constituting conditions that must be fulfilled cumulatively. Consequently, although the assignor has made the assignment without first seeking the debtor's consent, the assignment will produce effects with respect to the debtor, according to the above-mentioned legal grounds. In that case, the provision of Art. 38.1 of the Insurance Conditions regarding the interdict of assignment, does not constitute an inalienability clause as set out in Art. 1570 of the Civil Code, because in the light of the latter article, the legislator establishes which are the three cases/situations that are not subject to the inalienability clause of the debt. In other words, the given situation involves the assignment of a debt, which consists of a sum of money that the insured assignor sends to the assignee and has to collect it from the debtor (insurance company and defendant in this case). Thus, from the interpretation of the wording of Art. 1570 para. 1, it results that the assignment of debt produces effects towards the debtor and is valid, because it fits perfectly in one of the conditions/situations laid down in Art. 1570 of the Civil Code (respectively in the one set out in letter c) and is opposable to the debtor. It is also shown that the legislator, by art. 1570 of the Civil Code, does not establish conditions but establishes cases, situations or, more precisely, exceptions from the rule of non-enforceability of the assignment prohibited or limited by the agreement of the assignor with the debtor. In order to be able to speak of cumulative conditions, the legislator had to expressly provide for this, using the phrase: "unless the following conditions are cumulatively met: (...)" ... The debtor may have an interest in maintaining contractual relations with a particular creditor, by inserting in the contract, for this purpose, a clause of inalienability of the debt or stipulating limits of the assignment. However, the assignment of debt is an extremely important mechanism in a modern economy, through its ability to promote the movement of capital and, therefore, limiting the effects of such an inalienability clause is not only natural, but also necessary. According to the concept of the new Civil Code, inspired by the Unidroit Principles (art. 9.1.9), the transfer of the right of claim may be opposed by the assignee to the debtor, even in the presence of non-assignable or conventional limitations, if the debtor has consented to the assignment or if the prohibition or the limitation, which does not appear in the text of the ascertaining document, could not and should not have been known by the assignee at the time of the assignment. Also, the inalienability clause does not produce effects towards the assignee, if the assignment concerns a pecuniary claim, regardless of whether or not it was recorded in the ascertaining document. The law, thus, gives preference to the need for credit and the use of monetary claims as a tool for financing economic activity. In this regard, the Timiș Tribunal also ruled, by the civil decision of 26.03.2013, in a similar case, following the verification of the legality and validity of another decision delivered in a case settled by the Timișoara Court. By this decision, the Tribunal found the defendant's appeal versus the respondent to be groundless, and consequently found legal and valid the decision by which it was obliged to pay the compensation that was the subject of the assignment contract concluded with its insured. In relation to all these arguments, the appellate court ruled that the provisions of Art. 38.1 of the Insurance Conditions, do not constitute an inalienability clause as provided for in Art. 1570 Civil Code, because in the light of the latter article, the legislator establishes which are the three cases/situations that are not subject to the inalienability clause of the debt".

1.11. Requirement for the indemnity beneficiary's consent in case of an inalienability clause

In other cases, it has been decided otherwise, in the sense that the assignee could not receive the indemnity, because the provisions of the insurance contract, which prohibited the assignment of the right to indemnity without the insurer's consent, were not observed. Following an examination of the case documents and works, the court decided that the objection raised to the plaintiff's lack of standing capacity to sue was founded, based on the following reasons: "According to the provisions of Art. 36 of the new Civil Procedure Code, the standing capacity results from an identity between the parties and the subjects of a litigious legal relationship, as referred to the court. Hence, the standing capacity to sue requires an identity between the person of the plaintiff and that of the holder of the right referred to the court. In the case, the plaintiff vested the court with a claim based on an optional insurance contract for fire and other risks concluded between the parties. According to the "Special Provisions" clause of the insurance policy "Insurance rights are assigned in favor of Raiffeisen Bank. The property (stocks, equipment etc.) subject to insurance is mortgaged in favor of Raiffeisen Bank SA. The amounts due as insurance indemnity will be paid to a separate bank account opened with Raiffeisen Bank in the name of the policyholder, an account that will be available to Raiffeisen Bank". According to clause 6.5

[13] In this regard, see the Civil Decision no. 351/22.04.2013 delivered by the Timiș Tribunal on appeal. The court decision is available on www.rolii.ro.

of the insurance contract " (1) In the case of insurance contracts concerning assets mortgaged or pledged in favor of a creditor, the rights/receivables set forth by the insurance contract will be assigned by the policyholder to the relevant creditor up to the concurrence of the value of its right, by notifying the policyholder in writing about this, while the policyholder will receive only the difference. (2) Based on the express consent of the creditor, the indemnity may be paid to the policyholder". Based on these contractual provisions, the court established that the right of the policyholder-plaintiff to indemnity deriving from the insurance contract on which its claim is based was assigned in favor of a third party beneficiary - Raiffeisen Bank. As a result, even though, under the insurance contract, the plaintiff is the policyholder, due to the fact that the policy beneficiary is a third party, only the latter may request for the indemnity payment. Based on the aspects mentioned above and on the fact that the consent of the insurance third party beneficiary was not proven, in order to enable the indemnity payment to the plaintiff (the policyholder), the court will admit the objection raised to the lack of standing capacity to sue and, as a result, will dismiss the sue petition as being filed by a person lacking such standing capacity to sue" [14].

1.12. Requirement regarding the existence of a serious reason for a payment refusal

In some cases, courts decided that an indemnity may be granted to the receivable's assignee. They established that, even though the general conditions of the CASCO insurance contract stipulate that the policyholder is expressly prohibited to transfer its rights and obligations arising from the contract in the form of a receivable assignment, the sanction being that of refusing to pay the indemnity to the third party, yet, the sanction does not consist in an invalidation of the receivable assignment contract. This is and remains validly concluded. Moreover, it is also binding on the other party because it has been notified to the latter. The court also established that the provisions of Art. 1570 para. 1 item c of the Civil Code, under which: „ (1) *An assignment that is prohibited or limited by an agreement between the assignor and the debtor does not produce effects for the debtor unless:* ***c)*** *the assignment concerns a receivable the object of which consists in a money amount.",* were applicable in the case. The sanction established by the parties for non-observance of the provisions of Art. 47 para. 1 of the General Terms of the CASCO insurance contract consists in a refusal to pay the amount to the third party assignee, but the insurer failed to justify, based on a well-grounded and unequivocal reasons, its refusal to pay. Hence, in the absence of such reason, the court cannot apply the above-quoted contractual provisions"[15].

1.13. The particular situation deriving from Art. 4 para. 1 item b of Law no. 213/2005

In a different case decision, the supreme court established that, in a particular situation where the court acknowledges the applicability of the provisions of Art. 4 para. 1 item b) of Law no. 213/2005, the category of beneficiaries of indemnity paid through the guarantee fund will include only policyholders, insurance beneficiaries and prejudiced parties. The law does not prohibit the conclusion of legal documents whereby an insurance creditor transfers the insurance receivable held by it, but this situation is not applicable in the relevant case, in which the assignment concerns a receivable arisen under a collaboration agreement, not an insurance contract, and the assignor (the service unit) did not act as insurance creditor. The current legal framework does not include such express provision, as the lawmaker has understood to restrict the category of beneficiaries of compensations paid to policyholders through the guarantee fund.[16]

Form of the assignment contract and proof for its conclusion. In this respect, the opinions of courts were also diverging :

1.14. Assignment versus contract on behalf of third party beneficiary. Requirement regarding the existence of an effectively concluded assignment contract

Some courts decided that, in the absence of a receivable assignment contract effectively concluded, other documents may not stand for such agreement. Such documents may have the effects of a contract concluded on behalf of a third party beneficiary but, if such legal basis is not indicated for the action, the courts of first instance and the courts adjudicating in appeal may not exceed the limits with which they were vested. In this context, the courts established that a receivable assignment required an assignor, an assignee and an assigned debtor and that, in order to deal with a receivable assignment, there should be an agreement, whereby the vehicle owner transfers its receivable right held against the assigned debtor (the MTPL policyholder – the appellee-respondent) to the assignee service unit. The court established that such agreement was not proven in that case, because the indemnity claim relied upon by the appellant-plaintiff included only the agreement of the owner (the presumed assignor) and not that of the service unit (the presumed assignee). At the same time, the indemnity claim was filled in on a form prepared by the assigned debtor and, as it results from its content, was addressed precisely to the debtor. Therefore, this indemnity claim did not

[14] See for this purpose Civil Decision no. 998/11.04.2019 rendered by the Sixth Civil Division of Bucharest Tribunal, involving an obligation to comply. The court decision is available at www.rolii.ro.

[15] See for this purpose Civil Decision no. 639/08.05.2018. The court decision is available at www.rolii.ro.

[16] See for this purpose Decision no. 2852/2019 of 29-May 2019 rendered by Bucharest High Court of Justice-Administrative and Tax Litigation Division. The court decision is available at www.rolii.ro.

contain the agreement of the vehicle owner, in its capacity as assignor, and of the service unit, in its capacity as assignee, in order to be assimilated to a receivable assignment. By this indemnity claim, the policyholder indicated the insurance beneficiary, and, as a result, the legal relations arisen this way fall under the scope of a *contract on behalf of a third party beneficiary* mechanism, based on the following reasoning: the policy owner, through a proxy, acts as policyholder, and requests the promissory party (the MTPL policyholder – the appellee-respondent), which owes the indemnity to the policyholder, to pay it in favor of a third party beneficiary (the service unit). This agreement was valid only between the policyholder and the promissory party, i.e., between the owner's proxy and the MTPL policyholder. The service unit is a third party to this legal relation, and this is the reason why the indemnity claim does not even contain its consent. Through this mechanism, the parties sought to extinguish two legal relations, namely the obligation of the MTPL policyholder to pay the indemnity to the owner and the obligation of the owner to pay the value of repairs to the service unit. By using a contract on behalf of a third party beneficiary, one gets to a situation where the MTPL policyholder would pay directly to the service unit, extinguishing this way both obligations and simplifying the legal relations between the parties. The fact that the MTPL policyholder has paid part of the indemnity is not proof for the receivable assignment but for the performance of the obligation undertaken towards the owner through the agreement that includes a third party beneficiary. Through the mechanism of a contract on behalf of a third party beneficiary, the right arises directly in the estate of the third party beneficiary, which can make use of it, but not through other legal means, but precisely by relying upon the contract on behalf of the third party beneficiary. However, the court established that, in the case at hand, the plaintiff did not invoke as ground for its action a contract on behalf of a third party beneficiary, but the existence of a receivable assignment contract, which, as established previously, was not proven in the case. In conclusion, the admission of the plaintiff's action on a ground other than the indicated one would be a violation of the principle of party disposition, which governs the civil proceedings, being equivalent to a change in the ground for the sue petition (the ground consisting in the legally qualified situation). Since both the court of first instance and the one adjudicating the appeal are bound to the limits of their mandate, including in terms of the ground for the sue petition, and the court established that the existence of a receivable assignment contract between the owner and the service unit had not been proven in the case, it finally established that the plaintiff lacked the standing capacity to sue.[17]

1.15. Absence of a legal relationship between the insurer and the service unit

Other courts have decided in a similar way, in the sense that they have not considered that an assignment had taken place, because the filing of an indemnity claim, in which the indemnity beneficiary specifies the payment manner, is not equivalent to a receivable assignment. Moreover, there is no legal relationship between the service unit and the insurer: "the appellant-plaintiff claimed that its standing capacity to sue was justified for all claim files... These claims of the plaintiff are unfounded, since, as mentioned before, the filing of such indemnity claim, in which the indemnity beneficiary specifies the payment manner, is not equivalent to a receivable assignment. Given that the plaintiff must justify its standing capacity to sue on the date when it files the action, and through the documents lodged with the case file, the plaintiff failed to prove the existence of assignee's indemnity rights deriving from all claim files as of the action registration date, the court believes that the court of first instance correctly dismissed the objection raised to the lack of the plaintiff's standing capacity to sue for claims in an amount of RON ..., deriving from a number of 20 claim files, because there is no legal relationship between the service unit and the insurer, as the latter is not a party to the insurance contract. In fact, under the sue petition, the plaintiff's claims were based on the provisions of Art. 9 and Art. 20 of Law no. 136/1995, which refer to the obligation of insurers to pay the indemnity to the policyholder, the insurance beneficiary or to the prejudiced third party, under the terms of the insurance contract, as well as on the provisions of Art. 969, Art. 989 and Art. 1073 of the 1864 Civil Code. Yet, the plaintiff-appellant does not have the capacity as policyholder, or as insurance beneficiary or as prejudiced third party, and it may sue the respondent for the payment of owed compensations only in cases of a receivable assignment, subrogating itself in the rights of the assignor-indemnity beneficiary. Or the plaintiff unquestionably proved that it had the capacity as assigned party and, therefore, had the standing capacity to sue only for receivables deriving from six claim files".[18]

1.16. Absences of consent to receivable transfers and of proof for price payment

The considerations of other final court decision,[19] also rendered by the Sixth Civil Division of Bucharest Tribunal, plea in favor of the same aspects mentioned above. In this last decision, the court states extremely

[17] See for this purpose Civil Decision no. 364/24.01.2014 rendered by the Sixth Civil Division of Bucharest Tribunal, which is available at www.rolii.ro.

[18] See for this purpose Civil Decision no. 202/03.03.2015 rendered in extraordinary appeal by the Sixth Civil Division of Bucharest Tribunal, which is available at www.rolii.ro.

[19] See for this purpose Civil Decision no. 133/10.01.2014 rendered by the Sixth Civil Division of Bucharest Tribunal, which is also available at www.rolii.ro.

rigorously and convincingly from the perspective of a logical and legal reasoning as follows: "In its extraordinary appeal application, the appellant-plaintiff relied upon a presumed receivable assignment concluded between it and the respondent policyholder, but this assignment was not proven either in front of the first instance or of the court adjudicating the appeal. The fact that, through its indemnity claim, the policyholder requests that this indemnity be paid to the account of the appellant- plaintiff (the service unit having repaired the policyholder's vehicle) is not equivalent, in any case, to the conclusion of a receivable assignment contract. The policyholder's request could be based on other economic reasons and on other relationships existing between it and the appellant. Neither the existence of an agreement regarding the receivable transfer from the policyholder to the appellant-plaintiff nor the price assignment have been proven in the case. The indemnity claim did not amend the insurance contract in terms of the indemnity beneficiary, as claimed by the appellant. The mechanism used in this case is frequently used in insurance relationships, as insurers often pay the value of repairs directly to the account of service units. However, this does not give rise to any right to file an action against the insurers in favor of the service unit. Also, the court believes that the first instance correctly established that the provisions of Art. 9 and Art. 20 of Law no. 136/1995 (in force as of the insurance contract conclusion date) are not applicable in the case, since the obligation to pay the insurance indemnity is regulated basically through the insurance contract and only for the parties indicated by the above-mentioned provisions (the policyholder, the insurance beneficiary or the prejudiced third party), and the appellant-plaintiff does not fall within the category of such parties. Referring to the appellant's claim that, through the partial payment made, the appellee admitted its standing capacity, the court establishes that the payment made to the appellant's account is not proof for the assignment recognition, as claimed by it, but for the fact that the appellee made the payment to the account indicated by its policyholder through the indemnity claim, such payment being made however for the policyholder. There is no legal relationship arising from the insurance contract between the parties in this case. In conclusion, the court establishes that the appellant-plaintiff has failed to prove its capacity as policyholder, insurance beneficiary or prejudiced third party or as their successor in title and, therefore, has failed to justify its standing capacity to sue in this case.

1.17. Valences of indemnity claims signed by indemnity beneficiaries

Contrary to the decision above, some courts stated that, since from the documents lodged with the case file it resulted that the plaintiff and the policy owner concluded a receivable assignment contract, the indemnity claim signed and stamped de by the owner confirming this way the conclusion of a receivable assignment contract. They established that the assignment had been validly concluded based on the parties' agreement and had been mentioned in the indemnity claim signed by the indemnity beneficiary, by expressly specifying that the indemnity would be paid to the plaintiff's account. Moreover, based on the indemnity claim, a partial payment was made to the plaintiff' account. Under the circumstances, the court considered that the requirement to notify the assignment had also been met, since through the indemnity claim, the respondent was asked to make the payment directly to the service unit's account. The respondent also accepted the assignment, a fact proven by the direct payment made to the assignee's account. The conclusion of the relevant court was that the right referred to the court was precisely the right to compensations deriving from the conclusion of an optional insurance contract and from the assignment contract[20].

1.18. Effects of a partial payment. Acknowledgment of the capacity as beneficiary

In another case, the court established that the assignee who took over the right to sue for compensation from the assignor through an assignment contract could receive the indemnity, since through the partial payment made directly to the appellee-assignee's account, the latter's capacity as indemnity beneficiary and, therefore, as author of the recourse action taken over from the assignor under the assignment contract, was acknowledged. The court established that the assignee took over the circumstances of the assignment of the right to sue for compensation exercised by it in the case at hand for the indemnity difference. It considered that the legal act consisting in the partial payment made directly to the assignee's account was of essence in the case, because, this way, its capacity as indemnity beneficiary and, hence, as author of the recourse action taken over from the assignor under the assignment contract, were acknowledged to it. Even though the court vested with the recourse action did not deem itself entitled to examine the cumulative requirements for the assignment validity, it did establish however that this payment confirmed the validity of the legal operation named receivable assignment and highlighted at the same time that a summary examination of the assignment contract revealed the fact that it was an onerous contract, and that it could not be deemed a donation in disguise as long as the assignee undertook to pay the value of the services to the service unit. [21]

[20] See for this purpose Civil Decision no. 437/29.01.2014 rendered by the Sixth Civil Division of Bucharest Tribunal. The court decision is available at www.rolii.ro.

[21] See for this purpose Civil Decision no. 512/03.02.2014 rendered by the Sixth Civil Division of Bucharest Tribunal. The court decision is available at www.rolii.ro.

1.19. Inexistence of an assignment contract. Contract form flaws

For situations where, as a result of form flaws of the contract, the existence of an assignment contract has not been confirmed in a case, the considerations of a recent court decision are also relevant, as the court established as follows: "A receivable assignment is an agreement whereby a creditor transfers a receivable held by it to another person. A receivable assignment is a consensual agreement and, therefore, is validly concluded at the time when the parties reach an agreement. However, to the extent that a receivable assignment represents a donation, it will have to meet the form requirements set forth for it, meaning that it must be in an authentic form, according to Art. 813 of the 1864 Civil Code, applicable to the case, and to Art. 5 of Law no. 71/ 2011. In the case referred to the court, the court established that no receivable assignment contract had been concluded between the appellant-plaintiff and the leasing company. First of all, the court established that, if the receivable assignment relied upon by the appellant was a liberality in favor of the leasing company, it should have met the requirement of authentic form, which is not the case here, as the relied upon documents are deeds under private signature. Secondly, the court ascertained that, if the receivable assignment relied upon by the appellant was a sale and purchase operation, in order to be valid, it should have been performed in exchange for a price set in money. Otherwise, considering that the price setting in the form of a money amount is of essence for sales, the contract is absolutely null, at least in terms of the sale and purchase, since it lacks an essential element in relation to which the parties need to reach an agreement (Art. 1295 of the 1864 Civil Code). On the other hand, the fact that the appellee-respondent was requested to make the payment directly to the appellant-plaintiff's account cannot represent proof for a receivable assignment, as the will of the leasing company is not a univocal one in the meaning claimed by the plaintiff company. Consequently, the court established that the appellant-plaintiff failed to prove the existence of any contractual legal relation with the appellee-respondent, and that the first court correctly admitted the objection raised to the lack of the appellant-plaintiff's standing capacity to sue and dismissed the sue petition as being filed by a party lacking the standing capacity to sue".[22]

1.20. Effects of a payment request submitted by the assignor policyholder's judicial liquidator

Last but not least, in situations where the plaintiff company is subject to insolvency proceedings, it has been decided that the plaintiff company's attempt to be admitted in the list of creditors with the indemnity value is justified, even if the bank unit appears as indemnity beneficiary according to the specification in the insurance policy. Under the circumstances, the court decided that a request sent to insurers by a plaintiff, through its liquidators, in relation to the payment of an insurance indemnity can be qualified as termination of the provisions of the insurance contract regarding the insurance assignment in favor of the bank, the indemnity payment not being made by that date to this beneficiary, so that the objection raised to the lack of the standing capacity to sue is not justified in such case, as the debtor, through its judicial administrator, is entitled under the provisions of Art. 86 para. 1 of Law no. 85/2006 to request the insurers to pay the insurance for the purpose of paying its receivables included in the final list of creditors.[23]

2. Conclusions

We believe that, to the extent that damages caused to an insured asset do not lead to a total economic loss of it, and the policyholder has paid the installments to date, the consent of the indemnity assignee (the bank or the leasing company) will produce effects in the sense of legitimizing the policyholder's standing capacity to sue (in order to obtain the indemnity through judicial means) and the indemnity award/payment directly to the policyholder.

In our opinion, this solution validates an insurance functioning mechanism under which the freedom of parties to agree between themselves who should benefit from the indemnity should prevail.

On the other hand, the proposed solution is in accordance with the opinion expressed in practice, under which, in case of an *assignment affected by a precedent condition requiring the payment of installments to date*, until the fulfillment of this condition, the assignment does not produce effects and, therefore, the Bank's consent is not required. In the case at hand,[24] the court established that the bank had a receivable created for guarantee purposes, regulated by Art. 6 – Title VI ("Legal Status of Security Interests in Real Property") of Law no. 99/1999, which has as effect the creation/preservation of rights resulted from an insurance contract intended to secure the performance of an obligation (the loan contracted by the plaintiff), being about an assignment affected by a condition precedent: non-performance of obligations under the loan agreement. Therefore, until the condition fulfillment, the assignment does not produce effects. The plaintiff has the standing capacity to sue, so the Bank's consent to the filing of an action on its own behalf is not required, and the decision issued by the court of first instance in respect of the objection

[22] See for this purpose Civil Decision no. 786/19.02.2014 rendered by the Sixth Civil Division of Bucharest Tribunal. The court decision is available at www.rolii.ro.

[23] See for this purpose Civil Decision no. 451/20.11.2015 rendered by Suceava Court of Appeals Second Civil Division. The court decision is available at www.rolii.ro.

[24] See for this purpose Civil Decision no. 40/27.04.2012 rendered by Bacău Court of Appeals Second Civil Division. The court decision is available at www.rolii.ro.

raised to the lack of its standing capacity to sue is unlawful. However, we specify that this case concerned a partial loss caused to an insured asset, and the insured company, which was a debtor under the loan agreement, had remedied the loss caused by the insured event with its own financial resources.

At the same time, as long as the insured asset has not been completely destroyed, and the indemnity is affected by the asset repairs, the policyholder – which proves the bank's consent to cash the indemnity and/or to initiate a court action to obtain it – is the one to whom both the standing capacity and the interest must be recognized, since it is the one, not the bank, who will repair the asset in the future.

Our position in respect of the matter brought into discussion is also validated by the practice of the supreme court, which, in a case decision, paid more importance to the standing capacity of the Bank, an institution that, all along the proceedings, claimed its right to request the payment of compensations by the policyholder and claimed that the whole procedure for obtaining compensations from the insurer rested on policyholders. The court stablished also that [25] the mortgagee could claim only an amount equal to the debt owed by the borrower on the date of the indemnity receipt, and only within the loan validity period, while the remaining amount owed by the insurance company would belong to the borrower who was the owner of the insured assets. Only the right to indemnity related to the insurance policy was assigned and, therefore, the appellee-plaintiff continued to be a party to the insurance contract, as such capacity was not taken over by the assignee.

The same reasoning can be found also in another court decision, in which the court, in deciding on an objection raised to the lack of standing capacity, acknowledged that the policy assignment operated only in case of non-performance of obligations by the plaintiff and only within the limits of the receivable held by the bank against it[26].

In another case, in which the caused loss was also partial, the court established that under the policy insurance assignment contract, the ownership right over the crane was not transferred, and that the insurance policy represented only a guarantee for the bank under the loan agreement for a case in which the purchased asset that was bound to guarantee the loan repayment would perish.[27]

The situation would be completely different in case of total destruction of an insured asset, where the indemnity is meant to replace in the bank's estate the value of the insured asset by which the repayment of the granted loan has been guaranteed.

The bank will have all the more a standing capacity in situations where the parties have concluded an insurance contract under the third party beneficiary procedure, doubled by a receivable assignment to the same beneficiary. Thus, in a particular case, the policyholder agreed with the insurer, acting as promissory party, to conclude an insurance contract under a third party beneficiary procedure, whereby it was established that, on the date of the insured risk occurrence, the owed indemnity would be paid to the third party beneficiary (C.R.S. Bank), the right of claim arising in its estate under each of the two insurance contracts concluded between the two litigating parties in this case, under the precedent condition of acceptance by the beneficiary of the contract on behalf of the third party beneficiary pursuant to the provisions of Art. 1286 of the new Civil Code, in force as of the date of the agreement conclusion. In the case, the third party beneficiary mechanism was doubled by a receivable assignment to the same beneficiary (Banca C.R. Suceava) in relation to a policy of 2011. Hence, even though the plaintiff had paid the insurance premiums as he had undertaken under each of the two contracts, the insurance indemnity was not due to it, because it had been stipulated to the creditor institution, Banca C.R., Sucursala S. The specificity of the insurance contract confers a right to third party beneficiary Banca C.R. to collect the insurance indemnity, a right generated by the conclusion of the insurance policy, but which is affected by the condition precedent of the insured risk occurrence until the full repayment of the loan granted by the bank. Practically, the contracting parties understood to conclude those insurance policies under the third party beneficiary procedure based on the interpretation and application of which the plaintiff-policyholder undertook to pay, and paid, the first insurance premiums in favor of the respondent-promissory party, which, in turn, had an obligation to provide the service in favor of the third party beneficiary at the time of the insured risk occurrence, under the terms and clauses agreed and assumed by the contracting parties, which were binding on the latter and mandatory in light of the principles of autonomy of will and on the relative nature of contract effects governing the contractual liability area, as correctly claimed also by the respondent. In other words, third party Banca C.R. Sucursala S., as beneficiary of the insurance policies, a capacity acquired by the loss by the plaintiff of its capacity as creditor of the respondent, has also the capacity as holder of the right to collect the insurance indemnity stipulated in its favor, claimed by it in its capacity as author of a the action for damages, a case in which, the applicability of the objection raised to the lack of the

[25] See for this purpose Civil Decision no. 3933/03.10.2018 rendered by the High Court of Justice Second Civil Division, a court decision that is available at www.rolii.ro.

[26] See for this purpose Civil Decision no. 2084/14.12.2015 of Bucharest Court of Appeals, citată in the High Court of Justiceţs Decision no. 86/12.04.2016. The court decision is available at www.rolii.ro.

[27] See for this purpose Civil Decision no. 1118/01.03.2012, rendered by the High Court of Justice Second Civil Division, menționată în Civil Decision no. 2810/25.09.2013 of the High Court of Justice. The court decision is available at www.rolii.ro.

plaintiff's standing capacity to sue was correctly established by the court adjudicating the appeal.[28]

In a different case, the High Court of Justice validated the legal reasoning of the court adjudicating the appeal, stating that the latter correctly interpreted the legal provisions in relation to the leasing contract and to the insurance policy, by establishing that the plaintiff did not have standing capacity under circumstances where the financier, which, according to the provisions of the leasing contract, "was the insurance policy beneficiary" – *did not assign its rights deriving from the contract* and *did not empower the plaintiff to file an action for damages* against the insurance company, the financier being the beneficiary of the insurance policy and the author of the action for damages.[29]

In an atypical case, in which the insured event occurred on a date when the asset was owned by a legal entity – the leasing company, and after this moment, a transfer of the ownership right took place, the considerations presented in another court decision[30] are relevant, considerations from which it results that the user can also have standing capacity and interest in particular situations. Punctually, the court vested to settle the case stated as follows: the court justly noted that the claims to indemnity derived from an insurance contract concluded on a date when BT Leasing IFN S.A. was the owner of the insured asset and, therefore, the policyholder. The insured event occurred at a time when the asset was owned by this company. However, after this moment, there has been a transfer of the ownership right over the asset in favor of the initial user, namely of the appellee company, which filed the sue petition. Of course, this is an atypical situation, in which the concepts of policyholder and of holder of the insured interest do not have the same valences at the time of risk occurrence and at the time when claims were raised in respect of the indemnity. Starting from the definitions of the concepts of policyholder, contracting party and indemnity (policyholder = "a natural person or legal entity having concluded an insurance contract with the insurer and who is the holder of the insurable interest; when the policyholder is one and the same person with the contracting party, the concept of policyholder includes also the content of the concept of contracting party"; "contracting party = "a natural person or legal entity other than the policyholder who signs the insurance policy, undertakes to pay the policyholder's insurance premium and to comply with the obligations resting on it under the contract", "indemnity = the amount owed by the insurer to a holder of an insurable interest in case of an insured event occurrence"), the court correctly established that, together with the transfer of the ownership right over the vehicle from the financier to the appellee user, the appellee, who also paid the insurance premium, became the holder of the insured interest and could validly claim the indemnity. Independently from the existence of a receivable assignment contract between the asset's owner at the time of occurrence of the insured risk and the user, who became the asset owner prior to the finalization of the litigious situation, the court considers that the theoretical right to be a holder of the insured interest at the time when the sue petition was filed, in the person of the former user, is sufficient to justify its processual legitimacy, and this theoretical right derives from the particularities of insurance relationships when an insured asset is held under a leasing regime, when the user undertakes the obligation to pay the insurance premiums, even though the capacity as policyholder belongs to a different person, after which, during the performance of the insurance contract, the ownership is transferred in favor of the user. Contrary to the aspects claimed by the appellant, its obligation to pay the indemnity, contractually assumed, was not exclusively to the policyholder but to the holder of the insurable interest, and, at the time when the sue petition was filed, such holder was the appellee company. The standing capacity to sue results from the substantive law legal relationship referred to the court, and at the time when the sue petition was filed, such litigious legal relationship between the appellant insurance company and the holder of the insured interest and the appellee company included an assessment of the standing capacity to sue, which was correctly conducted by the court adjudicating the appeal. The provisions of Art. 1 and Art. 12 of Government Ordinance no.51/1997 relied upon by the appellant cannot lead to a different conclusion. The provisions of Art. 1 provide for a possibility to transfer an ownership right over an asset at the end of the leasing period, but do not regulate in any way the possibility of realizing a receivable as indemnity when the risk occurs before the date when the transfer of the ownership right over the asset in favor of the user takes place. However, the absence of a regulation in this norm is not equivalent to an impossibility for the former user of the asset to obtain the indemnity. On the other hand, the rights conferred by Art. 12 of Government Ordinance no. 51/1997 to the user relate to the period while the leasing relationship is under progress, but the provisions of Art. 12 do not regulate other rights that can be exercised by the former user after it loses such capacity, namely after it becomes holder of the ownership right over the asset. At the same time, the provisions of Art. 6.7 of the insurance conditions, under which the policyholder's liability ceases on the date of transfer of the ownership over the vehicle to a third party, except for leasing contracts under which the ownership is transferred to

[28] See for this purpose Civil Decision no. 250/29.01.2015 rendered by the High Court of Justice. The court decision is available at www.rolii.ro.

[29] See for this purpose Civil Decision no. 77/12.01.2011 of the High Court of Justice. The court decision is available at www.rolii.ro.

[30] See for this purpose Civil Decision no. 313/2019 din 11.06.2019, rendered by Cluj Court of Appeals, Second Civil Division. The court decision is available at www.rolii.ro.

the user, indicated by the court adjudicating the appeal in its decision considerations, are directly applicable in the punctual case referred to the court, contrary to the aspects claimed unjustifiably by the appellant."

Referring to proof for and form of assignment contracts, some courts decided that, in the absence of a receivable assignment contract effectively concluded, other documents may not stand for such agreement. Such documents may have the effects of a contract on behalf of a third party beneficiary but, in the absence of a specification of such *de jure* ground for an action, courts may not exceed the limits of their mandate. At the same time, the filing of an indemnity claim in which the indemnity beneficiary specifies the payment manner is not equivalent to o receivable assignment, since there is no legal relationship between the service unit and the insurer. The (partial) payment by the beneficiary indicated in the indemnity claim can be equivalent to a receivable assignment. If the receivable assignment is a liberality, it must meet the requirement of authentic form. If the receivable assignment is a sale and purchase operation, in order to be valid, it should have been performed in exchange for a price set in money. Otherwise, the contract is absolutely null, at least in terms of the sale and purchase, since it lacks an essential element in relation to which the parties need to reach an agreement (Art. 1295 of the 1864 Civil Code).

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MULTIPLE APPROACHES TO THE FOUNDATION SECTOR IN THE BASQUE COUNTRY. THE CASE OF LANTEGI BATUAK

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Abstract

Foundations have played an important role in social life in the Basque Country. Foundations, that are part of the Social Economy, are non-profit-organizations and apply their assets to the achievement of general interest purposes. This article analyses the Foundational sector in the Basque Country from different approaches: legal, social and economic. Their characteristic features and current challenges will also be analyzed. Finally, a very relevant case study will be developed: Lantegi Batuak Foundation, whose aim is to promote and achieve the social and occupational integration of people with disabilities by creating quality employment opportunities.

Keywords: *Foundations, Social Economy, persons with disability, social integration, labor integration.*

1. Origin and definition of Foundations in the Basque Country

Foundations in the Basque Country have historically had a relevant role in social life due to the activities carried out and their important social effects. Originally, the Foundations appeared together with charitable and welfare activities of a pious nature, associated with the Catholic Church.

With the entry into force of the Civil Code (1889), a new stage began for the Foundations that were conceived as an instrument for the participation of individuals alongside the public powers for the satisfaction of the demands of citizenship through compliance for general interest purposes, replacing the concept of charity with that of public interest. The Spanish Constitution of 1978 included in its article 34 the Right of Foundation for purposes of general interest, within the chapter on Rights and Freedoms.

Foundations can be defined as non-profit organizations which, by the will of their founders, have their assets permanently assigned to the realization of general interest purposes defined by them. The promotion of a purpose of general interest means, on the one hand, that their activity must contribute to human welfare in areas such as human rights, social action, educational, cultural and sporting activities or the promotion of equal opportunities as listed in Article 4-1 of the Basque Law on Foundations (hereinafter BLF).

On the other hand, the founding activity must benefit generic groups of persons, natural or legal, and not with the main purpose of allocating its benefits to the founding person or persons, or to the employers, their spouses or family members. In any case, the selection criteria for the group of beneficiaries must be objective and impartial (art. 4-2 and 3 BLF).

It can be stated that the Foundation generates interesting social advantages, since its unique legal form, together with its mission, allows the Foundation to fulfill a special and unifying role in the promotion of social innovation activities. It serves as a bridge between public and private institutions and NGOs, as a lever in the search for resources and, to a certain extent, as a social entrepreneur, allowing itself - more easily than many other types of organizations - to try new concepts and ways of doing things (ADAM & LINGELBACH, 2015; QUINN et al., 2014)

Foundations are part of the concept of Social Economy (SE), established in Spain by law in 2011 (Law 5/2011, of 29 March, on Social Economy, hereinafter SEL). It is defined as the set of economic and business activities carried out in the private sphere by those entities that, in accordance with the principles set out in article 4, pursue either the collective interest of their members or the general economic or social interest, or both (art. 2 SEL).

From the point of view of legal structures (art. 5-1 LES), the following fall into this category: Cooperatives, Mutual Societies, Foundations and Associations that carry out economic activity, Labor Societies[1], Work Integration Social Enterprise WISE),

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[1] Labor societies are a legal type existing only in Spain and regulated by Law 44/2015, 14th October on worker-owned companies. Their most relevant characteristic is that the majority of the share capital must belong to workers, admitting a minority equity participation by external investors.

Special Employment Centers[2], Fishermen's guilds[3], Agricultural Transformation Companies[4].

Foundations therefore form part of the Social Economy, although, as in the case of Associations, only those that are independent and carry out economic activities.

Likewise, these entities meet the requirements established in article 4 SEL:

a) Primacy of people and the social purpose over capital, since the assets are placed at the service of a general interest, which must benefit generic collectivities of people, whether natural or legal. Likewise, the model of management that it includes (autonomous and transparent, democratic and participative, which leads to prioritizing decision making more in terms of people) has a correlative in art. 28 "principles of management and operation" (BLF).

b) Application of the results obtained from the economic activity based mainly on the work provided and the service or activity carried out by the members and partners or by their members and, where appropriate, to the corporate purpose of the entity. In the case of Foundations, if asset management generates positive financial returns, a minimum of 70% of these must be applied to the purpose of the Foundation and the remaining 30% to strengthen its economic reserves (Art. 29-2 BLF)

c) Promotion of internal solidarity and with society that favors commitment to local development, equal opportunities between men and women, social cohesion, the insertion of people at risk of social exclusion, the generation of stable employment and quality, the balance of personal, family and work life and sustainability.

d) Independence from public powers. Social Economy organizations are independent from the public powers, and their control should not be subordinated to government agencies or political parties. Foundations, except those created by different agencies of the State or other public administrations, are independent in this sense; thus complying with this autonomy requirement.

2. Legal analysis of Foundations in the Basque Country

As already indicated, the Spanish Constitution of 1978 (SC) included in its article 34 the right of Foundation for general interest purposes. As the State does not have the exclusive competence on Foundations (art. 149 SC), the Basque Statute of Autonomy in its article 10.13 establishes exclusive competence in matters of educational, cultural, artistic, charitable, welfare and similar Foundations and associations , as long as they mainly carry out their functions in the Basque Country. Basque institutions have historically had competence in their regulation, directly linked to the regional competence in matters of charity, and this has been maintained without solution of continuity until its recognition in the Statute of Autonomy.

The first Law on Foundations in the Basque Country dates from 1994 (Law 12/1994 of June 17), and it was the first norm that provided a comprehensive legal regime to the Basque Foundation sector. This law was substantially modified in 2016 (Law 9/2016 of June 2), and is currently in force (hereinafter BLF).

The Protectorate and the Registry of Foundations of the Basque Country are two independent administrative bodies, which exercise in a coordinated way the functions of advising and controlling Foundations, as well as those relating to the registration of acts and legal businesses that must access the Registry and other functions established in the Law of Foundations of the Basque Country (art. 2-2 BLF). At this time, both figures are jointly regulated by a Decree of 2019 (BASQUE COUNTRY 2019), which replaced the existing Decrees dated 2007 and in accordance with the 1994 regulations (BASQUE COUNTRY, 2017 a, BASQUE COUNTRY, 2017 b)The Protectorate of Foundations of the Basque Country is configured as an administrative body of advice and technical support for Foundations, which must facilitate and promote the correct exercise of the right of Foundation, ensuring the legality of the constitution and operation of Foundations, as well as for the effective fulfillment of the will of the founding person or persons, and the Foundational purposes (art. 6.1, BASQUE COUNTRY, 2019)

The registry of Foundations (art. 34, BASQUE COUNTRY, 2019) is a legal registry that is configured as a public service for those who have an interest in knowing the content deposited in it, being its main object the registration of Foundations within the scope of BLF and the acts and legal businesses related to them.

From the point of view of the organization of the Basque Government departments, Foundations are part of the attributions assigned to the Department of Public Governance and Self-government, according to the Decree that establishes the organic and functional structure of that department (BASQUE COUNTRY, 2017). In turn, within said department, this area is assigned to the Vice-Ministry of Institutional Relations (art. 8), and within the Directorate of Relations with Local Administrations and Administrative Records (art. 10-1 section J). Both the Advisory Commission of

[2] Work Integration Social Enterprise (WISE) are non-profit entities that promote the socio-labor inclusion of people with disabilities.

[3] Fishermen's guilds are public law corporations with legal personality and the capacity to act for the fulfilment of their purposes, which are legally established as a participatory and collaborative channel of the fishing sector with the public administrations in defense of the general interest of fishing, shell fishing and aquaculture, and of the organization and marketing of their products.

[4] The Agricultural Transformation Companies are civil societies with an economic and social purpose in relation to the production, transformation and commercialization of agricultural, livestock or forestry products, the improvement of the rural environment, agricultural promotion and development, as well as the provision of common services related to the aforementioned concepts. Therefore, they have their own legal personality and their authorization requires firstly their constitution and secondly their registration in the corresponding register.

the Protectorate of Foundations and the Basque Council of Foundations are attached to or linked to this Department of Public Governance and Self-Government (ex article 61 BLF)

Foundations receive aid and subsidies from the different public administrations (Basque Government, Provincial Councils, Town Councils), not so much because due to their legal status, but because of the general interest activities they carry out: cultural, sports, promotion of employment, etc.

Along with aid and subsidies, Provincial Councils establish a specific tax regime for Foundations and public utility Associations, as well as their federations and associations, due to their non-profit nature and the pursuit of general interest purposes. They also recognize a tax regime for patronage, defined as "private participation in the performance of activities of general interest". (ARABA, 1993 and 2004; BIZKAIA 1992, 2019 a, 2019 b; GIPUZKOA 1993, 2004 a and 2004 b).

The requirements for access to the special taxation regime for both corporate tax and economic activity tax (exemption) are summarized in the following table. The full set of these requirements must be complied with:

Table 1. Eligibility for the special taxation regime

Requirements
Dedicate 70 % of all revenues to the general interest purpose, and reinvest the rest.
Economic activities unrelated to its statutory object or purpose shall not exceed 40% of its total income.
The founders and their immediate family members cannot be direct beneficiaries. Nor can they benefit from the tax regime for personal purposes.
The positions of trustee, statutory representative and member of the governing body are not remunerated
An annual financial report specifying the income and expenditure for the financial year must be drawn up

Source: elaborated by the authors in accordance with provincial tax legislation

With regard to tax incentives for patronage, the provincial regulations establish that these incentives are applicable to donations, gifts and contributions made in favor of non-profit organizations to which the differentiated tax regime they regulate is applicable.

3. Characterizing features of Foundations in the Basque Country

3.1. People-centredness

Foundations are organizations based on the centrality of people. The fact that these types of organizations are non-profit organizations means that the principle of the primacy of people over capital is fulfilled, since the activity (economic or otherwise) that they carry out never seeks to make an investment profitable in order to distribute the profits, but rather the objective is to respond, with the Foundation's assets, to the needs of society in general and of individuals and groups in particular. Moreover, it is usual that the social purpose of Foundations is focused on the development of people (e.g. inclusion of people with disabilities, education, sport, culture, etc.), both for the beneficiaries and in some cases for the employees as well.

3.2. Democratic character

Foundations are structured in organizational models of a democratic nature, which translates into decision-making and transparency practices.

The board of trustees is the supreme body of the Foundations as the governing and representative body of the Foundation (art. 13 BLF). Its function is to fulfil the Foundational purposes and diligently administer the goods and rights that make up the Foundation's assets, and it operates under the principles of democracy. While it is true that only the members of the Foundation's board of trustees are legally entitled to vote in its formal and binding decisions, Foundations are organizations that encourage participation in the management of their workers and seek the informal participation of their beneficiaries, being natural examples of participatory organizations.

3.3. Transparency

On the other hand, transparency in management is another characteristic of Foundations that nourishes their democratic nature. This means that, as part of their own nature and linked to their operating principles, Foundations must be transparent organizations.

From the Foundational sector there is the conviction that transparency is necessary and positive since, among other issues, it allows to establish a better communication with society. Funko[5] promotes and helps Foundations in the implementation of a transparent management. The compliance certification of the Foundations allows improving their transparency and confidentiality, as well as their management structures and processes (WORLD COMPLIANCE ASSOCIATION, 2020). The first to achieve this certification in the Basque Country was the San Prudencio Foundation, which is currently providing a compliance implementation service for companies.

In this realm, there are also numerous examples of good practices in relation to management transparency in Foundations. Some of them have received external recognition for transparent management, such as innovative experiences in the implementation of information systems on the social value they generate, as will be seen in section 6. Thus, for example, in the museum sector, the Basque Country continues being the most transparent of the Spanish Autonomous Communities with its three reference museums: the Bilbao Fine Arts Museum, the Guggenheim Museum Bilbao and the Artium Basque

[5] Funko, the Basque Confederation of Foundations, is the organization that brings together and represents Foundations in the Basque Country. See in this regard point 4.6 below.

Museum of Contemporary Art. Moreover, the latter is recognized as the most transparent museum in Spain (FERNÁNDEZ SABAU, et. al, 2018).

3.4. Business dimension

Although the economic dimension is not the ultimate aim of Foundations, it can be affirmed that their contribution to the economy is relevant. According to the latest official data (Social Economy Statistics, 2018), Foundations generated in 2018 a gross added value of more than 219 million euros, creating 13,045 jobs. They are also characterized by being highly sustainable organizations, with few cases of bankruptcy.

Moreover, there are Foundations in the Basque Country that can be considered sectoral benchmarks. For example, Teknalia is one of the leading research centers or Lantegi Batuak Foundation is one of the most important special employment centers in the region. The most charismatic museums, such as the Guggenheim, the Aquarium in Donostia or the Fine Arts Museum in Bilbao, are also Foundations.

3.5. Community engagement

Foundations are organizations with deep roots in the territory. This rootedness, in addition to their limited relocation, is characterized by their continuous (re)-investment of their assets and results in the community. In fact, the assets of Foundations are obligatorily dedicated to the general interest, so that the investments made are in tune with the needs of society.

Moreover, Foundations are obliged to reinvest at least 70% of the results obtained (in practice this percentage is usually higher) in the Foundational purposes, with the remainder being used to increase reserves. Finally, in the event of liquidation, surplus assets may not be distributed to private individuals and are earmarked for public or private non-profit entities that carry out general interest purposes. These particularities reflect the real commitment of the Foundations to the community.

On the other hand, they are organizations that promote social cohesion (this is the aim of many Foundations that work in the field of culture, social services, or the Basque language...), social capital (they weave relational networks, promoting people's participation and offering guidance to encourage greater commitment to society) and social transformation (in search of a more equitable, inclusive and advanced society).

3.6. Inter-cooperation processes

Foundations are organizations that also seek inter-cooperation. Although there are no inter-cooperation mechanisms that are widely applicable, there are examples that reflect the potential of inter-cooperation for this sector. In fact, there are very powerful collaboration processes at different levels. The organization that brings together and represents Foundations in the Basque Country is called Funko, the Basque Confederation of Foundations. It was created in 2003 on the initiative of a group of 10 people to promote and strengthen the Foundational phenomenon in the region. The aim is to constitute a platform for Basque Foundations to meet and cooperate, developing actions of interest, facilitating the interrelation between its members and creating working groups, conferences and other sectorial projects.

Funko aims to constitute an instrument for joint reflection, decision-making in favor of the sector, and a representative voice before the Public, Regional, Autonomous, State and Community Administrations.

Funko also organizes training and informative events open to all Foundations, providing a forum for the exchange of ideas between Basque Foundations before the Basque Government and other bodies and organizations. It also provides a legal, accounting and tax consultancy service for its members.

Lastly, it promotes collaboration between Foundations, even if they are not members of Funko, as well as with other Foundations. In the same way, it collaborates with other entities that carry out similar tasks, although under a different legal formula, as in the case of the Associations to which it also provides services, especially training services.

4. Socio-economic analysis of the Foundations sector in the Basque Country

According to official data, as of 2018 (latest available data, from 2020), the Basque Country has a total of 605 Foundations, which represent almost 51% of the so-called other forms of social economy (OFSE)[6].

The following table shows all the entities that form part of this OFSE concept and the data on the relative weight of each one with respect to the whole.

Table 2. Number of OFSE entities. Basque Country 2018

Type of entity	Number of entities	% of total OFSE
Foundations	605	51
Public Utility Associations	254	21
Voluntary Mutual Social Entities	155	13
Agricultural Transformation Companies	84	7
Work Integration Social Enterprise (WISE)	43	3,6
Special Employment Centers	37	3,1
Fishermen's guilds	14	1,2

[6] The official statistics on the social economy in the Basque Country are divided into two main sections. On the one hand, Cooperatives and Labor societies are analyzed, and on the other, the rest of the social economy entities, which are called "Other Forms of Social Economy (OFSE): Mutual Societies, Foundations and Associations that carry out economic activity, Work Integration Social Enterprise (WISE), Special Employment Centers, Fishermen's guilds, Agricultural Transformation Companies.

Source: elaborated by the authors in accordance with Social Economy Statistics 2018

Taking the search engine of the Basque Country Foundations Register as a reference, indicates that there are 742 entities. This discrepancy is due to the fact that the register includes all those Foundations registered that have not been extinguished, whether they are operational or not. In fact, a good number of them have been detected in this situation and an analysis is being carried out of those that are still in operation.

With regard to the numerical evolution of Foundations, the official statistics on the social economy include this data since 2010, and the following table shows their progress, representing a growth of 3,5% over the period.

Table 3. Evolution of the number of Foundations and their relative weight within OFSE. Basque Country. 2018-2010

Year	Number of entities	% of total OFSE
2018	605	51
2016	608	50,2
2014	619	51,55
2012	615	50,2
2010	585	53,8

Source: elaborated by the authors in accordance with Social Economy Statistics 2018, 2016, 2014, 2012, 2010.

Within the group of Foundations, there is a wide diversity of entities in terms of the social purpose they pursue, their origin or their size.

Firstly, the variety in the field of Foundations is to be found in the social purpose they develop, in line with the wide range set out in article 4-1 of the BLF, being their common element to serve purposes of general interest. Thus we find Foundations that carry out cultural activities, employment integration, education, promotion of the Basque language, museum activities, development cooperation, business, sports or technological activities, to mention just some of them.

The Basque statistics service, EUSTAT, provides a distribution by area of activity in coherence with the sections into which the Foundations Register is organized:

Table 4. Number of Foundations by area of activity. Basque Country. Year 2018 (last available dated November 20, 2020)

Activity Developed	Number	% of total
Teaching and research	241	35,92
Charitable-welfare and labor	189	28,17
Cultural, youth and sports	141	21,01
Other areas	100	14,90
Total	671	100

Source elaborated by the authors in accordance with DEPARTMENT OF PUBLIC GOVERNANCE AND SELF-GOVERNMENT (2018)

Secondly, there is a wide variety of Foundations depending on the founding persons or entities. Thus, we find companies, financial institutions, sports clubs, the public administration itself or private individuals who wish to endow all or part of their assets for a specific social purpose.

Finally, in terms of size, the average size of Foundations in terms of the number of jobs is 21,4 according to the 2018 social economy statistics. The data is very similar to that of public utility associations (16,2) and insertion companies (16,7), and is far from that of special employment centers, with an average size per job of 269,9. What can be observed in the different statistical records is an increase in the size of Foundations over time, as with the rest of the entities (16,9 in 2014 and 19,4 in 2016).

In terms of employment, 46,2% of paid employment in OFSE is associated with Foundations: 13,045 annualized paid jobs in 2018. In terms of their evolution with respect to the previous statistic (2016), an increase of 10,4% has being registered. By gender, 39,9% are contracts for men and 60,1% for women. Likewise, 76% are permanent jobs and 24% are temporary.

The evolution of these paid employment indicators since the official Social Economy statistics have been recorded (2010) and their segregation by gender or type of contract can be seen in the following table:

Table 5. Number of employment in Foundations segregated by gender and type of contract. Basque Country. 2018-2010

Year	Persons Employed	% by gender	% by type of contract
2018	13.045 46,2% total OFSE	60,1% female 39,9% male	76% permanent 24% temporary
2016	11.811 45,8% total OFSE	57,6 % female 42,4 % male	78,9 % permanent 21,1 % temporary
2014	10.482 45,1% total OFSE	60,9 % female 39,1 % male	82,4 % permanent 17,6 % temporary
2012	12.315 46,6% total OFSE	Not available	Not available
2010	12.448 % total OFSE (Not available)	Not available	Not available

Source: elaborated by the authors in accordance with Social Economy Statistics 2018, 2016, 2014, 2012, 2010.

Along with paid employment, OFSE mobilize an estimated 25.236 volunteers in 2018, of whom 26,6% are structural volunteers and 73,4% are linked to one-off support. In the case of Foundations, they host a total of 5.322 volunteers (21% of all OFSE volunteers), which together with the volunteers of public utility associations (19.878 people, 78,8% of the total), account for 99,8% of all OFSE volunteers in the Basque Country. In the case of Foundations, the majority of

volunteers are women (55,6%), although in the OFSE as a whole, the highest percentage of volunteers are men (62,4%). A good part of the volunteers who collaborate with the Foundations are of a structural nature (48,0%).

In terms of turnover, OFSE had an overall turnover of 2,2 billion euros (9,5% higher than in 2016). Foundations in the same year had a turnover of more than €566 million, 28,2% more than in the previous record of 2016. They also receive a total of grants amounting to some 468,3 million (66% of all grants received by OFSE), which is 34,4% of their turnover.

In terms of economic results, Foundations have generated positive financial results of almost 145 million euros, and a Gross Value Added (GVA) of 219 million euros, which represents 84% of all the GVA generated by the OFSE. The evolution of these concepts can be seen in the following table.

Table 6. Financial data on Foundations. Basque Country. 2018-2010 (data in millions of euros).

Year	Turnover	Grants	Financial Results	GVA
2018	556	468,3	145	219
2016	442	465,6	Not available	158
2014	524	431	Not available	267
2012	610	Not available	-22,8	361
2010	875,6	442	-15,7	360,7

Source: elaborated by the authors in accordance with Social Economy Statistics 2018, 2016, 2014, 2012, 2010.

5. Challenges for Foundations in the Basque Country

5.1. Increase the visibility and social awareness of Foundations

In the Social Economy survey, one of the items measured is the assessment of the external social perception of this type of entities. In last year's survey (2018), "Only one in four social economy enterprises perceives a positive assessment by Basque society in relation to the role it plays and its own contribution to the socio-economic development of the Basque Country". Although this result refers to cooperatives and labor societies, it can be extrapolated to all social economy organizations and therefore to Foundations.

In general, society has heard of Foundations, and could perhaps mention some of them, but it would be very difficult to indicate some of their identifying features, or their fundamental characteristics, i.e. what distinguishes them from other similar figures. Apart perhaps from the case of development cooperation Foundations (Mundukide, Alboan), or banking Foundations through which they channel their social work, or those of sports clubs because of their connection with citizens, perhaps not many other examples can be mentioned. This is despite the fact that citizens are often users or beneficiaries of their work. The image is usually positive, associated with social purpose, with entities that have an impact, that generate social value... But even on this point, it is necessary to transmit to society the social value that Foundations generate, which would help to understand the full dimension of their character as an entity of general interest, which brings us to the next challenge.

5.2. Measuring and disseminating the social value generated by Foundations

Foundations by their very nature are entities with social and general interest purposes. It is therefore essential that they measure their impact beyond the classic statistical dimensions such as employment, income or added value (AV). The fact that economic value and social value are separated poses a problem both in terms of social and internal management, and the fact that social value is not documented means that it is undervalued (RETOLAZA et. al., 2014). It is therefore vital to document the social impacts that Foundations generate, both for the economic activity carried out and for their own specific social value in environmental, social, labor and community issues.

We find different impact measurement systems such as the GRI (Global Reporting Initiative), the SDGs themselves can become a measurement mechanism, or systems for monetising social value. Regardless of which system is used, what is suggested to Foundations is that they learn to "manage impact" which implies managing systems, processes, culture and capacities related to social impact measurement (HEHENBERGER et. al, 2020).

We can find very outstanding examples, such as that of Lantegi Batuak, which will be analyzed later on.

Another relevant example is the Añana Salt Valley Foundation (2018), committed to a model that takes into account current and future economic, heritage, social and environmental repercussions. Its model assumes the principles of the World Charter for Sustainable Tourism (2015), which incorporates the 17 Sustainable Development Goals.

Mundukide, San Sebastian Aquarium, Alboan, Gureak Group or BBK Fundazioa, among others, can be presented as models of good practice.

Some Foundations are obliged to draw up transparency reports as private entities that receive public aid or subsidies of more than €100.000,00 during a year (SPAIN, 2013). These reports and their publication on the websites also serve to know and assess the Foundations in terms of their organization and legal structure, governing bodies and certain economic information.

In the same way, some Foundations will have to prepare the non-financial information report (SPAIN, 2018), just like any company that complies with the requirements established by law. Its objective to contribute to measuring, monitoring and managing the performance of companies and their impact on society, as well as sustainability by combining long-term

profitability with social justice and environmental protection. Its content, as set out in art. 49 of the Commercial Code, establishes that it must generally include the information necessary to understand the evolution, results and situation of the company and the impact of its activity, at least with regard to:

- environmental issues such as pollution, circular economy, waste prevention and management, sustainable use of resources, climate change, or biodiversity.
- social and personnel issues, including measures taken, where appropriate, to promote the principle of equal treatment and equal opportunities for women and men, non-discrimination and inclusion of persons with disabilities and universal accessibility
- respect for human rights, applying due diligence procedures, prevention of risks of human rights violations and, where appropriate, measures to mitigate, manage and remedy possible abuses committed, among other contents.
- the fight against corruption and bribery measures taken to prevent corruption and bribery; measures to combat money laundering, contributions to Foundations and non-profit organisations.
- the company itself in relation to its commitment to sustainability, suppliers and subcontractors, consumers or tax information by country.

A model of this report can be seen, for example, with respect to Gureak group (GUREAK, 2019), and in addition to regulatory compliance, it is highly expressive of the social value it generates.

5.3. Maintain the character of Foundations as key actors for the achievement of the Sustainable Development Goals (SDGs)

The UN General Assembly adopted the 2030 Agenda for Sustainable Development, with 17 Goals and 169 targets, covering the economic, social and environmental spheres. It is a plan of action for people, planet and prosperity, which also aims to strengthen universal peace and access to justice. States are committed to mobilizing the necessary means to achieve it, although this Agenda implies a common and universal commitment. For this reason, together with the administration, businesses and civil society organizations, Foundations are key to advancing the Agenda's objectives.

The United Nations Development Program (UNDP, n.d.) recognizes the indispensable knowledge that Foundations offer to a variety of areas that coincide with the SDGs' proposals. For example, those related to people's well-being (health, education, gender equality, the fight against poverty and hunger), environment (water and sanitation, responsible production and consumption, terrestrial ecosystems and underwater life), decent work, reduction of inequalities or the fight for peace and justice, to name but a few.

Funko promotes the explicit statement of the SDGs, and proposes their integration in the management of Foundations and associations, in all the actions they develop, communicating the results obtained through reports.

We can mention as an example that the Aquarium of Donosti includes the SDGs as part of its strategic planning, establishing its objectives in accordance with its own Foundational essence (Funko 2020):

SDG 14 (underwater life) To raise awareness and sensitize society to respect the marine environment through the exhibition, conservation and research of the flora, fauna and heritage of the different oceans and seas, with special emphasis on the Cantabrian Sea.

SDG 11 (sustainable cities and communities) to disseminate our maritime and fishing traditions and memory by safeguarding, exhibiting and disseminating collections of great historical and emotional value.

6. Lantegi Batuak Foundation

One of the most paradigmatic examples within the ecosystem described above is the case of a Foundation called Lantegi Batuak. It is an outstanding case both for the service provided to society, the innovative way in which it develops the activity and for the real impact on people, their families and the community as a whole.

6.1. Origin and evolution

Lantegi Batuak is a Foundation whose aim is to promote and achieve the social and occupational integration of people with disabilities by creating quality employment opportunities. Its origins date back to 1964, when the first protected work experiences arose under the auspices of Gorabide, the Biscayan Association in Favor of People with Intellectual Disabilities. It was a group of parents and friends of people with intellectual disabilities who set up this association to raise public awareness of this social and family problem, as well as to create assistance centers, which did not exist at the time.

In 1983 the commercial name of Lantegi Batuak was adopted, with the aim of centralizing the management and coordinating the network of workshops created in the Province of Biscay since the late sixties. Subsequently, the doors of Lantegi Batuak were opened to people with physical or sensory disabilities, and in 2001 the group of people with mental illness was incorporated. In January 1998 it was constituted as a Foundation, with its own legal personality.

It is currently the largest business initiative in the field of protected employment in the Province, as it generates job opportunities for more than 2,500 people with intellectual, physical, sensory or mental disabilities, through industrial and service activities.

In the Basque Country, in 2019, there are almost 140,000 people (out of a total population of almost 2.2 million people) who have a recognized disability of more than 33%. Around 47% of whom live in Biscay, where Lantegi Batuak carries out its activities. Of this total group, 44% are women and 56% men. In the working age group, i.e. between 18 and 64 years of age, there are almost 70,000 people in the whole region, of which almost 50% live in the province of Bizkaia. (EHLABE, 2019).

In the Basque Country, in 2018, around 8,000 people with disabilities were employed in a special employment center, around 11.4% of the potentially active group. Of these employed people, 35% are women and 65% men (EHLABE, 2019)[7].

The Lantegi Batuak Foundation currently has 22 centers covering the entire province of Biscay. These centers are organized by activities or areas (industrial and services) and a general support center for all activities. The following map shows the distribution and location of the Lantegi Batuak centers in the province.

Figure 1. Map showing the presence of Lantegi Batuak work centres in the Province of Biscay

Source: Lantegi Batuak

As for the activities they carry out, they are of a diverse nature and are grouped into two areas: industrial and services, as shown in the following table:

Table 7. Economic activities carried out by Lantegi Batuak

Industrial	Services
Wiring	Cleaning
Electromagnetic assemblies	Gardening and environment
Metal transformation	Vending
Electronics	Document management
Logistics solutions	Food delivery

Source: elaborated by authors based on www.lantegibatuak.eus

It is an entity in constant expansion, both by increasing the number of centers in its usual areas of work, such as the opening in 2019 of Sestao Barri, a new center specialized in electronics, and also by new sectors of activity, which aims to create new employment opportunities for people with disabilities.

As a summary, and based on the socio-economic analysis carried out in section 5, Lantegi Batuak has the following characteristics:

- As for the origin, it is an entity generated by the impulse and leadership of a group of families whose objective is the provision of services for their sons and daughters with intellectual disabilities.
- In terms of the specific purpose of the classification in table 4 would be the second: charitable welfare and labor, and specifically would fall within this last dimension, labor.
- In terms of size, while the average employment in Foundations is 21,4 employees in 2018, Lantegi Batuak employs 2,500 people. But it also stands out in terms of size among the special employment centers, whose average employment is 269,9.

6.2. Socio-occupational integration processes

Together with what has already been mentioned in relation to the Foundations in section 3, as well as its belonging to the Social Economy in section 2, a third axis should be added, as Lantegi Batuak is also considered a special employment center.

These centers are regulated by Royal Legislative Decree 1/2013, which defines them as "those whose main objective is to carry out a productive activity of goods or services, participating regularly in market operations, and whose purpose is to ensure paid employment for people with disabilities; at the same time they are a means of inclusion of the greatest number of these people in the ordinary employment regime". Furthermore, it is established that "they must provide, through the support units, the personal and social adjustment services required by disabled workers, according to their circumstances and in accordance with what is determined by regulation.[8]

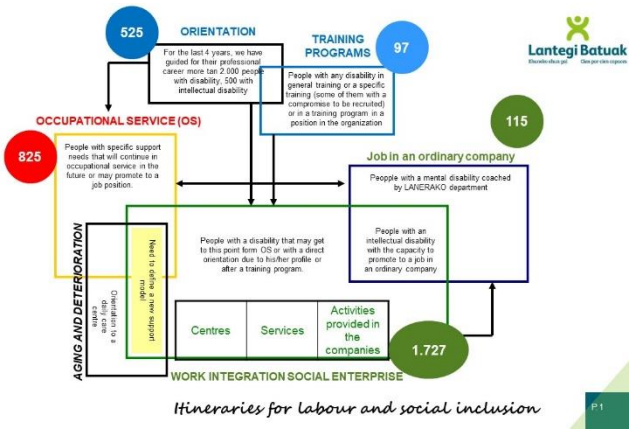
Lantegi Batuak offers each person an individualized socio-occupational insertion itinerary (figure 2), ranging from guidance and training, to incorporation in the Occupational Service, in the Special Employment Centre, in access to Ordinary Employment, or in the processes of return and support for active ageing. In the latter case, the need to design new support systems has been detected. In fact, around 46% of people with disabilities are aged 65 or over (EHLABE, 2019).

The following figure summarizes the inclusion pathways graphically and the inclusion pathways, which are developed further below:

[7] More information about the disability in the Basque Country can be found in EDEKA, BASQUE COORDINATOR OF REPRESENTATIVES OF PEOPLE WITH DISABILITIES (2014), *White Paper on disability in the Basque Country*. http://www.edeka.es/wp-content/uploads/2017/11/Libro-Blanco-de-la-Discapacidad-1.pdf. Año 2014.

[8] More information can be found in BENGOETXEA ALKORTA, Aitor et. al. (2019), *The Basque Model of Social and Labor Inclusion*. https://www.ehlabe.org///upload/memorias/Informe-elmodelo-ISBN-ING.pdf.

Figure 2. Outline of the itineraries for socio-occupational inclusion in Lantegi Batuak



Source: Lantegi Batuak

a) Orientation: first phase to determine the most suitable position for each person, based on their aspirations, skills and expectations, improving their qualifications. In the last 4 years around 2.000 people have received this service.

b) Training: adapted, practical (focused on the development of skills) and professional (oriented towards inclusion in the labor market) The aim is to improve the employability of people with disabilities. In the last year, 57,800 hours of training have taken place, most of them in continuous training (169 actions) and others in occupational training (10). Likewise, since 2016, the *Lan Eskola* program has taken place, through which accredited training is carried out in approved centers of Lantegi Batuak or collaborators. The theoretical, professional and transversal training is complemented with tutored internships and individualized accompaniment. Last year, 79 participants took part in 9 training actions.

c) Occupation: the training and support necessary to improve the skills of people with disabilities, so that they have greater autonomy and a better quality of life. Around 825 people have been users of this itinerary in the last year.

d) Employment: through the Special Employment Center, people with disabilities can develop their work in adapted conditions and in competitive sectors, industrial and service activities. 1.727 people form part of this group.

e) Employment with support: which enables people with disabilities to work in normalized jobs, private or public, for which they seek opportunities, raising awareness and advising companies, positions are analyzed, the right people selected and trained them in situ, guaranteeing continuous monitoring and professional development. In fact, more than 400 visits were made to companies for prospecting, advice on compliance with the law and recruitment, and 55 transitions to regular employment.

6.3. Measuring social value

As a business organization, Lantegi Batuak operates in a global market with increasingly demanding competition, which obliges it to achieve the highest standards of professionalism in each of the different sectors in which it provides services. However, it should be noted that the value generated by Lantegi Batuak is not the same as that of a regular company, as its management is based on values centered on people, sustainability and the search for excellence. For this reason, over the last 10 years Lantegi Batuak has developed, together with the University of the Basque Country and the University of Deusto, a methodology that allows to measure the integral value generated, quantify it and even monetize it (RETOLAZA et. al, 2014). This same methodology is used by other Foundations and social enterprises (AYUSO SIART et al., 2020).

In 2019, the total (integrated) social value generated amounts to 207 million, totaling 1,5 billion in the last 10 years (Lantegi Batuak, 2020). But the impact of Lantegi Batuak in other areas can be seen, as shown in the following figure:

Figure 3. Amount of the total integrated social value and by area. 2019. (data in million euros)

Source: Lantegi Batuak

Lantegi Batuak is also characterized by its involvement in territorial development: with a network of centers and services present in all the counties and its close collaboration with public institutions and social and business entities. In fact, for every public euro received, Lantegi Batuak contributes approximately €13 to society, helping to unite the territory and develop the business and social fabric of Bizkaia (LANTEGI BATUAK, 2020).

Likewise, in the last year, more than 500 actions in the community can be highlighted, the participation in more than 20 conferences and events to present its model, and the reception of around 20 visits for the same purpose.

6.4. Effects of Covid-19 and the pandemic in Lantegi Batuak

The Covid-19 and the effects of the pandemic have meant a great change in daily, personal and professional life, and this effect has also been felt in the daily management of Lantegi Batuak.

The new context has required the adoption of a series of changes in the organization, allowing the

continuity of the business activity to be combined with the prevention and protection of people's health.

A virtual support system has been developed for the users of the occupational service, which allows the service to continue to be provided without employees having to travel to the work centers.

The process of adapting systems to respond to this need to work remotely (VPN, IntraLan, FortiClient, Teams, Support, Communication and exploitation of databases, etc.) has been accelerated, boosting agility in operational decision-making (customer service, maintenance of essential activities, people management, occupational service, funding assurance, dialogue with different administrations, processing of regulatory changes and recommendations, etc.), which have made it possible to respond to the needs of this new context.

This has been made possible by having the support of the Board of Trustees in decision-making, backing up the measures agreed by the management team.

7. Conclusions

Along this research paper, we have argue that Foundations are non-profit organizations whose assets are permanently assigned to the realization of general interest purposes. Their activity must contribute to human welfare in areas such as human rights, social action, educational, cultural and sporting activities or the promotion of equal opportunities.

The Basque Government aware of the positive social effects of these organizations, establishes a legal regime that facilitates and promotes these entities.

Foundations are democratic, transparent and engaged with community entities, but they also stand out for their business dimension. Data show a dynamic and growing sector in terms of employment, volunteers and turnover. But in this realm, among other challenges, Foundations are very interested in measuring and disseminating the social value generated by Foundations to document the social impacts.

Among the fundational sector there is an outstanding case, Lantegi Batuak, whose aim since 1964 is to promote and achieve the social and occupational integration of people with disabilities by creating quality employment opportunities. Now there are nearly 2500 persons employed and has generated a total (integrated) social value totaling 1,5 billion in the last 10 years. Lantegi Batuak is a is an example of how it is possible to combine social action with economic results.

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THE LEGAL FRAMEWORK OF SECURITISATION ON THE ROMANIAN CAPITAL MARKET

Cristian GHEORGHE*

Abstract

Securitisation scheme enables credit institutions to refinance a set of loans, exposures or receivables, such as residential loans, auto loans or leases, consumer loans, credit cards or trade receivables. These loans, transferred to a special purpose vehicle, are transformed in tradable securities offered to investors.

The lender organises loans into different risk categories for investors, thus giving them access to investments in loans and other exposures to which they normally would not have direct access. Returns to investors are originated in payments made by debtors of the underlying loans.

Domestic law regarding securitisation (Law no 31/2006) does not meet the market expectations in order to generate securitisation schemes. Moreover, the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation).

Finally, domestic law has been repealed to leave room for application of the European regulation.

Keywords: *securitisation, capital market, securitisation special purpose entity (SSPE), originator, investment firm.*

1. Introduction

This paper covers the matter of securitisation, a still new topic for Romanian capital market. In traditional Western economies securitisation scheme has proven useful in debt refinancing. In the most common situation securitisation allows credit institutions to refinance a set of loans. Investors acquires tranches of these loans as securities issued by the collectors of these loans, SSPE (securitisation special purpose entity).

Securitisation proved to be an important element of developed financial markets. It allows for a broader distribution of financial risk and can help free up creditors' balance sheets to allow for further lending to the economy. Securitisation creates a bridge between credit institutions and capital markets[1].

We will study the securitisation process in terms of Romanian law. First law in the field was Law no 31/2006) that did not meet the market expectations in order to generate securitisation schemes. Moreover, the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation). In present the domestic law has been repealed to leave room for application of the European regulation.

2. Concept of securitisation

Securitisation is a mechanism used by the lenders, *originato*rs in terms of securitisation, mainly credit institutions, to refinance a set of loans, exposures or receivables, such as residential loans, auto loans or leases, consumer loans, credit cards or trade receivables.

In principle, these originators' loans are transferred to a SSPE (securitisation special purpose entity), although securitisation may involve the transfer of risk achieved by the use of credit derivatives. In this case the exposures being securitised remain exposures of the originator.

The credit risk associated with exposures is "tranched". 'Tranche' means a segment of the credit risk (associated with an exposure or a pool of exposures). Usually securitisation entity (SSPE) initiates a programme of securitisations. The securities issued by this programme predominantly take the form of asset-backed commercial paper (ABCP) with an original maturity of one year or less.

The lender organises loans into different risk categories for different investors, thus giving investors access to investments in loans to which they normally would not have direct access. Returns to investors are originated in payments made by debtors of the underlying loans.

The selling of a securitisation position is prohibited to a retail client unless the seller of the securitisation position has performed a suitability test[2]

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[1] Regulation (EU) no 2017/2402, Preamble 4. The Regulation recognises the risks of increased interconnectedness and of excessive leverage that securitisation raises, and enhances the microprudential supervision by competent authorities of a financial institution's participation in the securitisation market.

[2] In accordance with Article 25(2) of Directive 2014/65/EU.

with the outcome that the securitisation position is suitable for that retail client.

Regarding institutional investor, European Regulation lay down due-diligence requirements. Prior to holding a securitisation position, an institutional investor shall verify that the originator or original lender grants all the credits (giving rise to the underlying exposures) on the basis of sound and well-defined criteria and clearly established processes for approving, amending, renewing and financing those credits[3].

Risk retention principle applying to a securitisation obliges the originator or sponsor to retain a material net economic interest in the securitisation of not less than 5 %. That interest shall be measured in a manner explained by Regulation[4].

Transparency requirements for originators, sponsors and SSPEs.[5] The originator, sponsor and SSPE of a securitisation shall make certain information available to holders of a securitisation position and competent authorities. Such information includes: information on the underlying exposures on a quarterly basis; all underlying documentation that is essential for the understanding of the transaction; where a prospectus has not been drawn up, a transaction summary or overview of the main features of the securitisation; quarterly investor reports, any inside information relating to the securitisation that the originator, sponsor or SSPE is obliged to make public[6].

Details of a securitisation are collected by a repository. A securitisation repository shall be a legal person established in the Union and shall comply at all times with the conditions for registration. A securitisation repository shall, without undue delay, notify ESMA of any material changes to the conditions for registration[7].

3. Participants to securitisation

SSPE 'securitisation special purpose entity' means a corporation or other legal person which is established for the purpose of carrying out one or more securitisations schemes, the activities of which are limited to those appropriate to accomplishing that objective. SSPE is intended to isolate the obligations of the SSPE from those of the originator who transfers the exposures.

'Originator' means a person which was involved in the original agreement which created the obligations of the debtor giving rise to the exposures being securitized. It can also be the purchaser of a third party's exposures on its own account and then securitises them. *'Original lender'* means an entity which concluded the original agreement which created the obligations of the debtor giving rise to the exposures being securitised[8].

'*Sponsor*' means a credit institution[9], located in the Union or not, or an investment firm[10] other than an originator, that establishes and manages an asset-backed commercial paper programme or other securitisation that purchases exposures from third-party entities. Sponsor can delegates the day-to-day active portfolio management involved in that securitisation to an entity authorised to perform such activity such an undertakings for collective investment in transferable securities (UCITS)[11], an Alternative Investment Fund Managers (AIFM)[12] or investment firm[13].

'*Investor*' means a natural or legal person holding a securitisation position.

Securitisation repository' means a legal person that centrally collects and maintains the records of securitisations[14].

4. Legal framework

Domestic Law. Former internal law regarding securitisation (Law no 31/2006) did not meet the market expectations in order to generate securitisation schemes.

Securitisation was defined as a financial operation initiated by an investment vehicle (IV) that acquires receivables, groups and affects them to guarantee a securities issue. Receivables subject to securitisation can arise from credit agreements (including mortgage credit agreements, credit agreements for the purchase of cars, contracts for the issuance of credit cards), leasing contracts, term payment contracts (including sale-purchase contracts with payment in instalments) and finally any other debt securities provided that the rights they confer may be the subject of an assignment.

Under this domestic law an investment vehicle was an entity set up as a securitisation fund on the basis

[3] Art. 5 Regulation (EU) no 2017/2402.
[4] Art. 6 Regulation (EU) no 2017/2402.
[5] Art. 7 Regulation (EU) no 2017/2402.
[6] In accordance with Article 17 of Regulation (EU) No 596/2014 of the European Parliament and of the Council on insider dealing and market manipulation.
[7] Art. 10-12 Regulation (EU) no 2017/2402.
[8] Art. 2 al. 20 Regulation (EU) no 2017/2402.
[9] As defined in point (1) of Article 4(1) of Regulation (EU) No 575/2013.
[10] As defined in point (1) of Article 4(1) of Directive 2014/65/EU.
[11] In accordance with Directive 2009/65/EC.
[12] Directive 2011/61/EU.
[13] Directive 2014/65/EU.
[14] Art. 2 al. 23 Regulation (EU) no 2017/2402.

of a civil society contract or as a securitisation company organized in the form of a joint stock company.[15]

The administration of funds and securitisation companies was performed by legal entities established in the form of a joint stock company. The registration at the trade register office of a company having as object of activity the administration of investment vehicles was made only with its prior authorization by CNVM.[16]

The above provisions of the domestic law came into conflict with European legislation (Regulation UE 2017/2402 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation)[17]. Still, this conflict has an intrinsic solution. European law takes precedence over the national laws of the Member States. The principle of supremacy applies to all European acts that are binding. Member States may not apply a national rule which is contrary to European law. In EU Court of Justice wording, the law stemming from the treaty could not be overridden by domestic legal provisions[18]. Romanian Constitution states the same principles of the pre-eminence of European law over national law.[19]

The European regulatory act is a regulation [Regulation (EU) 2017/2402]. Such an act is directly applicable in national law, without a national implementation. Moreover, such an implementation would create a normative redundancy because the regulation has general applicability. It shall be binding in its entirety and directly applicable in all Member States (Article 288 of the Treaty on the Functioning of the European Union).

European Law. Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 lay down a general framework for securitisation and creates a specific framework for simple, transparent and standardised securitisation[20].

The Union is striving to improve the legislative framework implemented after the financial crisis. EU aims to address the risks inherent in highly complex, opaque and risky securitisation. EU legislator tries to ensure that rules are adopted to better differentiate simple, transparent and standardised (STS) products from complex, opaque and risky instruments. [21]

Finally, domestic law has been repealed to leave room for application of the European regulation. Now are enacted in domestic law measures implementing Regulation (EU) 2017/2.402 of the European Parliament establishing a general framework for securitisation and creating a specific framework for simple, transparent and standardized securitisation.[22] Romanian Law establishes competent authority in securitisation field (FSA – Financial Supervisory Authority) with particular competencies[23], supervisory powers[24] and powers to apply punishments for the violation of the rules[25]. With these implementing rules the European Regulation is directly applicable on Romanian capital market.

5. Simple, transparent and standardised ('STS') securitisation

European Regulation creates a specific framework for simple, transparent and standardised ('STS') securitisation, a unique defined operation throughout the Union. It should be established a general applicable definition of STS securitisation based on clearly laid down criteria. The implementation of the STS criteria throughout the Union should not lead to divergent approaches that would create potential barriers for cross-border investors. They would not be compelled to familiarize themselves with the details of the Member State frameworks, thereby undermining investor confidence in the STS criteria. A single source of interpretation would facilitate the adoption of the STS criteria by originators, sponsors and investors throughout the Union. The European Regulation and ESMA[26] should play an active role in addressing potential interpretation issues.

Traditional securitisation (true-sale securitisations) in Regulation wording[27] means a securitisation with the transfer of the economic interest in the exposures being securitised through the transfer of ownership of those exposures from the originator to an SSPE. By contrast, *synthetic securitisation* means a securitisation where the transfer of risk is achieved by the use of credit derivatives or guarantees. The

[15] Art. 12 Law no 31/2006.
[16] Ibidem, art. 21. CNVM is former Romanian capital market authority, now Financial Supervisory Authority (ASF).
[17] Official Journal of the European Union L 347/35, 28.12.2017.
[18] Case 6/64 Costa v ENEL [1964] ECR 593: *the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question*.
[19] Art. 148 Romanian Constitution: *Following accession, the provisions of the Constitutive Treaties of the European Union, as well as other binding Community regulations, shall take precedence over the contrary provisions of national law, in compliance with the provisions of the Act of Accession.*
[20] Official Journal of the European Union L 347/358, 12.2017.
[21] Regulation (EU) no 2017/2402, Preamble 2.
[22] Law no 158/2020, Chapter XI.
[23] Art. XV Law no 158/2020.
[24] Art. XVII Law no 158/2020.
[25] Art. XX Law no 158/2020.
[26] Regulation (EU) no 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC.
[27] Art. 2 al. 9 Regulation (EU) no 2017/2402.

exposures being securitised remain exposures of the originator.

The Regulation only accepts for traditional securitisation to be designated as simple, transparent and standardised STS. The transfer of the underlying exposures to the SSPE should not be subject to clawback provisions.

STS requirements are clearly laid down by the Regulation. In the end ESMA shall maintain on its official website[28] a list of all securitisations which the originators and sponsors have notified to it as meeting the STS requirements. ESMA shall add each securitisation so notified to that list immediately and shall update the list where the securitisations are no longer considered to be STS following a decision of competent authorities.

Requirements relating to simplicity[29] mean the title to the underlying exposures shall be acquired by the SSPE (by means of a true sale) and the transfer of the title to the SSPE shall not be subject to clawback provisions in the event of the seller's insolvency.

Requirements relating to standardisation[30] mean the originator, sponsor or original lender shall satisfy the risk-retention requirement. Thus means they shall retain a material net economic interest in the securitisation of not less than 5 %., measured at the origination (e.g. the retention of not less than 5 % of the nominal value of each of the tranches sold or transferred to investors).

Requirements relating to transparency[31]. The originator and the sponsor shall make available data on static and dynamic historical default and loss performance.

The Regulation edict a ban on resecuritisation. Resecuritisation means securitisation where at least one of the underlying exposures is a securitisation position.[32] The reason for ban is that resecuritisations could hinder the level of transparency that the Regulation seeks to establish.

The Regulation lay down above mentioned requirements regarding non-ABCP[33] securitisation. Further the text deals with ABCP securitisation.

The Regulation allows for the different structural features of long-term securitisations and of short-term securitisations (namely ABCP programmes and ABCP transactions) and there should be two types of STS requirements: one for long term securitisations and one for short-term securitisations corresponding to those two differently functioning market segments[34].

6. Conclusions

Securitisation proved to be an important element of developed financial markets. It can help free up creditors' balance sheets to allow for further lending to the economy. Securitisation creates a bridge between credit and capital markets, giving investors access to investments in loans and other exposures to which they normally would not have direct access. They can use sophisticated financial instruments such as credit derivative but tradeable securities used in traditional securitisations are more accessible.

Still, holding a securitisation position implies many risks. It is important that the interests of originators and sponsors that are involved in a securitisation and investors be aligned. In order to achieve this goal original creditors or other participants in this scheme should retain a significant interest in the underlying exposures of the securitisation. It is therefore important for the originator or sponsor to retain an economic exposure to the underlying risks in question. Any breach of that obligation should be subject to sanctions to be imposed by competent authorities.

The main purpose of the general obligation for the originator, sponsor and the SSPE to make available information on securitisations (via the securitisation repository) is to provide the investors with a source of the data necessary for performing their due diligence. Dissemination of relevant information deter participants to enter into securitisation transactions without disclosing sensitive commercial information on the transaction.

Securitisation scheme are still new for Romanian capital market. These operations should be implemented to provide both investors and institutional creditors with a new financial instrument.

The Romanian authority (FSA) must provide the necessary framework for the use of securitisation on the internal market.

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[28] https://www.esma.europa.eu/.
[29] Art. 20 Regulation (EU) no 2017/2402.
[30] Art. 21 Regulation (EU) no 2017/2402.
[31] Art. 22 Regulation (EU) no 2017/2402.
[32] Art. 2 al 4. Regulation (EU) no 2017/2402.
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BRIEF CONSIDERATIONS REGARDING RESOLUTION OF SALE PROMISES

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Abstract

The matter of resolution of sale promises poses practical problems arising from the interpretation of the Civil Code and that we intend to analyze in this study. Among the issues to analyze we can mention: specific aspects of the written stage, such as stamp tax; the criteria for establishing competence; the substantial conditions for the resolution of the promise of sale; the prescription of the material right to action. Regarding the conditions of operation of the resolution, it is necessary to determine what is significant execution in the context of the promise of sale, from what time is considered to be late the contractor of the party wishing to appeal the termination of the contract and what kind of contractual behavior who wishes to terminate contractually, whether or not the notion of contractual fault is incidental or it is sufficient that the adverse party does not prove one of the justified causes of non-performance provided by art. 1555-1557 Civil code. Also concerning the prescription of the substantive law of the action, it is necessary to analyze concretely the moment from which it starts to flow, with possible causes of interruption, taking into account the fact that the resolution usually appears after several steps to execute in nature of the contract, being an extreme solution.

Keywords: *art. 1549, art. 1669, promise of sale, resolution, prescription.*

1. Introduction

The provisions of art. 1516 of the Civil Code offers in the case of the promise of sale, besides the forced execution in kind in the form of pronouncing a decision that takes the place of the contract, the forced execution by equivalent, but also the extreme remedy, of last resort, of the resolution. In the case of the promise of sale, the mechanisms of the resolution remain apparently unchanged, but they have particularities both substantially and procedurally.

The resolution mechanism has a particular application in the field of sales promises given the specific nature of pre-contracts. The action in the resolution provoked discussions over time both on the conditions to be met for accessing this remedy, on the prescription of the material right to action, but also on the procedural level on the establishment of the stamp duty and jurisdiction. We consider it important to analyze the resolution mechanism in terms of sales promises as much as the sales promise is by its nature an intermediate stage and the application of the rules of resolution must be adapted by comparison with a sales contract, for example, the interpretation of applicable rules in the specific context of the pre-contractual phase. Thus, in addition to the difficulties in determining the object of the action in the resolution and its value when we speak of the promise to conclude a contract of sale in the future, there are subsequent difficulties in establishing the material jurisdiction of the court.

With regard to the conditions of operation of the resolution, it is necessary to determine what is significant execution in the context of the promise of sale, from what time is considered to be late the contractor of the party wishing to appeal the termination of the contract and what kind of contractual behavior who wishes to terminate contractually, whether or not the notion of contractual fault is incidental or it is sufficient that the adverse party does not prove one of the justified causes of non-performance provided by art. 1555-1557 Civil code.

Also, from the perspective of the prescription of the substantive law of the action, it is necessary to analyze concretely the moment from which it starts to flow, with possible causes of interruption, taking into account the fact that the resolution usually appears after several steps to execute in nature of the contract, being an extreme solution.

Thus, in the following pages, we will analyze the problems listed above regarding the resolution of sales promises, trying to capture the existing guidelines in judicial practice and legal literature, but also to offer our own solutions, from those already existing or starting from them to identify preferable alternatives.

2. Judicial stamp duty

The judicial stamp duty applicable to the analyzed request is calculated at the value according to art. 3 para. (1) and (2) letter a) of O.UG. no. 80/2013. It is also an incident of art. 31 para. (2) thesis I of O.U.G. no. 80/2013, according to which in the case of fees calculated according to the value of the object of the application, the value at which the judicial stamp duties are calculated is the one provided in the action or in the application.

The request regarding the reinstatement of the parties in the previous situation is exempted from stamp duty if it is ancillary to the action in resolution, according to art. 3 lit. a) Thesis II of O.U.G. 80/2013.

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According to art. 8 para. (2) of O.U.G. 80/2013, the request for reinstatement of the parties in the previous situation, when it is not ancillary to the action in finding nullity, cancellation or resolution or termination of a legal act is taxed with 50 lei, if the value of the request does not exceed 5,000 lei, and by 300 lei, for applications whose value exceeds 5,000 lei.

Similar to the action for a decision taking the place of a contract, for the resolution of the promise of sale the issue which arises in determining the stamp duty is related to the value of the object of the application. Thus, the action in the resolution of the promise of sale is evaluable in money, the determination of the amount of the judicial stamp duty being made by reference to the value limits established by art. 3 para. (1) of the mentioned normative act. According to art. 31 para. (2) of the O.U.G. no. 80/2013, the value taken into account for establishing the stamp duty is the one indicated in the content of the action (which may or may not coincide with the one indicated in the content of the promise of sale). The same text of the law establishes that if the value is contested or appreciated by the court as clearly derisory, the evaluation is made under the conditions of par. (3) of art. 98 Civil procedure code.

The object of the sale promise is an obligation to make, namely to conclude the sales contract on a date agreed by the parties. Given that the object is an obligation to perform, the difficulty that arises procedurally is to determine whether this obligation is assessable in money and in the case of an affirmative answer which is the actual value by reference to which the stamp duty will be set.

With regard to the first question, both legal doctrine and practice are unanimous in considering that the action for the resolution of a promise to sell is assessable in money. However, there are different opinions about the value to which we must relate.

In a first approach, the circulation value of the good whose sale was promised by the parties through the pre-contract is relevant for determining the stamp duty. This conception is based on the premise that through the promise concluded, the parties established the conclusion of a future contract of sale, and the objective value of this contract is the value of the good. This reasoning is similar to that applied when determining the value of a sales contract, in order to calculate the stamp duty. For the resolution of the sale, the circulating value of the good is considered to be an objective benchmark as opposed to the price set by the parties by contract or the value indicated by the plaintiff in the request, which are subjective, depending on several factors.

A second approach considers the value criterion that enters the patrimony of each of the co-contractors by concluding the contract. This reasoning is applied somewhat by analogy from the termination of a contract of sale. In this case, by resolution, the seller would regain in his patrimony the good, and the buyer, the price paid. Consequently, in the event of the action being taken for the judicial termination of a contract of sale by the buyer, he would pay the judicial stamp duty at the value of the price paid, and if the plaintiff is the seller he will pay the stamp duty at the value of the sale price. This algorithm is also applicable in the case of the resolution of the sale promise insofar as we consider that its value is equivalent to the value of the patrimonial gain predicted by the parties in the event of concluding the sale contract.

Starting from these two approaches, we can observe an overlap, at least apparent, between the object of the promise of sale and the object of the contract of sale. Thus, although the promise of sale is an intermediate stage set by the parties before the sale is concluded, it is equivalent to the sale in terms of the applicable stamp duty treatment. So we have on the one hand the firm commitment of the parties to sell and buy a good, which resulted in the acquisition by each co-contractor of the good, respectively of the price in its patrimony. In this case, it appears natural to tax the share in the resolution either at the taxable value of the good or at the value with which the patrimony of each of the parties is to be increased, the price paid or the value of the good.

However, the reasoning set out is no longer justified in determining the value of the object of the request in the termination of a pre-contract whose legal object is the future conclusion of a sale. In order to determine the value of the object of a pre-contract, the obligation to perform assumed by each of the parties should be effectively assessed. From this perspective, the simple obligation to appear at a certain date for the conclusion of the contract is not assessable in money. On the other hand, the pre-contractual determination of the obligatory elements of the sales contract, such as its object and price, as well as the payment of a price advance or a deposit, is a reason to give the promise of sale a patrimonial value at most equal to the advance. or arvuna paid, because as a result of the resolution they will return to the patrimony of the promising buyer. The action in resolution formulated by the promising seller would be considered invaluable in money because his patrimony will not increase in any way after the resolution, he can win at most the right to alienate the promised good, in case of the existence of a clause of inalienability implied or expressed in the promise.

In conclusion, regarding the way of setting the stamp duty, we identified a problem from the perspective of the value of the request for resolution of the promise of sale. Thus, despite the unanimous practice of setting the stamp duty at the circulating value of the good, this reasoning has the weakness of equating the promise with an actual sale in terms of the value of the object. However, the solution adopted in practice has the advantage of not creating problems, providing a constant criterion for calculating the stamp duty, although from the applicant's point of view it could be seen as an unjustified taxation on the value of the property.

3. Competence of the court

Regarding the material competence of settlement in the first instance, the request in question belongs to the court, as the case may be to the court, by reference to art. 94 pt. 1 lit. k) and art. 95 pt. 1 C. proc. civ, taking into account the establishment of the value of the object of the application, art. 101 para. (2), para. (1) Civil procedure code.

Regarding the territorial competence to solve the mentioned request, this is the one of common law, regulated by art. 107 Civil procedure code or, as the case may be, the alternative one, according to art. 113 para. (1) § 3 Civil procedure code, in the event that the contract expressly provides for a place of execution of the obligation covered by the application.

Discussions concerning jurisdiction overlap almost entirely, with the arguments presented in the analysis of the judicial stamp duty being valid.

From the point of view of substantive competence, an inconvenience would arise if the seller's request for termination of the promise were considered to be invaluable in cash and the buyer's claim would have the value of the price advance paid under the promise. Thus, the request formulated by the seller, according to art. 94 para. (1) Civil procedure code, regarding an obligation to make it invaluable in money, would always be within the material competence of the court, while the request made by the buyer would attract the competence of the court or tribunal, by reference to the amount of the advance paid, according to art. 94 pt. 1 lit. k) and art. 95 pt. 1 Civil procedure code However, in that situation, the termination of the same contract would attract the material jurisdiction of different courts depending on its holder, which would lead to the possibility of mandatory rules governing substantive jurisdiction, which is unacceptable.

Thus, although the logical fracture we identified seems important to us, not being able to equate the value of the object of a promise of sale with the object of a sale, at least for the moment, it seems preferable to establish material competence and stamp duty by reporting. to the circulating value of the good, in the absence of an alternative that does not present shortcomings.

4. The conditions of the judicial resolution of the promise of sale

According to art. 1550 alin. (1) of the Civil Code "the resolution may be ordered by the court, upon request, or, as the case may be, may be declared unilaterally by the entitled party". The second paragraph of the same article also states that "in specific cases provided for by law or if the parties have so agreed, the resolution may operate in its own right". This is the legal classification of the forms of the resolution according to their mode of operation.

Thus, the Civil Code provides the creditor, regarding the resolution, a right of option between resorting to the intervention of the court to terminate the contract as a result of non-performance and declaring himself, by unilateral expression of will, the termination of the contract. Therefore, pursuant to art. 1516 of the Civil Code, the creditor may choose between several consequences of non-performance of contractual obligations. As an exception to this principle, the creditor may choose the resolution only in particular cases, when the non-execution is sufficiently significant.

Pursuant to art. 1550 of the Civil Code, the full resolution is either legal or conventional. Regarding the full resolution of the conventional law, it operates in the presence of an express commission commission agreement regulated by art. 1553 of the Civil Code. The utility of such commissioners' pacts is that they remove the arbitrariness of assessing the significant character of the non-execution; thus, the parties stipulate from the outset which obligations, once violated, give rise to the right to request the resolution.

Finally, the option that the creditor has regarding the application of the resolution results from the very manner of formulating art. 1,549 of the Civil Code. So, according to him, "if he does not demand the forced execution of the contractual obligations, the creditor has the right to resolution". Thus, the exercise of the right to opt enshrined by the phrase "if he does not ask" used in the cited legal text will be exercised by the creditor through the declaration invoking the resolution.

For the hypothesis of inserting a commission pact, art. 1553 of the Civil Code allows the parties to derogate from the rule of the need for delay, in which case the resolution intervenes by "the mere fact of non-execution". The contrast with the variant of the resolution by unilateral declaration is striking and undeniable: when the parties derogate from the rule of the need to delay (the same hypothesis above) the resolution - provides art. 1552 - intervenes by "written notification of the debtor"[1].

By the phrase "by right" we should understand that non-performance gives rise to the possibility of the creditor to prevail or not the termination of the contract - the termination operates automatically, but the creditor can choose whether to proceed with this cancellation that operated automatically or not. The peculiarity compared to the other forms of resolution would be that this option does not imply a declaration of resolution, in the sense of art. 1552 of the Civil Code, but it can be done anyway, as long as it is univocal. In this way, the direct execution regulated by art. 1726 of the Civil Code is a particular application of the full legal resolution. In other words, in the case of full resolution, as in the case of resolution by unilateral

[1] V. Diaconiță, Condițiile substanțiale ale rezoluțiunii în noul Cod civil, Revista Romana de Drept Privat 6 din 2012, p. 9.

declaration, the creditor has full power over the fate of the contract, but, unlike the latter, the option must not be notified in writing to the debtor.

A first condition of the resolution is the significant nature of the non-execution which is considered to be the only substantial condition of the resolution, for all types of resolution. This condition is deduced from the a contrario interpretation of art. 1551 para. (1) It follows from the second sentence of the same article that in the case of contracts with successive execution the termination can be obtained by the creditor for a non-execution that is not serious enough to be considered significant, but is repeated.

A second condition for obtaining the resolution is the delay of the debtor under the conditions of art. 1521 and the following Civil Code, i.e. the granting of an additional term to it by the creditor in order to execute the contractual obligations. Although it is not expressly provided as a condition in the regulation of the judicial resolution, its obligatory character results from several legal texts such as art. 1516 alin. (2) and art. 1522 para. (5) The Civil Code If the debtor has not been granted the additional term for execution, the request for summons itself produces such an effect, and the consequence of the fact that the defendant was not delayed prior to the formulation of the request for summons is the possibility the debtor to execute the obligation within a reasonable time from the date of communication of the summons, as provided by art. 1522 para. (5) of the Civil Code. As an exception, in case the debtor is legally in arrears, the granting of an additional term of execution is no longer necessary and the creditor is entitled to request the resolution directly in court.

4.1. The need for guilt for pronouncing the resolution

The only requirement provided by art. 1516 alin. (2) point 2 of the Civil Code is that the non-execution of the obligation is "without justification". From the evidentiary point of view, the debtor has the task of proving the existence of one of the causes that justify the non-execution, provided by art. 1555-1557 of the Civil Code There is no reason to believe that the phrase "fortuitous event" used in art. 1557 alin. (1) sentence I of the Civil Code would take into account other events than those specified by art. 1634 Civil Code, with reference to art. 1351 and 1352 of the Civil Code, respectively force majeure and fortuitous case, as well as the deed of the victim, the creditor and the deed of a third party, but only if the latter have the characteristics of force majeure or fortuitous event[2].

The verification or not of the debtor's fault exceeds the legal provisions, there being in general rule no coincidence between the non-execution without justification and the culpable non-execution of the obligation, aspect that results even more clearly from the provisions of art. 1530 Civil Code which in its final thesis mentions them alternately.

However, the notion of non-execution without justification, used in art. 1350 alin. 2 Civil Code and in art. 1516 alin. 2 of the Civil Code usually overlaps, in contractual matters, with the notion of culpable non-execution[3].

In this context, there is the problem of identifying those hypotheses that differentiate the scope of the two phrases, i.e. those situations in which non-execution is unjustified and innocent.

In this respect, it was considered that the non-execution without justification no longer expresses the idea of fault whenever, on the basis of an express legal provision or a contractual clause, the fortuitous case does not remove the liability of the debtor. In such a situation, the scope of non-enforcement without justification expands, including cases of non-performance without fault, and the scope of justified non-enforcement is reduced accordingly, excluding cases of non-performance without fault. As long as the fortuitous case justifies non-execution, it means that in the absence of proof, non-execution without justification overlaps with culpable non-execution[4].

4. Prescription of the action in the resolution of the promise of sale

The limitation period of the right to action in the resolution of the sale-purchase promise starts to run only from the moment when the interested party has acquired the certainty that the defendant is unable to fulfill his main obligation.

When the plaintiff requested within the legal term the capitalization of the sale-purchase promise, and after the final settlement of the action he promoted the action in resolution, his entire conduct was an active and diligent one, all these qualities being incompatible with the application, against him, of the sanction of extinctive prescription. Therefore, only from the date of finality of the court decision rejecting the action requesting the execution in kind of the obligation assumed by the promisor-seller, the promisor-buyer has acquired the certainty that the defendant is unable to execute his principal obligation assumed, so that the limitation period of the right to action in the resolution of the sale-purchase promise starts to run only from this moment[5].

Otherwise, the plaintiff would be sanctioned by rejecting the present action as prescribed, although he, proving diligence, requested, within the legal term, the capitalization of the sale-purchase promise, and after the final settlement of the initial action, of the action in resolution.

[2] V. Stoica, Înțelesul noțiunilor de rezoluțiune și reziliere în Codul Civil român. Între dezideratul clarității și fatalitatea ambiguității, R.R.D.P. nr. 4/2013.

[3] V. Stoica, *Idem.*

[4] V. Stoica, *Idem.*

[5] V. Terzea, Promisiune de vânzare-cumpărare. Acțiune în rezoluțiune. Prescripție, Revista Dreptul nr. 8 din 2020, p. 1.

4.2. Timely application of the extinctive prescription

In order to establish the legal norms applicable to the extinctive prescription, a special relevance is represented, in a first stage, by the determination of the beginning moment of the extinctive prescription term, considering the transitional norm contained in art. 201 of Law no. 71/2011 implementing the Civil Code1, as interpreted by the Decision in the interest of law no. 1/2014, pronounced by the High Court of Cassation and Justice.

Therefore, in the case of prescriptions started to run before the entry into force of the current Civil Code, i.e. before October 1, 2011, fulfilled or not fulfilled on that date, the legal regime applicable to the extinctive prescription will be the one provided by Decree no. 167/1958 regarding the extinctive prescription.

4.3. The moment of beginning for the extinctive prescription

In the case of a pre-contract of sale-purchase concluded prior to the entry into force of the Civil Code, to determine the legal regime of the extinctive prescription it is necessary to establish when the limitation period began to run in which the creditor's right could be exercised.

In this sense, it is worth mentioning that through art. 7 para. (1) thesis I of Decree no. 167/1958 regarding the extinctive prescription, the rule was established according to which the prescription right starts to run from the moment the creditor's right to action arises, and by exception, in case of a suspensive term, the prescription term started to run from the expiration of the term. suspensive, according to art. 7 para. (3) the final thesis from Decree no. 167/1958.

Also, through art. 3 para. (1) of the same normative act established the general duration of the prescription as 3 years.

In the event of concluding a sale-purchase pre-contract, the promisor-buyer acquires a right of claim correlative to the obligation to do what is incumbent on the promisor-buyer and has as object the obligation to transfer the property right either immediately after concluding the sale-purchase pre-contract or at a later date[6].

The term of capitalization of the right to action of the promising-buyer under the incidence of the Decree no. 167/1958 regarding the extinctive prescription was 3 years regardless of the nature of the good that was the object of the pre-contract of sale-purchase, a term that starts to run either from the conclusion of the pre-contract of sale-purchase, or from the fulfillment of the suspensive term in which the promisor-seller had to fulfill its obligation, according to the distinctions provided by art. 7 of the Decree no. 167/1958 regarding the extinctive prescription, in the hypothesis of the pre-contracts concluded before October 1, 2011.

4.4. Interruption of the term of extinctive prescription or extension of the moment of beginning of the term of extinctive prescription

Both in the specialized literature[7] and in the judicial practice[8] it was considered, under the incidence of Decree no. 167/1958, that in the event that the parties have handed over the use of the property, either at the time of concluding the pre-contract, or later, there will be either the extension of the start of the term of extinction, or an interruption of the term of extinction by art. 16 para. (1) lit. a) of Decree no. 167/1958 regarding the extinctive prescription.

If the use of the good was handed over at the time of concluding the pre-sale-purchase contract, extending the beginning of the term of extinctive prescription until after the entry into force of the current Civil Code, the term of extinctive prescription of capitalization of the promisor-buyer began to flow at the moment when the promising seller undoubtedly challenged that right of claim. In such a case, as an effect of the introduction of a first request for a summons requesting the issuance of a court decision to take the place of a sale-purchase contract, there is an interruption of the term of extinctive prescription according to art. 2537 point 2 of the Civil Code reported to art. 2539 Civil Code.

The interruption of the limitation period will maintain its effects even if the first action has been rejected provided that a second action is brought within 6 months from the date when the decision resolving the action remained final and the second action to be admitted, in relation to the provisions of art. 2539 para. (2) final thesis Civil Code.

Furthermore, if the second action having as object the resolution of the pre-sale-purchase contract was formulated within the term of 6 months from the date of finality of the court decision rejecting the action having as object the pronouncement of a court decision place of sale-purchase contract, so that the extinctive prescription did not operate, in relation to the provisions of art. 2539 para. (2) final thesis Civil Code.

Under the current Civil Code it has been argued that since the claim contains a plurality of coercive prerogatives (material rights of action), the object of which is a remedy, there will be a different prescription for each of these material rights to action, which may flow different in relation to each remedy. Regarding the

[6] M.M. Costin, C.M. Costin, Natura juridică a obligaţiei asumate de promitentul-vânzător şi a acţiunii în justiţie pe care o poate promova promitentul-cumpărător împotriva acestuia în caz de neîndeplinire a obligaţiei asumate. Prescripţia dreptului la acţiune, în "Pandectele române" nr. 9/2015, p. 98. See also Înalta Curte de Casaţie şi Justiţie, Decizia în interesul legii nr. 8/2013, publicată în Monitorul Oficial al României, Partea I, nr. 581 din 12 septembrie 2013.

[7] G. Boroi, Drept civil. Partea generală. Persoanele, ediţia a III-a, revizuită şi adăugită, Editura Hamangiu, Bucureşti, 2018, p. 398; M. Nicolae, *op. cit.*, p. 513 apud V. Terzea, Promisiune de vânzare-cumpărare. Acţiune în rezoluţiune. Prescripţie, Revista Dreptul nr. 8 din 2020.

[8] C. Ap. laşi, S. civ., Dec. nr. 937/1998, în V. Terzea, Noul Cod civil, vol. II (art. 1164-2664), adnotat cu doctrină şi jurisprudenţă, ediţia a II-a, Editura Universul Juridic, Bucureşti, 2014, nr. 6, p. 1322. See also case law cited în M. Nicolae, *op. cit.*, p. 597, nota 4 apud V. Terzea, Promisiune de vânzare-cumpărare. Acţiune în rezoluţiune. Prescripţie, Revista Dreptul nr. 8 din 2020.

limitation period for the action in resolution, this is the general term of 3 years according to art. 2501 of the Civil Code, correlated with art. 2517 of the Civil Code and it will begin to flow according to the mechanism analyzed above, from the moment when to the moment when, for example, the promising-seller undoubtedly challenged the right of claim of the promising buyer.

5. Conclusions

The resolution mechanism has a particular application in the field of sales promises given the specific nature of pre-contracts. The action in the resolution provoked discussions over time both on the conditions to be met for accessing this remedy, on the prescription of the material right to action, but also on the procedural level on the establishment of the stamp duty and jurisdiction.

Thus, we analyzed in our study the difficulties in establishing the object of the action in resolution and its value when we talk about the promise to conclude a sales contract in the future, as well as the problems that arise in establishing the material jurisdiction of the court. Regarding the operating conditions of the resolution, the notion of significant execution in the context of the promise of sale was analyzed, from which moment the contractor of the party wishing to appeal the termination of the contract is considered to be late and what kind of contractual behavior the party must have wishes to terminate contractually, whether or not the notion of contractual fault is incidental or it is sufficient that the adverse party does not prove one of the justified causes of non-performance provided by art. 1555-1557 Civil code.

Regarding the value for establishing the stamp duty or the jurisdiction, it is preferable to report the market value of the good. The circulation value of the good is related to the moment of filing the lawsuit. If the value indicated by the plaintiff is contested, the value is established according to the documents submitted and the explanations given by the parties, according to art. 98 para. (3) Civil procedure code, within which the data regarding the taxable value of the good or, as the case may be, the grids of the notaries public could be capitalized.

Regarding the conditions that must be met for the resolution of the promise of sale, these are: the significant character of the non-execution which is considered to be the only substantial condition of the resolution, for all types of resolution; delaying the debtor under the conditions of 1521 and the following Civil Code, i.e. the granting of an additional term to it by the creditor in order to execute the contractual obligations. Although it is not expressly provided as a condition in the regulation of the judicial resolution, its obligatory character results from several legal texts such as art. 1516 alin. (2) and art. 1522 para. (5) Civil Code If the debtor has not been granted the additional term for execution, the request for summons itself produces such an effect.

Of course, in order to operate the resolution, it is necessary to conclude a valid pre-contract, in case of contract the rules on nullity are incidental, which are to be applied with priority over the resolution.

We also showed above that we support the opinion that the verification of the debtor's fault exceeds the legal provisions, there is generally no coincidence between non-execution without justification and culpable non-execution of the obligation, an aspect that results even more clearly from the provisions of art. 1530 Civil Code which in its final thesis mentions them alternately. However, the notion of non-execution without justification, used in art. 1350 alin. 2 Civil Code and in art. 1516 alin. 2 of the Civil Code usually overlaps, in contractual matters, with the notion of culpable non-execution.

Regarding the prescription of the material right to action in the resolution of the promise of sale in case of prescriptions started to run before the entry into force of the current Civil Code, i.e. before October 1, 2011, fulfilled or not fulfilled on that date, the legal regime applicable to the extinctive prescription will be provided by Decree no. 167/1958 regarding the extinctive prescription, being subject to the provisions of the Civil Code the prescriptions started later given on October 1, 2011. On the other hand, the limitation period regarding the action in resolution will not run if the use of the good was handed over at the time of concluding the pre-contract. sale-purchase, operating the extension of the beginning of the term of extinctive prescription until after the entry into force of the current Civil Code, the term of extinctive prescription starting to run at the moment when the promising-seller undoubtedly challenged the respective claim.

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CONSIDERATIONS ON THE COORDINATION OF PREVENTIVE RESTRUCTURING MEASURES INTRODUCED BY DIRECTIVE (EU) 2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 20 JUNE 2019 ON PREVENTIVE RESTRUCTURING FRAMEWORKS, ON DISCHARGE OF DEBT AND DISQUALIFICATIONS, AND ON MEASURES TO INCREASE THE EFFICIENCY OF PROCEDURES CONCERNING RESTRUCTURING, INSOLVENCY AND DISCHARGE OF DEBT, AND AMENDING DIRECTIVE (EU) 2017/1132 (DIRECTIVE ON RESTRUCTURING AND INSOLVENCY)

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Abstract

Preventive solutions are a growing trend in insolvency law and approaches that have the aim of saving the companies which are still economically viable are a benefit to the economy. Differences between Member States in relation to procedures concerning restructuring, insolvency and discharge of debt generate additional costs for investors and also lead to uneven conditions for access to credit and to uneven recovery rates. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal market in general and for a working Capital Markets Union in particular. These are only some of the results of the reflection determining the initiative for a new legal framework, as introduced by the Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).This paper does not aim to offer solutions or to critically analyse the level of ambition of the Directive, but only to provide an examination of the national frameworks in articulation with the new instrument introduced at Union level, indicating new trends foreseen by its provisions and preliminary directions for reflection in the transposition process.

Keywords: *arrangement with creditors, ad-hoc mandate, viability test, early warning tools, classes of creditors, employees' rights.*

1. Introduction

The directive aims at the smooth functioning of the internal market by removing obstacles to the exercise of fundamental freedoms, such as the free movement of capital and the freedom of establishment, resulting from differences between national legal provisions and procedures relating to preventive restructuring, insolvency, debt relief and write-offs. The legislative instrument also ensures that viable businesses and entrepreneurs in financial difficulty have access to effective national preventive restructuring frameworks that allow them to continue to operate, that honest insolvent or over-indebted entrepreneurs can benefit from a full debt write-off after a reasonable period of time has elapsed, thus allowing them a second chance, and last but not least that restructuring, insolvency and debt write-off procedures become more effective, in particular by shortening their duration.

2. Development of the proposed Directive

As is well known, in 2016[1] the Proposal for a Directive on preventive restructuring frameworks, second chance and efficiency enhancing measures for restructuring, insolvency and debt relief procedures and amending Directive 2012/30/EU was launched and in December 2018, the EU Council and the Parliament reached an agreement on the compromise text, the final form of the text being confirmed by the Council on 19 December 2018. The legislative process ends on 6 June 2019, when the legislative proposal was adopted at Justice and Home Affairs Council level. It should be noted that, from the perspective of national legislation, a significant part of the objectives of the Directive are reflected in our legislative system. We have in mind, on the one hand, the common regulation and, on the other hand, the special legislation in the field of banking, of which we will present, below, some aspects of a principled nature.

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[1] Boon, Gert-Jan and Ghio, Emilie, *An EU Preventive Restructuring Framework: A Hole in One?* (August 5, 2019). D. Ehmke et al., *"An EU Preventive Restructuring Framework: a hole in one?"* (2019) 28 International Insolvency Review 184 available at SSRN: *https://ssrn.com/abstract=3689002* or *http://dx.doi.org/10.2139/ssrn.3689002*.

2.1. Status of restructuring/prevention measures in common regulatory framework

In our legal system, insolvency prevention procedures were regulated for the first time by Law No 381/2009[2] on the introduction of the arrangement with creditors and the ad hoc mandate. This law provided an opportunity for debtors in financial difficulty to avoid insolvency proceedings. The scope of application of Law No 381/2009 was laid down in Article 1 of the Law, according to which the arrangement with creditors and the ad hoc mandate applied to legal persons organising an undertaking in financial difficulty without being in a state of insolvency[3]. It follows that the main addressees of Law No 381/2009 were legal persons organising an undertaking in financial difficulty[4].

Law No 85/2014 introduced a new legal regime for insolvency proceedings which differs from the previous regulation in several respects[5]. One such difference also concerns the scope of these proceedings. In the current regulation, insolvency proceedings apply to debtors in financial difficulty. According to Article 5(27), a debtor in financial difficulty is a debtor who, although performing or capable of performing the obligations due, has a low degree of short-term liquidity and/or a high degree of long-term indebtedness, which may affect the fulfilment of contractual obligations in relation to the resources generated by the operational activity or the resources attracted by the financial activity.

There are therefore two conditions for the application of insolvency proceedings: the status of the debtor and its financial difficulty. Since the law does not specify otherwise, it means that insolvency prevention proceedings are intended for both natural person debtors and legal person debtors, the important thing is to have the legal status of debtor within the meaning of this law.

As regards the debtor's financial difficulty, this may be caused by: a significant drop in the economic profitability of the debtor's business; the loss of important markets, partners, customers or suppliers; the introduction of administrative or legislative measures in the field in which the debtor operates, the bankruptcy of business partners, etc. It is important to note that recourse to the arrangement with creditors, i.e. the ad hoc mandate, does not imply that the debtor is insolvent or insolvent and, even more so, that insolvency proceedings have been opened against him. The financial hardship referred to in the rule under consideration has a different legal meaning from the specific meaning of insolvency, which implies the impossibility of paying the debtor's debts with the money available. While insolvency involves the cessation of payments due to a lack of liquidity, the arrangement with creditors and the ad hoc mandate concern only certain managerial or economic disruptions, but not the non-payment of outstanding debts. At most, they can be regarded as precautionary measures to prevent the debtor from becoming insolvent or insolvent in the future.

If the debtor who owns the business is unable to pay (insolvency), the use of a composition or an ad hoc mandate is excluded, because in such cases, according to Article 66 of the law, the debtor is obliged to apply to the court for insolvency. While the use of composition and the ad hoc mandate is optional, the application for insolvency is mandatory for the debtor. Nor is the commencement of insolvency proceedings conditional on the debtor attempting to use the arrangement with creditors or the ad hoc mandate. The procedures governed by the current legislation are not mandatory preliminary proceedings prior to the opening of insolvency proceedings or the exercise of any action or procedural means of enforcement by creditors, and it is left to the debtor to use them.

Within the meaning of Article 5(17) of Law No 85/2014, a composition agreement is a contract concluded between the debtor in financial difficulty, on the one hand, and the creditors holding at least 75% of the value of the claims accepted and uncontested, on the other hand, approved by the court, whereby the debtor proposes a recovery plan and a plan for the realisation of the claims of these creditors, and the creditors agree to support the debtor's efforts to overcome the difficulties in which it finds itself.

The ad hoc mandate is a confidential procedure, initiated at the request of the debtor in financial difficulty, whereby an ad hoc trustee, appointed by the court, negotiates with creditors with a view to reaching an agreement between one or more of them and the debtor in order to overcome the state of difficulty (Article 5(36) of the Law). The arrangement may provide for measures such as write-offs, rescheduling or partial reduction of debts, continuation or termination of ongoing contracts, staff reductions, etc., with a view to making the economic activity of the debtor's business in difficulty profitable.

Both the arrangement with creditors and the ad hoc mandate are reserved to the debtor, in the sense that they are triggered at his request, but their implementation requires the creditors' consent. Therefore, the procedures and measures regulated by Law No 85/2014 can only be carried out with the express consent of the creditors, materialised in the conclusion of a contract to this effect.

As regards the participants in the two procedures, according to the provisions of Article 7 of Law No

[2] M. Of. no. 870/14 december 2009.

[3] About a similar framework see RPS Submitter, Banque de France and Epaulard, Anne and Zapha, Chloé, *Bankruptcy Costs and the Design of Preventive Restructuring Procedures* (April 2021). Banque de France Working Paper No. 810, available at SSRN: *https://ssrn.com/abstract=3840236*.

[4] V. Nemeș, *Drept comercial*, Ed. Hamangiu, București, 2018, p. 483.

[5] St.D. Cărpenaru, *Tratat de drept comercial român*, ediția a V-a actualizată, Ed. Universul Juridic, București, 2016, p. 705.

85/2014, the bodies applying the ad hoc mandate and composition procedure are the courts, through the president of the court. It follows from the wording of the law that, in practice, the procedures and measures under the ad hoc mandate are ordered by the president of the court, while those specific to the arrangement with creditors fall within the competence of the judge in charge of the proceedings.

From the point of view of territorial jurisdiction, the procedures governed by Title I of Law No 85/2014, the ad hoc mandate and the arrangement with creditors, fall within the ordinary jurisdiction of the court in whose district the debtor's main office or place of business is located. In this regard, Art. 8 para. (1) of Law No 85/2014 provides that the court within whose jurisdiction the debtor's principal place of business or place of business is located shall have jurisdiction to hear the applications referred to in this Title. According to Article 9 of Law No 85/2014, the court of appeal is the court of appeal for judgments delivered by the president of the court or the syndic judge

With regard to the other bodies applying insolvency proceedings, namely the ad hoc trustee and the administrator in composition, the former is present in the ad hoc trustee proceedings and the latter in the proceedings and measures established in the composition proceedings. The rule gives effect to the principle enshrined in Article 4(13), according to which the administration of insolvency prevention and insolvency proceedings must be carried out by insolvency practitioners and their conduct under the control of the court.

In addition to these bodies, creditors and the debtor whose economic enterprise is in financial difficulty also participate in insolvency proceedings.

Creditors participate in the proceedings individually, to the extent permitted by the rights attached to their claim, and collectively, under the conditions laid down by law, through the creditors' meeting and the creditors' representative.

The debtor participates in the procedure mainly through the ad hoc trustee and, in the arrangement with creditors procedure, through the administrator. Moreover, the ad hoc trustee and the administrator in composition are proposed by the debtor, so that they are the contractual representatives of the debtor in financial difficulty.

2.2. Features of prevention/restructuring procedures in the current domestic regulation

Thus, the prevention procedures in the current regulation, which can be used to achieve the objectives of restructuring, have the following characteristics:

a) They are optional procedures because recourse to either of the two instruments (ad hoc mandate and composition) is optional;

b) Both procedures are triggered at the exclusive request of the debtor;

c) Reorganisation and liquidation procedures are not subject to preventive (restructuring) procedures;

d) Both proceedings are collective in the sense that they require the participation of all creditors;

e) Both the ad hoc mandate and the composition procedure are applicable in the event of the debtor's financial difficulties;

f) Both procedures are judicial in nature, in that they presuppose the participation of the judiciary; the ad hoc mandate is granted by the president of the court of the debtor's seat, and the composition procedure is triggered by the syndic judge;

g) Both procedures are primarily aimed at safeguarding the debtor's business and, in the alternative, the interests of creditors;

h) Lastly, both procedures are clearly social in nature, the aim being, as far as possible, to save jobs and, implicitly, to protect employees.

3. The rationale for the new Directive

The rationale of this new architecture reflects the economic and social reality of commercial enterprises at European level. Of these, it is worth mentioning at least those with a particular impact, such as: half of all businesses survive less than five years , 43% of Europeans would not start a business for fear of failure in several EU Member States, viable businesses facing financial problems are more likely to liquidate rather than restructure early.

4. Specific objectives in the context of the co-ordinated preventive restructuring

In terms of structure, the Directive contains: general provisions and early warning tools (Title I), preventive restructuring frameworks (Title II), measures to enhance the efficiency of preventive restructuring, insolvency and debt relief procedures (Title IV).As regards the objectives pursued, the following guidelines deserve attention:

►Access of viable firms in financial distress to national preventive restructuring mechanisms;

►Giving a second chance to honest, over-indebted entrepreneurs by providing full debt relief after a reasonable period of time and limiting the length of time that an insolvency procedure can lapse;

►Increasing the efficiency of preventive restructuring, insolvency and debt write-off procedures including through the introduction of electronic means of communication.

►Avoiding, as far as possible, financial collapse and the use of winding-up proceedings for economic enterprises.

The purpose of the current preventive procedures in domestic law (composition and ad hoc mandate)

The main purpose of the insolvency prevention procedures in our law can be deduced from the

interpretation of the provisions of Article 2, second sentence, of Law 85/2014 and consists in granting "where possible, the opportunity to recover the activity" to the debtor. Also, one of the principles promoted by the aforementioned law is to give the debtors a chance for an efficient and effective recovery of the business through insolvency prevention proceedings (Article 4, paragraph 2 of the law). It follows from the texts of the law to which I have referred that the purpose of the procedures specific to the ad hoc mandate and those specific to the arrangement with creditors is to rescue the debtor in difficulty and, implicitly, to avoid financial collapse by opening insolvency proceedings. But the rules governing insolvency proceedings also have a clear social character, since they are concerned with saving the jobs of the debtor's employees (Article 13(2)).In contrast, by comparison, the main purpose/objective of insolvency proceedings is to apply collective proceedings to cover the debtor's liabilities (Article 2 of the Act). It should be noted that while the ad hoc mandate and the arrangement with creditors are concerned with rescuing the debtor by maintaining its existence and preserving jobs, the insolvency proceedings are primarily concerned with satisfying creditors' claims. Metaphorically but with full practical meaning, it can be argued that insolvency proceedings are "debtor proceedings" and insolvency is "creditor proceedings".

5. Elements of novelty introduced by the Directive[6]

5.1. The 'viability test' in relation to a debtor in financial difficulty

According to Recital 21, Member States should be able to introduce a debtor viability test as a condition for access to the preventive restructuring procedure provided for in this Directive. Such a test must be carried out without prejudice to the debtor's assets, which could take the form, inter alia, of granting an interim stay or carrying out the test without undue delay. However, the absence of prejudice should not prevent Member States from requiring the debtor to prove his viability at his own expense. The operative part of the Directive enshrines in Article 4 this way of conditioning access to preventive restructuring frameworks by stipulating that Member States may maintain or introduce a viability test in national law, provided that this test is aimed at excluding debtors who have no prospect of viability and that it can be carried out without detriment to the debtors' assets.

It should be noted that the Directive does not require the introduction of such a test (it is not a mandatory provision), leaving this option to the national legislator. However, the prescribed way in which such a test could be devised is rather vague, as "no prospect of viability" and "no damage to the debtor's assets" are far from being objective criteria for quantifying an outcome on the basis of which access to a restructuring procedure should be allowed. On the other hand, access to the procedure and the suspension of enforcement could lead to losses of the debtor's assets and, at the same time, to the impossibility of realising creditors' claims.

Provisions of the national Law

In assessing the stage of financial difficulty and the chances of recovery/restructuring, the rules of domestic law differ depending on the procedure used. Thus, in the matter of ad-hoc trusteeship, Article 13 of Law 85/2014 provides that, after hearing the debtor, if it is established that the debtor's financial difficulties are real and the person proposed as ad-hoc trustee meets the legal conditions for exercising this capacity, the president of the court shall appoint, by enforceable decision, the proposed ad-hoc trustee. In this procedure, therefore, the analysis is left to the discretion of the courts through the president of the court, who will decide on the basis of the financial statements submitted by the debtor applicant.

With regard to the arrangement with creditors, Article 24(1) of Law 85/2014 provides that "the draft arrangement agreement must set out in detail: a) the analytical statement of the debtor's assets and liabilities, certified by a chartered accountant or, where applicable, audited by an auditor authorised by law; b) the causes of the state of financial difficulty and, where applicable, the measures taken by the debtor to overcome it by the time the arrangement offer is submitted; c) the projected financial and accounting development over the next 24 months". It is easy to see that the documentation is much more extensive and, moreover, some of the documents are endorsed by specialist experts, in order to make it easier for the official receiver to analyse them.

5.2. Early warning tools

One preventive measure promoted by the Directive is the creation of tools to identify and give early warning of financial distress.

In this respect, it is worth noting Recital (49), which states that, in order to further encourage preventive restructuring, it is important to ensure that directors are not discouraged from exercising reasonable business judgement or taking reasonable commercial risks, in particular where this would improve the prospects of a potentially viable business restructuring. Where the company is in financial difficulty, directors should take steps to minimise losses and avoid insolvency, such as: seeking professional advice, including on restructuring and insolvency, using, for example, early warning tools

[6] Krohn, Axel, Rethinking Priority: The Dawn of the Relative Priority Rule and a New 'Best Interest of Creditors' Test in the European Union (June 20, 2020) available at SSRN: https://ssrn.com/abstract=3554349 or http://dx.doi.org/10.2139/ssrn.3554349.

where they exist; safeguarding the company's assets to maximise value and prevent loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; refraining from engaging the company in the types of transaction that could be subject to avoidance action unless there is a proper business justification; continuing to trade where it is appropriate to do so in order to maximise the value of the company as a going concern; negotiating with creditors and entering into pre-emptive restructuring procedures.

As can be seen, the Directive places a very strong (even unprecedented) emphasis on the managers of the company, who are primarily responsible for both identifying future financial difficulties and finding the best measures and solutions to overcome financial crises and avoid the bankruptcy of the businesses they run.

In addition to the increased responsibilities of company managers, it is also worth mentioning the provisions of the Directive on technical early warning instruments and access to information. In this respect, Article 3 of the Directive states that Member States shall ensure that debtors have access to one or more clear and transparent early warning instruments which enable them to detect circumstances which may give rise to the likelihood of insolvency and which may signal to them the need to act without delay.

For the purposes of the first subparagraph, Member States may use up-to-date information technology for notification and communication. Early warning tools may include: (a)alert mechanisms where the debtor has failed to make certain types of payments; (b)advisory services provided by public or private organisations and (c) incentives under national law for third parties holding relevant information about the debtor, such as accountants, tax authorities and social security authorities, to alert the debtor to adverse developments.

Member States shall ensure that debtors and employees' representatives have access to relevant and up-to-date information on the availability of early warning instruments as well as procedures and measures on debt restructuring and debt relief.

5.2.1. Early intervention tools in the current legislative system

As mentioned above, our legal system regulates measures to prevent financial distress in the banking and insurance sectors. These measures are identical, although they are regulated by separate legislation, which is why we will present mainly those in the banking sector. The regulatory act that constitutes the seat of matter in this regard is Law No. 312 / 2015[7] on the recovery and resolution of credit institutions and investment firms, as well as for amending and supplementing certain regulatory acts in the financial sector, which transposes the main European regulations in this area, such as EU Regulation No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments[8]

5.2.2. Early intervention measures that can be taken in the course of financial resolution

In this regard, Article 149 of the Law provides that if a credit institution breaches or, due to, inter alia, a rapid deterioration of its financial situation is likely to breach, in the near future, the requirements laid down in Regulation (EU) No 575/2013, Government Emergency Ordinance No 99/2006 and the regulations issued by the National Bank of Romania in application thereof, the capital market provisions transposing Title II of Directive 2014/65/EU or any of Articles 3-7, Articles 14-17, Articles 24, 25 and 26 of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets may take, as appropriate, at least the following measures: (a) require the management body of the credit institution to implement one or more of the arrangements or measures set out in the recovery plan or to update such recovery plan where the circumstances leading to the early intervention differ from the assumptions set out in the original recovery plan and to implement one or more of the arrangements or measures set out in the updated plan within a certain timeframe to ensure that the negative conditions prescribed by law no longer exist; (b) request the management body of the credit institution to review the situation, identify measures to address any problems identified and develop an action programme to address those problems and a timetable for its implementation; (c) request the management body of the credit institution to convene a general meeting of the shareholders of the credit institution or, if the management body fails to comply with this requirement, to convene such a meeting directly and, in either case, to set the agenda and request that certain decisions be considered for adoption by the shareholders; d) request the replacement of one or more members of the management body or of the senior management of the credit institution; e) request the management body of the credit institution to draw up a plan for the negotiation of a debt restructuring with some or all of the creditors of the credit institution in accordance with the recovery plan, as appropriate; f) request changes to the business strategy of the credit institution; (g) request changes in the legal or operational structure of the credit institution; and (h) obtain, including through on-site inspections, and provide to the National Bank of Romania as resolution authority all information necessary to update the resolution plan and to prepare for a possible resolution of the credit institution, as well as to carry out a

[7] M. Of. no. 920/11 december 2015.
[8] JLO 176 /27.6.2013 and JLO 173 from 12.6.2014.

valuation of the credit institution's assets and liabilities in accordance with legal provisions.

For the purposes of the law (Art.149 para.2), a rapid deterioration in the financial situation of a credit institution includes a deterioration in the liquidity situation, an increase in leverage, non-performing loans or concentration of exposures, assessed on the basis of a set of indicators, which may include the credit institution's own funds requirement plus 1.5 percentage points[9].

One measure that may be used is the appointment of a temporary manager. The temporary administrator is appointed if the replacement of senior management or the management body is insufficient to overcome the distressed situation. In particular, the National Bank of Romania, as the competent authority, may appoint one or more temporary administrators of the credit institution, which may include the Bank Deposit Guarantee Fund. The National Bank of Romania may appoint any temporary administrator, either to temporarily replace the credit institution's management body or to temporarily work with the credit institution's management body.

As mentioned above, identical regulations are also found in the insurance sector, being introduced by Law 246/2015[10] on insurance recovery and resolution. According to the law, early intervention measures are those measures ordered by the Financial Supervisory Authority for the purpose of restoring the financial situation of the insurer and avoiding deterioration of the solvency capital situation, as well as of the own funds covering the solvency capital requirement (Art., item 29 of Law no.246/2015). If the above-mentioned measures do not achieve their purpose or there is a significant deterioration of the financial situation of the insurer or there are serious breaches of the law, the Financial Supervisory Authority may request the replacement of the senior management or the management body of the insurer as a whole or of some of its members (Art. 29). We have presented the principles of early intervention in the financial-banking sector because they can serve as a source of inspiration for the common law legislator when implementing restructuring frameworks in national legislation.

5.3. Possibility of granting a suspension, on request or by law, in order to access a restructuring procedure

Suspension applies to all types of claims (including secured and preferential claims), but Member States may provide that suspension may also be partial (certain creditors or categories of creditors, notified under national law).

Member States may provide for certain exclusions from the applicability of the suspension:

- in well-defined circumstances;
- with appropriate justification; and only if the suspension would unfairly prejudice the holders of the claims concerned enforcement would jeopardise the restructuring.

Employees' claims are excluded from the application of the suspension, but Member States may decide otherwise. The period of suspension is 4 months, with the possibility of extension, under limited conditions, up to a maximum of 12 months). Article 30 of Law no.85/2014, provides "(1)By ordering the approval, the syndic judge shall suspend all enforcement proceedings.(2) At the request of the administrator in composition, subject to the debtor's provision of guarantees to creditors, the syndic judge may impose on non-signatory creditors of the composition with creditors a maximum period of 18 months to postpone the due date of their claim, during which time no interest, penalties or any other expenses related to the claims shall accrue. The provisions relating to the deferment of the due date of the claim shall not apply to qualified financial contracts and bilateral netting transactions under a qualified financial contract or a bilateral netting agreement.(3) The composition shall be enforceable against budget creditors, subject to compliance with the legal provisions on state aid in domestic and European law, as provided for in Article 24(5)."

5.4. Division into "classes" of creditors

Law 85/2014 does not provide for the division of creditors into classes in insolvency proceedings Directive but leaves the possibility that Member States may provide that debtors who are SMEs may choose not to treat affected parties in separate classes.

5.5. Protection of new financing in proceedings

Article 4 of Law 85/2014, Principle 8 provides at this stage for ensuring access to sources of finance in insolvency prevention proceedings, during the observation and reorganisation period, with the creation of an appropriate regime to protect such claims.

5.6. Protection of employees (right to information and consultation, in the spirit of the regulation and not formally versus interference of employees in company decisions, better position of employees' claims)

The Directive proposes, in an effort to increase support for employees and their representatives, that Member States ensure that employees' representatives have access to relevant and up-to-date information on the existence of early warning instruments and that they are offered support in assessing the economic situation of the debtor. It goes without saying that workers will benefit from the full protection of labour law in all preventive restructuring procedures. In this respect, the

[9] It is noted that "rapidly deteriorating financial condition" within the meaning of the financial and banking regulations refers to the state of insolvability of the entity in question.

[10] M. Of. no. 813/2 november 2015.

Directive provides that the obligations relating to the information and consultation of employees under the national provisions transposing those Directives remain unaffected. The same applies to the obligations to inform and consult employees' representatives on the decision to have recourse to a preventive restructuring framework under Directive 2002/14/EC.

However, we draw attention to the possibility of tactical insolvencies, deliberately used to evade the debtor from tax or labour law provisions, to the need to maintain the status of preferential creditor of employees and also to the need to implement rules that prevent the company's assets from being reduced below the level necessary to pay wage claims.

6. Conclusions. Possible guidelines for the transposition process

As it has been observed and also mentioned at the beginning of the study, measures promoted by the Directive (EU) 2019/1023 are to be found already in national law, in the framework of the two preventive procedures, namely the ad hoc mandate and the arrangement with the creditors We have also listed the main features of the two procedures and also need to confirm their effectiveness, without denying however, the need for their improvement. Consequently, inspired by the application of the national existing legal framework , we continue to advocate, in the transposition process, for the preservation of a voluntary, judicial, collective, social and safeguarding character of the proceedings. At the same time, we are convinced that early intervention instruments which are completely lacking in domestic law, should be used with maximum efficiency and, as we have outlined above, the tools used in the banking and insurance sector could serve as a benchmark for the legislator in this area, as well. In concrete terms, as recommended by the Directive and, moreover, banking and insurance regulations, the measures adopted should provide also the responsibility of the directors, especially since, except in certain fairly limited sectors, no special training or experience is required to run the company. We do not rule out the creation of technical instruments, including by involving public authorities in the task of identifying financial difficulties, an early and prompt intervention being necessary in order to find viable solutions for businesses that have a chance of being rescued.

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ACQUITTAL OF THE DEFENDANTS IN THE CRIMINAL TRIAL BASED ON ARTICLE 16(1)(B) OF THE CRIMINAL PROCEDURE CODE - HIGHLIGHTS

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Abstract

Civil claims not settled by the criminal court may be brought before civil courts, one of which is the delivery of a settlement of acquittal based on Article 16(1)(b) of the Criminal Procedure Code. It is therefore essential to know how these civil claims can be obtained, i.e., what kind of civil action is to be or may be filed, what are the specific features of the shading of the application and the admissibility aspects of such an application. As is the case in majority practice, actions brought by civil parties in a criminal case, where civil action has remained unresolved by the criminal court, are requests for criminal liability to be held. One should not overlook, however, that such an action for civil liability must comply, inter alia, with the requirements set out in Article 1357 of the Civil Code, i.e., it must be proved that the four essential conditions of liability are met, namely: the existence of unlawful conduct, the taking of injury, the causal link between the unlawful conduct and injury and, ultimately, the guilt of the perpetrator. Throughout this paper, we intend to analyze all these issues in detail, by reference to concrete cases, court rulings which have supported the solutions adopted on these issues, as well as relevant doctrinal views on these matters. At the same time, the work will finally redraw its own conclusions on all the issues addressed.

Keywords: *civil action, claims, unsolved civil action, criminal court, liability, unlawful conduct.*

1. Introduction

1.1. What matter does the paper cover?

This paper addresses a common theme in judicial practice, namely the particularities of civil actions left unresolved by criminal courts, where the criminal trial is finally settled by acquittal of the defendant(s) sent to trial pursuant to Article 16(1)(b) of the Criminal Procedure Code.

1.2. Why is the studied matter important?

The subject chosen by the authors is of particular importance, given the problems encountered in practice by those against whom civil proceedings are brought after the criminal case have been solved, in which civil claims are made by the alleged victims during criminal proceedings for the civil court to resolve them. In fact, in the case of these claims, the civil action brought during the criminal trial is repeated, which the criminal court left unsolved in view of the settlement of the acquittal based on Article 16(1)(b) of the Criminal Procedure Code against the defendant(s).

In addition, the subject is of relevance, given that these cases also raise questions about whether to pay the judicial stamp duty for the civil court request after the criminal court proceedings have been settled. This issue arose as the Constitutional Court of Romania has decided on this matter that is excessively interpreted by the alleged victims who make the civil claims.

1.3. How do the authors intend to answer to this matter?

This paper was chosen by the authors to highlight a number of practical problems which they have experienced in disputes in which they have provided legal assistance and representation to some of the parties, through the initial approach of the legal bases on which claims were made in these particular types of disputes, then by highlighting and analyzing the solutions given by the courts on these issues.

At the same time, the authors make a brief incursion into the majority legal doctrine and practice that has held on these subjects, in order to give readers an overview of some of the obstacles they may face in the case of civil actions left unsolved by the criminal court, where the criminal trial is settled by acquittal of the defendant(s) pursuant to Article 16(1)(b) of the Criminal Procedure Code.

Finally, this paper presents – as a case study –the particularities of a complex criminal file, from which several unsolved civil actions have been brought together with the criminal proceedings, so that judicial problems may be assessed not only from a theoretical but also a practical perspective.

1.4. What is the relation between the paper and the already existent specialized literature?

This paper is related to the already existent specialized literature that addressed the proposed topic in its content by highlighting the different views of professionals who have written on the topics subject matter in this paper. The authors then assess how the various issues are resolved by the courts, and ultimately give their own views on all of the above.

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2. Article 16(1)(b) of the Criminal Procedure Code: the unwanted solution from civil parties' point of view

2.1. Preliminary

The Criminal Procedure Code currently applicable in Romania entered into force on 1 February 2014[1]. At this time, there has also been much controversy over the ununified application of many of its provisions in court practice.

However, the Romanian Criminal Procedure Code contains numerous clear legal provisions, which can only be applied *ad litteram*, as they are non-derivative and imperative. One such legal provision is settled by Article 16(1)(b) of the Criminal Procedure Code, which expressly states the following: "*The criminal proceedings cannot be set in motion, and when set in motion, they cannot be exercised if: (b) the act is not provided for by criminal law or has not been committed to the fault prescribed by law;*".

Thus, this text provides the legal basis for a criminal court to settle a case by acquitting the defendant(s), according to the provisions of Article 396(1),(5) of the Criminal Procedure Code, stating that "*The court decides on the accusation against the defendant, by pronouncing, as appropriate, the conviction, the renunciation of the penalty, the postponement of the application of the penalty, the acquittal or the termination of the criminal trial*." "*The acquittal of the defendant shall be decided in the cases provided for in Article 16 (1)(a)-(d).*".

By interpreting of the above-mentioned law texts, it is obvious that the courts do not have a faculty, an option as to the acquittal of the defendant, if the provisions of Article 16(1)(b) of the Criminal Procedure Code are applicable to a certain case. Therefore, in this respect, the courts are obliged to rule on the acquittal solution.

Thus, one of the key issues that this paper aims to appraise and find solutions to is highlighted: What happens to the civil claims made in criminal files by the alleged victims, if the court acquits the defendant according to the provisions of Article 16(1)(b) of the Code of Criminal procedure?

As provided for in Article 397(1) of the Criminal Procedure Code, the civil action must be solved by the same judgement as the criminal action. Nonetheless, Article 25(5) of the Criminal Procedure Code expressly states, *inter alia*, that if the defendant is acquitted on the basis of Article 16(1)(b), first sentence, "*the court shall leave the civil action unresolved*.".

As a result, civil parties in criminal proceedings "*may bring proceedings before the civil court if, by final judgment, the criminal court has left the civil action unresolved. Evidence administered during criminal proceedings may be used before the civil court*"[2].

Last but not least, a key-provision used by the majority of civil parties that bring their claims before civil courts is provided for in Article 28(1) of the Criminal Procedure Code, setting forth that: "*The final decision of the criminal court shall have the force of res judicata before the civil court which is to judge the civil action, concerning the existence of the criminal offense and the person who committed it. The civil court shall not be bound by a final judgment on the acquittal or cessation of criminal proceedings as regards the existence of damage or guilt of the culprit*.". In other words, the final judgement of a criminal court is partially mandatory for the civil court that must settle the unsolved civil action, regarding the unlawful act and on the identity of the person who committed it.

2.2. Payment of the judicial stamp duty: to be or not to be?

One of the main issues that this paper addresses is whether the judicial stamp duty has to be payed by the civil party whose civil action remained unsolved during the criminal trial when his/her claims are brought before civil courts.

This problem arose in light of the provisions of Article 29(1)(i) of the Government Emergency Ordinance No. 80/2013 on judicial stamp duties[3] (hereinafter referred to as "***G.E.O. No. 80/2013***"). According to this legal text, the following actions and claims, including ordinary and extraordinary appeals are exempted from the payment of the stamp duty, if they "*relate to: […] i) criminal cases, including civil compensation for material and moral damage resulting therefrom*".

Despite the fact that the above-mentioned text seems clearly worded, national judicial practice has been ununified in its application to particular cases, so that the Romanian Constitutional Court partially accepted the constitutional challenge of this provision, in the sense that: "*The provisions of Article 29(1)(i) of the Government Emergency Ordinance No. 80/2013 on judicial stamp duties are constitutional in so far as actions and claims relating to civil compensation for material and moral damage resulting from a criminal case are exempted from judicial stamp duties, provided that the causing act at the time the damage was committed, was foreseen as a criminal offense*"[4].

To put it another way, the Romanian Constitutional Court stated that only in those criminal cases where the deed is provided for as a crime by *verbum regens*, one may file for a civil action for damages that is exempted from the payment of any judicial stamp duty.

Nonetheless, if the criminal court settles the case by acquitting the defendant(s) on the basis of Article

[1] Published in the Official Journal of Romania, Part I No. 486 of 15 July 2010, as amended and supplemented thereafter.
[2] According to Article 27(2) of the Criminal Precedure Code.
[3] Published in the Official Journal of Romania, Part I No. 392 of 29 June 2013, as amended and supplemented thereafter.
[4] The Romanian Constitutional Court, Decision No. 387/2015, published in the Official Journal of Romania, Part I No. 555 of 27 July 2015.

16(1)(b) first sentence of the Criminal Procedure Code (*i.e.* the deed is not provided for by the criminal law) the following legitimate question arises: for the possible damages suffered by civil party/parties as a result of the deed (regardless of the fact that the deed shall not be considered crime) the judicial stamp duty must be payed for the action for damages filed for before the civil court?

To answer this question, one has to carefully assess both the provisions of Article 29(1)(i) of the G.E.O. No. 80/2013 and the Decision No. 387/2015 of the Romanian Constitutional Court. Thus, a clear distinction must be drawn between the rule and the exception, in the sense that the rule is the obligation to pay the stamp duty for money-valuable civil actions[5], whereas the provisions of Article 29(1) of the G.E.O. No. 80/2013 are the exception. Consequently, the exceptions are of strict interpretation and application and cannot be extended to situations expressly foreseen by law.

In addition, in relation to the specificities of the civil action left unsolved by the criminal court, the mandatory interpretation of the Romanian Constitutional Court must be considered, so that the following conclusion can be stated: civil actions arising from criminal proceedings **shall not be exempt from the required judicial stamp duty** if the act allegedly giving rise to such damages was not forseen as a criminal offense at the time it was committed. Among other things, one shall note that failure to comply with the procedural obligation laid down in Article 197 of the Civil Procedure Code[6], *i.e.* payment of the judicial stamp fee related to a certain claim, leads to **the annulment of the writ of summons**.

The same conclusion was drawn by the 3rd District Court of Bucharest in its recent judicial practice regarding the case study subject to this paper. Thus, in two similar cases[7], concerning the settlement of the civil claims which remained unsolved by the criminal court, which acquitted the defendants according to Article 16(1)(b) of the Criminal Procedure Code, the 3rd District Court of Bucharest established the obligation to pay the judicial stamp duty on the plaintiffs, as calculated by reference to the amount claimed, as provided for in Article 3(1) of the G.E.O. No. 80/2013.

2.3. Admissibility of the civil action left unsolved by the criminal court: conditions and practical issues

Foremost, it should be reiterated that, in accordance with the provisions of Article 28(1) of the Criminal Procedure Code, it is unequivocally established that the final judgment of the criminal court has the force of *res judicata* before the civil court which settles the civil action, in respect of the existence of the deed and of the person who committed it. In relation to the subject matter of this paper, namely the resolution of the civil action where it remains unresolved by the criminal court because acquittal of the defendant(s) has been ordered pursuant to Article 16(1)(b) first sentence of the Criminal Procedure Code, several issues need to be highlighted:

1) The provision of the deed within the criminal law means "*in principle the identity between the conduct itself and all the conditions of the rule (the «typical» characteristic of the offense)*", whereas the absence of any content of the offense, whether „*objective or subjective, makes the offense not provided for by criminal law*", as indicated in the legal literature[8].

2) The conditions for the filing for civil action in criminal proceedings are those developed in the specialized literature on tort civil liability[9]. Specifically, one shall prove that the four conditions resulting from the text of Article 1357 (1) of the Civil Code[10] governing tort civil liability are cumulatively fulfilled, namely: the perpetration of an unlawful conduct, the occurrence of damages as a result of the unlawful conduct, the existence of a causal link between the conduct and damages and the guilt with which the unlawful conduct was committed. Failure to prove that all of these conditions are fulfilled shall result in the impossibility of triggering ort civil liability.

3) Before the civil court, the plaintiff (*i.e.* the former civil party before the criminal court) must prove the fulfillment of the aforementioned conditions. Practically, the plaintiff needs to prove that the former culprit actually perpetrated an unlawful conduct (although such conduct is not provided as a crime by the applicable criminal law) which lead to damages, as well as the link between the unlawful conduct and damages and his/her guilt.

4) As set forth in Article 28(1) of the Criminal Procedure Code, the Romanian legislator has determined the force of *res judicata* on the existence of the deed and of the person who committed it. In other words, if the criminal court does not establish that a particular deed has been committed by a specific person, we consider that the force of *res judicata* of the final decision of the criminal court before the civil court cannot be called into question.

In light of the above, we deem that unless the criminal court assesses that a particular unlawful conduct has been perpetrated by the culprit(s) although

[5] According to the provisions of Article 3(1) of the G.E.O. No. 80/2013.

[6] In the version of the second re-publication, in the Official Journal of Romania, Part I No. 247 of 10 April 2015.

[7] See case No. 27951/301/2019 (*i.e.* 3rd District Court of Bucharest, Minutes of the proceedings of 11 June 2020) and case No. 6070/205/2019 (3rd District Court of Bucharest, Minutes of the proceedings of 23 March 2021).

[8] I. Kuglay, comment in M. Udroiu (Coord.), *The Criminal Procedure Code. Comments on Articles* (Bucharest: C.H. Beck Publishing House, 2015), 111.

[9] C. Ghigheci, comment in N. Volonciu, A.S. Uzlău (Coord.), *The New Criminal Procedure Code Commented* (Bucharest: Hamangiu Publishing House, 2014), 60.

[10] In the version of the firts re-publication, in the Official Journal of Romania, Part I No. 505 of 15 July 2011.

it does not fall under the criminal law the civil party/civil parties cannot legitimately exercise their right to file an action form damages before the civil court, as a result of the alleged unlawful conduct. Moreover, one may consider that, in the above-mentioned case, the question arises as to **the inadmissibility of civil action** brought before the civil court which has been left unsolved by the criminal court that issued the acquittal pursuant to Article 16(1) of the Criminal Procedure Code. In this respect, the relevant national courts have ruled within their recent judicial practice, as follows in the section below.

Secondly, we acknowledge that it is necessary to clearly set forth what kind of civil action may be brought before the civil court if the claims requested thereof have originated in a criminal dispute. In principle, it is reasonable that any damage, whether material or moral, should be sought in the course of a tort civil liability action, as mentioned before.

As for any contractual liability claim, we consider that such a civil action could not, as a matter of principle, seek compensation for damage resulting from a criminal act, given that a valid contract concluded cannot provide as purpose the non-observance of the law.

However, depending on the specificities and complexity of the case, we believe that contract liability may not be set aside regardless of circumstances. As a result, the *ipso facto* exclusion of a contract liability claim cannot be justified even if it originates from a criminal trial.

Thirdly, civil parties must note that if they are willing to file for an action for damages before the civil court they must pay attention to the way in which the arguments are made. We stress this precisely because, in practice, there is a tendency to keep the same grounds as in criminal proceedings, omitting proof of the four requirements for the admissibility of claims for civil liability laid down in the provisions of Article 1357(1) of the Civil Code. This may even be the case for the rejection of such claims by the civil court.

3. Case study

For the purpose of a better understanding of the practical part of the issues detailed in this paper, we propose a short analysis of two civil cases arising from the same criminal proceedings, on which the competent courts have recently ruled.

Thus, civil courts empowered to settle these civil proceedings were addressed by several former civil parties in the same criminal trial, claiming material and moral damages that allegedly resulted from the deeds described in the indictment.

Criminal proceedings have been finally settled by the Bucharest Court of Appeals by Decision No. 1165/2019 in which the court ordered the acquittal of all culprits in accordance with the provisions of Article 16(1)(b) of the Criminal Procedure Code for the alleged unlawful deed that led to the claimed damages.

Nonetheless, as stated previously, former civil parties had the right to file for an action for damages before a competent civil court, which they actually did. Both claims were filed with the 3rd District Court of Bucharest, given that this is the court with substantive, territorial and operational jurisdiction in accordance with the provisions of the Civil Procedure Code.

The content of the aforementioned claims is particularly similar, as they reiterate exactly the same grounds as those upheld before the criminal court. Moreover, plaintiffs failed to substantiate and prove the cumulative fulfillment of the four conditions for the admissibility of claims for civil liability provided for in Article 1357(1) of the Civil Code.

Both actions for damages were based on three different legal texts of the Civil Code, namely: Articles 1347, 1349 and Article 1638. In relation to the legal provisions plaintiffs have invoked in the justification for their civil actions, it may be held an obvious contradiction between these grounds of law, given that the institutions governed by them are mutually exclusive and, being excluded from the grounds for the same application for legal action.

In other words, in such dispute, the plaintiffs could have either brought an action for tort civil liability based on the provisions of Article 1349 of the Civil Code; or prevail over the existence of an alleged legal act such as unjust enrichment (of course, if they would have proven the impact of the assumption contained in Article 1345 of the Civil Code), in which sense the application of Article 1347 of the Civil Code may be called into question.

With regard to the last legal provision (*i.e.* Article 1638 of the Civil Code), it alleges a civil liability under contract, resulting from an unlawful cause for the contract(s), in which sense it would be necessary to examine the conditions essential to the validity of the contract(s) as governed by Article 1179(1) of the Civil Code.

Therefore, it may be held that inadmissibility of these civil actions, as they have been filed, is quite clear.

The same opinion has been expressed by the 3rd District Court of Bucharest itself, by Civil judgment No. 6838 of 6 August 2020. In this regard, the court has stated the following:

"It should be specified that the legality of contracts (whether or not they were concluded in compliance with the applicable legal provisions) was not subject to court review, both in criminal proceedings No. [...], or by civil action. As a consequence of this, the court considers that at this point in time contracts enjoy a presumption of legality. In such circumstances, compared with the presumption of legality enjoyed by the contracts, the action filed by the plaintiff appears to be inadmissible as it aims to establish the alleged unlawful nature of the

acts committed by the defendant natural persons [...]"[11].

Accordingly, one may acknowledge that filing for an action for damages before the civil court must comply with the rules thereof, regardless of the fact that the same claims were brought before a criminal court. In relation to the practical cases brought forward, the plaintiffs had to substantiate their claims in accordance with the provisions of Article 1357(1) of the Civil Code in order for their actions to have been accepted by the court.

4. Conclusions

Particularities of civil actions left unsolved by criminal courts present, in judicial practice, a number of issues which we have tried to understand and explain throughout this paper. Thus, a mistake made by the majority of those who bring civil actions left unsolved by the criminal court before civil courts is to omit the justification for meeting the four conditions necessary to attract tort civil liability, namely those laid down in Article 1357 of the Civil Code. As stated above, in accordance with the relevant jurisprudence on the matter, failure to prove the application of article 1357 of the Civil Code shall be sanctioned with the inadmissibility of the civil action.

Moreover, one should note that civil actions resulting from criminal proceedings, which are left unsolved during the criminal trial shall be subject to the legal rules governing the payment of judicial stamp duties if the alleged criminal offence was not provided for by the law at the moment of its perpetration.

Conclusively, the final decision of the criminal court shall benefit from the force of *res judicata* before the civil court to the extent that claims are derived from an act the existence of which has been established by the criminal court and the person who committed it is similarly determined by that court.

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[11] The Judgement of the 3rd District Court of Bucharest has been confirmed also by the Bucharest Tribunal, in its capacity as superior court.

PARENTAL AUTHORITY BETWEEN LAW AND PSYCHOLOGY

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Abstract

The Romanian Civil Code uses the concept of „parental authority", which means all the rights and duties concerning both the child and his/her assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. It does not matter whether the child's parents are married or not, and whether the child was born during or outside the marriage. When making the decision, the court will consider, first of all, the interest of the child. So the court must observe the personality of the child, the lifestyles of his parents, as well as the emotional orientation and background of the child. The court will also must take into consideration the child's right that the parents care for him, his right to maintain regular personal contact with the parent to whom he has not been entrusted and, for that parent, the right to obtain regular information about the child. Also, the court may also decide to approve an agreement between the parents unless it is clear that this agreement is not in accordance with the principle of the best interest of the child.

The term „parental authority" is an old concept from ancient times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children's rights, this concept of a parent having control or domination over the child's life is seen as being outdated. More appropriate seems to be the term of „parental responsibility" or even „parental responsibilities", in order to refer at the rights and duties „owed" by the parents towards their children. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to others and, most importantly, parents have the obligation to ensure that their children become into responsible and mature adults.

Keywords: *parental authority, parental responsibility, best interests of the child, children's rights, Convention on the Rights of the Child, emotional development of the child, parenting styles.*

„1. Sons, listen to me, father, and behave so that you may redeem yourselves,
2. That the Lord raised the father over the sons and strengthened the mother's judgment over the children."[1]

1. Short considerations about parental authority in the Roman and the Germanic law

In the Roman law, the power („*potestas*") was characterized by absolute rights over the persons and things belonging to the household. The power over the children of the house („*filii*" and „*filiae familias*") was called „*patria potestas*", the power over the wife to whom the „*pater familias*" was married „*cum manu*" was called „*manus*", and the power over slaves was called „*ownership*" (or „*dominicia potestas*").

So, the Roman period placed the children under the „*patria potestas*" and they were, as a rule, under the authority of the head of the family, who could be their father or even their grandfather. Like their mother, the children were considered „*alienii iuris*", there was no age of civil majority, but children could become „*sui iuris*", even at an early age, if, for example, the head of the family was taken prisoner, or lost his citizenship.

On the other hand, in the Germanic law, like the „*patria potestas*" of early Roman law, the „*munt*" was initially a complex of powers. The idea that the head of the family owed duties to those subject to his power developed only later, in the Middle Ages. In Germanic law, legal capacity depended on the capacity to bear arms. Since women and children were not capable of bearing arms, they were subject to „*munt*". The reason for the subordination of women and children was thus the physical helplessness of the woman or child. „*Munt*" had to be exercised in the interests of the woman or child. For this reason, „*munt*" gradually lost his characteristic of power, and became an obligation to care for the woman or for the child.[1]

In ancient roman times, this power was actually limitless, the „*pater familias*" being able to punish children, sell them, abandon, banish, marry or even kill those under his power. So, the content[2] of „*patria potestas*" referred to:

a) the „*ius vitae necisque*" (the power of life and death) was expressly mentioned in the Twelve Tables and it was seen as the core of „*patria potestas*" – domestic discipline implied even the right to kill the child;

b) the power to alienate the child (the authority to sell those under his „*potestas*" into slavery; this authority was abolished in the post-classical period,

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[1] *Book of Wisdom of Jesus, Son of Sirah (Ecclesiastic) 3:1-2, http://www.bibliaortodoxa.ro/carte.php?id=72&cap=3*, website consulted last time on March, 16th, 2021.

[1] See H. Kruger, *The legal nature and development of parental authority in Roman, Germanic and Roman-Dutch law - a historical overview*, page 102, *https://journals.co.za/doi/pdf/10.10520/AJA1021545X_69*, website consulted last time on March, 10th, 2021.

[2] See H. Kruger, *op. cit.*, pages 92-93.

however, the „*pater familias*" still had the power to sell new-born children into slavery in case of poverty);

c) the power over the child's estate and juristic acts (almost any acquisitions by those under „*patria potestas*" automatically became the property of the „*pater familias*"; also, the „*pater familias*" had the right to give his children in marriage even without their consent; the „*pater familias*" also had the right to dissolve the marriages of his children);

d) the power to institute proceedings to recover the child against a third party who obtained possession of the child and exercised control over him.

Gradually, this situation of the descendants „*alienii iuris*" improved in classical and postclassical law, the parental power being restricted by many exceptions, but not completely abolished. Only in the age of Justinian, the legal personality of the person under parental power becomes complete.[3]

The patriarchal vision and full powers of the „*pater familias*" can only lead to the conclusion that, in relation to what we understand today by the notion of „parental authority", it was then exercised only by the father or by another ascendant of the child and the mother never had „*potestas*". And how could the mother have had such power, since she herself „benefited" from a diminished civil capacity and was regarded as an „accessory", possibly „good accessory" of the man? It was only in the 4th century that imperial law enshrined the right of the mother to be the legal protector of her child whose father had died, but only if she did not to remarry, in order to watch over the property of the protected child from the possible fraudulent acts of the stepfather.

Unlike the Roman law, in Germanic law the mother enjoyed some authority over her children. In practice, she had considerable say over the care and education of the children, although her position was never equated with that of the father.[4]

In Roman law, in case of divorce, children born during marriage remained under the parental authority of their father. Their mother risked never seeing them again, and this fact weighed heavily when she could only think about dissolving the marriage.

However, in exceptional cases, for reasons related to the depraved nature of the father, the mother could receive physical custody of the child, a term that today would be called *the establishment of the child's residence* with the mother. But, even so, the „*patria potestas*" of the father was not affected in any way.

In case of amiable divorces, the parents could agree, extrajudicially, to share physical custody over their children or, even, for those very young children, to remain with their mother.[5] We can see how the dichotomy between the exercise of parental authority and the concrete establishment of the child's residence after divorce, when the parents no longer lived together, dates back to the era of classical Roman law.

It was only in the age of postclassical Roman law that Justinian's *Novela* 117 established a major, substantial transfer of parental authority over the children to their mother if she had been unjustly repudiated by her husband or if she had obtained a divorce against the father of her children.[6]

As a conclusion, the doctrine[7] noted important differences between Roman and Germanic concepts of parental authority, regarding:

a) the nature of parental authority (*in Roman law* the „*pater familias*" was vested with a kind of quasi-ownership in respect of his children; *in Germanic law*, on the other hand, the reason for the subordination of women and children was the physical helplessness of the woman or child and the parental authority had to be exercised in the interests of the child);

b) the duration of the parental authority (the *Roman* „*patria potestas*" lasted until the death of the father, unless it was terminated before that date by emancipation, adoption or the marriage of a daughter and it was regarded as a kind of perpetual authority; in *Germanic law*, on the other hand, parental authority was exercised for the protection of the child);

c) in *Roman law* „*patria potestas*" was exercised by the „*pater familias*" and the child's mother had no authority in respect of her children — she was herself subject to „*potestas*"; in *Germanic law*, on the other hand, although also subject to her husband's „*munt*", the mother had some authority in respect of her children.

2. Meanings of the expressions „parental authority", „parental responsibility" or „parental responsibilities", between philosophy and law

If there are parental rights, what are their grounds? Many contemporary philosophers (but not only them) reject the notion that the children are there parents' property and reject also the idea that parents have rights to their children and over their children. Some philosophers argue for a biological basis of parental rights, while others focus on the best interests of the children or a social contract as the grounds of

[3] See, for more information, M.D. Bob, *Elementary manual of Roman private law*, Universul Juridic Publishing House, Bucharest, 2016, page 101-105, quoted by M. Floare, *The exercise of parental authority and the issue of the child's habitual residence in national Romanian law, comparative law and private international law*, in M. Avram (coordinator), *Parental authority. Between greatness and decline*, Solomon Publishing House, Bucharest, 2018, page 241 et sequens.

[4] For more informations about the parental authority in the Germanic Law, see H. Kruger, *op. cit.*, pages 100-104.

[5] See J.E. Grubbs, *Women and the Law in the Roman Empire – a sourcebook on marriage, divorce and widowhood*, Routledge, London and New York, 2002, pages 199-200, quoted by M. Floare, *op. cit.*, page 243.

[6] See P. Gide, *Étude sur la condition privée de la femme dans le droit ancien et moderne et en particulier sur le senatus-consulte velléien*, L. Larose et Forcel, Paris, 1885, page 191, quoted by M. Floare, *op. cit.*, page 244.

[7] See H. Kruger, *op. cit.*, pages 104-106.

such rights. Still others reject outrightly the notion that parents have rights, as parents. They do so because of the skepticism about the structure of the putative rights of parents, while others reject the idea of parental rights in view of the nature and extent of the rights of children.

Apart from biological, best interests and social contract views, there is also a casual view of parental obligations, which includes the claim that those who bring a child into existence are thereby obligated to care for that child. It is not a simple, theoretical question about parental rights and obligations; we must also focus the attention on practical questions like: making medical decision[8], the autonomy of children, child discipline[9] or the propriety of different forms of moral, political and religious[10] upbringing of children.

Parental responsibilities express a collection of rights and duties in order to promote and protect the rights and the welfare of the children. It should, however, be pointed out that certain States prefer to use the term „parental authority", for example Germany[11] (*elterliche Sorge*), Italy (*potestà genitoriale*), Spain (*patria potestad*) or France (*autorité parentale*), or even „*custody*" as is the case in Canada and the United States. Other countries, the United Kingdom or the Czech Republic for example, use the term „*parental responsibility*". The Swiss legal system has both concepts: „parental responsibility" is used as a generic term referring to all the obligations of parents towards their children and includes both parental authority and the maintenance obligation. In this context, „parental authority" comprises all the rights and duties of parents towards children.

However, it is important to point that in *Canada* and in the *United States*, the term *parental responsibility* refers to the potential or actual liability that may incurred by parents for the behavior of their children.

Parental responsibility legislation has been enacted in three Canadian provinces: Manitoba (1997), Ontario (2000) and British-Columbia (2001). Under the *Parental Responsibility Act*, 2000[12], a *child* is anyone under the age of 18 years and *parent* means either the biological, adoptive or legal guardian parent of the child or the person who has lawful custody of, or a right of access to, the child. This legislation[13] allows victims of theft or property damage to sue the parents of a minor in Small Claims Court for their damages. The parents will be found automatically responsible, unless they can prove they were exercising „reasonable supervision" over the child at the time of the activity in question, and they had made „reasonable efforts" to prevent or discourage the child from engaging in such activity. Secondly, the legislation states that in all other litigation outside of the Small Claims Court, a parent will be assumed to have failed to exercise reasonable supervision and control over the child, unless they can prove otherwise. This is known as a „reverse onus" provision. The consequences of the Parental Responsibility Act may be significant if the child causes an injury to someone else.

All *U.S. states* allow parents to be sued for the various actions of their children. But the idea of a criminal legislation to allow the prosecution of adults for „neglectful" parenting is relatively new.[14] For example, a number of states have enacted or proposed laws that will automatically hold parents financially responsible for all expenses associated with a second false bomb threat or 911 call made by a child; or impose a prison term and order payment of restitution to any victims if the child commits a serious crime; but also if the child uses a gun owned by the parent to commit a crime.

The generally accepted definition of the concept of *parental responsibility*, as given in a recent

[8] Exceptions to parental autonomy are usually made at least in cases where the life of the child is at stake, on the grounds that the right to life exceed the right to privacy, if those rights come into conflict. A different issue arise with respect to medical decision making as it applies to procreative decisions. An increasing number of couples are using reproductive technologies to select the sex of their children (the process of *in vitro* fertilization or the process of sperm sorting). One criticism of this practice is that it transforms children into manufactured products, they become the result, at least in part, of a consumer choice. Similar worries are raised with respect to the future use of human cloning technology. For details, see M. Austin, *Rights and obligations of parents*, *https://iep.utm.edu/parentri/*, point 4, c. Medical Decision Making, website consulted last time on March, 10th, 2021.

[9] Some auhtors argue that punishment in the family should both result from and maintain trust. See D. Hoekema, *Trust and Punishment in the Family. Morals, Marriage and Parenthood*, Laurence Houlgate, ed. Belmont, CA: Wadsworth, 1999, pages 256-260, quoted by M. Austin, *op. cit*., point 4, d. Disciplining Children.

[10] See M. Austin, *op. cit*., point 4, e. The Religious Upbringing of Children.

[11] The term „parental responsibility" refers to all the rights and obligations parents have in relation to a child. An important part of parental responsibility is parental care (custody). Parents have the duty and the right to care for their child. Parental care involves taking care of the child and his/her property, and representing the child; the right to make decisions for the child is therefore in principle associated with parental care. Parental responsibility also includes contact with the child and the duty to provide maintenance for the child. As a general rule, joint parental custody is possible if the child is born to married parents, or the parents marry after the birth of the child, or the parents declare that they wish to care jointly for the child (custody declarations) or if the Family Court (*Familiengericht*) grants them joint custody of the child. For details, see *https://e-justice.europa.eu/content_parental_responsibility-302-de-en.do?member=1*, website consulted last time on March, 15th, 2021.

[12] See *https://www.ontario.ca/laws/statute/00p04?search=Parental+Responsibility+Act*, website consulted last time on March, 15th, 2021.

[13] See *https://oatleyvigmond.com/the-parental-responsibility-act/*, website consulted last time on March, 15th, 2021.

[14] For more information about parental reponsibility in U.S., see E.M. Brank, V. Weisz, *Paying for the crimes of their children: Public support of parental responsibility*, Journal of Criminal Justice, Science Direct. 32 (5), pages 465-475, 2004, *https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1551&context=psychfacpub*, website consulted last time on March, 15th, 2021.

Recommendation of the Committee of Ministers[15], identifies this notion like a „collection of duties, rights and powers, which aim to promote and safeguard the rights and welfare of the child in accordance with the child's evolving capacities". This collection of „duties, rights and powers" relate to health and development, personal relationships, education and legal representation, decisions on the habitual place of residence and the administration of the property of the children.

In the *UK's law*, *parental responsibility* seems like an ambiguous and confused concept. In part, this ambiguity is due to the wide statutory definition in that the definition includes all aspects of being a parent: „all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property"[16]. Although the statutory definition of parental responsibility and indeed the term itself refers to the rights and responsibilities of a parent, the concept is not synonymous with parentage or parenthood. At the time of the creation of parental responsibility, one of the recommendations of the Law Commission was that the title refer to responsibility instead of rights „it would reflect the everyday reality of being a parent and emphasize the responsibilities of all who are in that position"[17]. It can be seen that the Law Commission wished to underline the functional aspect of the new legal concept of parental responsibility, perhaps due to the greater diversity of family forms in the twentieth century. This was in order to benefit *all* parents, including those who lacked a genetic link with the child (for example, the step-parents, who lack automatic parental responsibility[18]).

Since its creation, judicial interpretation of the concept has tended to focus on the rights aspect rather than functional responsibilities (granting the practical benefit of having parental responsibility for social parents which would include the right to consent to medical treatment on the child's behalf).

The *Danish national concept of „parental responsibilities"*, as defined by the Council of Europe (see above), is *forældremyndighed*, which is best translated as „parental authority".[19] The holder(s) of parental authority have certain duties and powers and decisions must be made from the perspective of the child's interests and needs. The holder(s) of parental authority is/are also the child's guardian(s), which entails a right to act on behalf of the child in legal and financial matters. It has been considered on a number of occasions whether the concept of parental authority should be changed into a concept which better reflects the responsibility of the holder(s). When the Danish Act on parental authority and contact was changed in 1985 the concept of parental authority was retained, the underlying reasoning being that a change in concept would not change the legal content of the concept. It was further stressed that the concept of parental authority entailed not just a right to decide for the child, but also a duty to protect and care for the child. In general it is the parents or one of the parents who is/are the holder(s) of parental authority. Parental authority can be transferred to a non-parent (for example, a step-parent) or to two non-parents (this must be a married couple), but there can never be more than two holder(s) of parental authority at the same time (art. 11 Danish Act on Parental Authority and Contact). If child protection measures are taken, the holder(s) of parental authority retain parental authority but their rights and duties are accordingly restricted. When a child is taken into care as a child protection measure, the local authorities and/or the foster parents with whom the child is placed are not endowed with parental authority.

The Romanian Civil Code uses the concept of *parental authority*. Parental authority means all the rights and duties concerning both the child and his assets. The rights and duties belong equally to both parents and are exercised in the best interests of the child. Parental authority shall be exercised until the child reaches full legal capacity.[20]

According to the Articles 487-499 of the Romanian Civil Code and Law No 272/2004 on the protection and promotion of children's rights, the parental rights and duties include[21]:

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[15] Recommendation CM/Rec(2015)4 of the Committee of Ministers on preventing and resolving disputes on child relocation, adopted on 11 February 2015, *https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22022&lang=en*, website consulted last time on March, 22th, 2021.

[16] See Children Act 1989, Section 3, (1), *https://www.legislation.gov.uk/ukpga/1989/41/section/3*, website consulted last time on March, 15th, 2021.

[17] See Law Commission, Family Law Review of Child Law, Guardianship and Custody, Law Com No 172 at paragraph 2.4., on *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-172-FAMILY-LAW-REVIEW-OF-CHILD-LAW-GUARDIANSHIP-AND-CUSTODY.pdf*, website consulted last time on March, 15th, 2021.

[18] The only acknowledgement of their legal position is provided within Section 3 (5) Children Act 1989 which auhorises the to „do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare". See Children Act 1989, Section 3, (5), *https://www.legislation.gov.uk/ukpga/1989/41/section/3*, website consulted last time on March, 15th, 2021.

[19] There are no official translations of Danish legislation. At *http://www.jur.ku.dk/biblioteker/infosoeg/* a number of unofficial translations of different acts can be found. The Danish Act on parental authority has not been translated. However, the unofficial translation of an older version of the Act on the formation and dissolution of marriage, Act No. 148 of 08.03.1991 with later amendments, uses the concept of custody. The concept of custody can also be found in a number of older articles and governmental reports. The concept of parental authority is chosen as a better direct translation of the Danish concept *forældremyndighed*. For details, see I. Lund-Andersen, C. Gyldenløve Jeppesen de Boer, *National report: Denmark, Parental Responsibilities – DENMARK, http://ceflonline.net/wp-content/uploads/Denmark-Parental-Responsibilities.pdf*, website consulted last time on March, 15th, 2021.

[20] See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[21] *Ibidem*.

- the right and duty to establish and preserve the child's identity;
- the right and duty to raise the child, to care for the health and physical, psychological and intellectual development of the child, of his education, studies and professional training, according to their own beliefs, characteristics and needs of the child;
- the right and duty to provide child supervision;
- the right and duty to provide child support[22];
- the right to take certain disciplinary measures against the child[23];
- the right to ask for the return of the child from any person who holds him with no right;
- the right of the parents to reunite with their child;[24]
- the right of the parent to have personal relations with his child (for example: visiting the child in his home, visiting the child while he is in school, the child spending holiday with each of his parents);
- the right to determine the child's home;[25]
- the right to consent to the engagement and marriage of the child in the case of minors who have reached 16 years of age;
- the right to consent to the child's adoption;
- the right to appeal against the measures taken by the authorities with regard to the child and to make requests and actions in their own names and on behalf of the child.

The parental rights and duties (Article 500-502 of the Romanian Civil Code) as regards the child's assets may include[26]:

- *management of the child's assets*. The parent has no right over the assets of the child, nor has the child over the assets of the parent, apart from the right to inheritance and maintenance. Parents have the right and duty to manage the assets of their minor child and to represent him in legal civil acts or to give their consent to these acts. After the age of 14, the minor shall exercise his rights and shall execute his duties alone, however, with the consent of the parents and of the Court, where appropriate.
- *the right and duty to represent the minor in civil acts or to give one's consent to such acts*. Up to the age of 14, the child shall be represented by the parents in civil acts as he lacks legal capacity entirely. From the age of 14 to 18, the child shall exercise his/her rights and shall execute his/her duties alone, however, the prior consent of the parents is required as she/he has limited legal capacity.

According to the Romanian Civil Code, the rights and duties belong equally to both parents[27] [Article 503 (1)]: if the parents are married; after divorce (Article 397); to the parent whose filiation has been established if the child was born out of wedlock and to both parents if the parents live in domestic partnership [Article 505 (1)].

From my point of view, which is not singular[28], the term *parental authority* is an obsolete concept from olden times where parents were presumed to have power and a sense of ownership over their children, just as they had over their goods or animals. Nowadays, taking into consideration the recognition and acknowledgement of children's rights, this concept of a parent having control or domination over the child's life is seen as being outdated. I find more appropriate using the term of *parental responsibility* or even *parental responsibilities*, in order to refer at the rights and duties „owed" by the parents towards their children. Maybe, in the past, children had no say in familial matters and parental authority was exercised with nothing say to the children's wishes, but the world has moved away from such a drastic measures. More than authority, the parents have responsibilities and the children are individuals in their own right and should be treated as such. No one has power over another human being, but everyone has responsibilities to each other and parents have the obligation to ensure that their children become responsible and mature adults. Parental responsibilities are not static. As the child grows these responsibilities change and adapt, so, the level of responsibility diminishes, like a natural progression, as children grow older.

In decisions such as living arrangements, contracts, or consenting to medical/surgical/dental procedures, the capacity to make decisions and act in the child's best interest was vested in their parent or guardian, because, until this moment, the child was seen as lacking the capacity to express a valid consent,

[22] Parents are obliged, jointly and severally, to provide maintenance for their minor child. Parents are obliged to support their grown-up child until graduation if he is pursuing his studies, but no later than by the age of 26 years.

[23] However, it is forbidden to take certain measures, such as some physical punishment that would impair the physical, mental or emotional state of the child.

[24] This right is correlated with the right of the child to not be separated from his parents other than for exceptional and temporary reasons (for example, placement measures).

[25] The minor child shall live with his parents. If the parents do not live together, they shall decide the child's home by mutual agreement. In case of disagreement between the parents, the Court shall decide.

[26] See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[27] Parents may agree on the exercise of parental authority or as regards the measures taken to protect the child with the consent of the Court, if it is in the best interest of the child (Article 506 of the Romanian Civil Code). If the parents cannot come to an agreement on the issue of parental responsibility, the alternative means for solving the conflict without going to court is mediation. Mediation is optional before the referral to the Court. During the resolution of the trial, the judicial authorities are obliged to inform the Parties about the possibility and advantages of using mediation. If mediation does not result in an agreement, the disputed issues shall be settled in Court.

See, for more information, https://e-justice.europa.eu/content_parental_responsibility-302-ro-en.do?member=1, website consulted last time on March, 22th, 2021.

[28] See also A.M. Mangion, Is it the end of parental authority?, june 2010, https://timesofmalta.com/articles/view/is-it-the-end-of-parental-authority.310466, website consulted last time on March, 15th, 2021.

until the child attained majority. The current approach establishes that the parental powers are effective only so long as they are needed for the protection of the person and of the property of the child. Therefore, it is no longer accepted the rule that children remain under parental control until they are of certain age.[29]

The principle according to which the extent of the parental responsibilities diminishes was established by *Gillick v West Norfolk & Wisbech Area Health Authority* (1986)[30]. The ruling in this case provides that the child's voice is listened to in court when he reaches a sufficient understanding to be capable of making up his own mind. In practice, the child's ability to make decisions for himself relates to a number of different situations, but the main areas where issues often arise, however, are connected with consent or refusal of medical or psychiatric treatment.

When we have to establish if the child has capacity to consent (his maturity and his understanding), we must determine that they can understand the nature, purpose and possible consequences of investigations or treatments proposed, as well as the consequences of not having treatment. Only if they are able to understand, retain, use and weigh this information, and communicate their decision to others can they provide a valid consent.

If the children are found to have the required level of understanding, their decision could be upheld even if the parents' wishes are different. After the court's decision to uphold the child's view, the parents will not have authority to contradict that decision or even to force their child into the opposite course of action. As Lord Scarman said in the *Gillick case*, „parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."[31]

3. „Best interests of the child" and parental authority

The concept of the best interests of the child is defined by the United Nations *Convention on the Rights of the Child – CRC*, but also in the Convention of the Hague on international adoption, seen as a concept that has two „traditional" roles, one that seeks to control and one that finds solutions (criterion of control and criterion of solution[32]). „Best" and „interests", as a whole, mean that the final goal should and must be the well-being of the child, as defined through the Convention, especially in the Preamble and in the Article 3 of the CRC (paragraphs 2 and 3).

This expression is also included in a number of other articles of the CRC[33], as a reference point that must be considered in particular situations.

For example, Article 9 of the CRC put the principle promulgated by Article 3 of CRC in relation to the right of the child to live with his parents, also referring to the rule that the child must maintain personal relationships and direct contact with both parents, unless this threatens the best interests of the child (situations that include an open conflict between the child and one or both parents, or the cases when a child and his parents may become separated as a result of an official decision, necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence, but only when such a decision takes into account the best interests of the child).

Also, Article 18 establishes the principle according to which the two parents must be involved with the education of the child; this is called the common responsibility for education.

We observe that the principle of the best interests of the child is a general principle which must be applied in all activities related to implementation of the entire CRC.[34]

It is important to mention here that child's rights do not eliminate parental responsibilities. Indeed, the Article 5 of CRC[35] provides that „*State parties shall respect the responsibilities, rights and duties of parents* or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, *to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized* in the present Convention."

This „right" is not the right of parents to control their child but rather the right to guide their child in exercising his or her rights; furthermore, the parents' rights diminish as the child grows in knowledge, experience, and understanding.[36]

We must consider the development of a proper family environment in which children may freely express their views.

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[29] See https://www.inbrief.co.uk/child-law/children-making-legal-decisions/, website consulted last time on March, 16th, 2021.

[30] *Ibidem*.

[31] See https://www.inbrief.co.uk/child-law/children-making-legal-decisions/, website consulted last time on March, 16th, 2021.

[32] See P. Pichonnaz, Le bien de l'enfant et les secondes familles (familles recomposées), in Le Bien de l'enfant, Verlag Ruegger, Zürich/Chur, 2003, page 163; H. Fulchiron, De l'intérêt de l'enfant aux droits de l'enfant in Une Convention, plusieurs regards. Les droits de l'enfant entre théorie et pratique, IDE, Sion, 1997, page 30 et sequens.

[33] See https://www.ohchr.org/documents/professionalinterest/crc.pdf.

[34] For details on the principle of the best interests of the child, see I. Pădurariu, *The principle of the best interests of the child*, LESIJ - Lex ET Scientia International Journal no. XXVII, vol. 2/2020, ISSN: 1583-039X, pages 7-13.

[35] See *https://www.unicef.org/child-rights-convention/convention-text*, website consulted last time on March, 16th, 2021.

[36] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

The participation right of children is one of the core principles of the CRC. Citizen participation, of course, is a key value of a democracy, and the CRC establish new ground by viewing children as „agents who share the power to shape their own lives" and encouraging them to exercise their own rights as members of society.[37] The CRC[38] grants each child the right to participate in all decision-making processes that affect his life, so that the child might obtain a more equal role in relationships with adults and a greater opportunity to think and act independently.

It is also important to note that under Article 12, children have a right to the information necessary to formulate their views and to choose to not express their views.[39] The CRC does not, however, delineate an unlimited participation right – and decision making powers – of children. The treaty recognizes a right to free expression only for children who are capable of forming independent views, and even then, the weight given to their views depends upon the age and maturity of each child. Even when a child is able to express his or her views, they are not necessarily dispositive—Article 12 merely asks that children's views, if expressed, act as a factor in decisions regarding the children.[40]

The CRC regulates different but yet fundamental principles (best interests of the child and the participation right of the children), and in some cases the principles are in „tension" with each another. For example, Article 12 stands in opposition to another central principle of the CRC: the best interests of a child. The CRC is committed to the protection of the „best interests" of each child, a principle best reflected in its Article 3 (1)[41].

The tension between those principles is due to the fact that Article 3 sees children as vulnerable objects in need of protection from parents or other authority figures, while Article 12 views children as autonomous beings with the right to make their own decisions, whether or not it is in their best interests.

Some critics of the CRC argue that the rights-focused approach of the CRC, a shift away from a purely best-interests-focused approach, has failed to protect either the rights or the best interests of children. After all, a child's preferences may not always coincide with what is in his or her best interests, at least from the government's or parents' point of view. [42]

The initial lack of guidance from the Committee resulted in a wide variety of methods of implementing the CRC into domestic law.[43] However, the *United Kingdom* and *Germany* demonstrate that different approaches to resolving the tension between Article 12 and parental authority have some telling similarities.

The CRC has helped update the language of parental authority to emphasize duties over rights. In *England and Wales*, the Children Act 1989 translated key principles of the CRC, including those of Article 12, into domestic law. The Act „replace[d] the concept of parental rights and duties with the concept of parental responsibility," abandoning such notions as the „right[s] to custody" in favor of the child's interests. This was an acknowledgment of the outdated language of parental „rights" and „authority", incongruous with the modern view that „parenthood is a matter of responsibility rather than of rights."

Germany reflects a similar trend, in which „the child and [his or her] welfare have increasingly become the focal point" in parental authority. Legal reform in 1979 transformed „parental powers" into „parental care," emphasizing both the rights and responsibilities of parents over their children.

The language of *U.S. law*, on the other hand, asserts the right of parents to manage their children's lives on a basis separate from the interests of children. Yet much of the law reflects an underlying rationale grounded in the best interests of a child rather than the liberty interest of parents; in other words, giving parents primary authority and discretion over the upbringing of children is often justified as being in the child's interest.

There is, therefore, an inconsistency between the rhetoric of parental rights and the practice of emphasizing the interests of children to justify parental rights.

Children are not at all the property of their parents. That being the case, we must admit that the term „authority" is a little bit more excessive, redundant. The Convention above mentioned admits that children's capacities are evolving and increase as they grow up. Therefore, parental responsibilities should be exercised in accordance with the children's

[37] *Ibidem.*

[38] Article 12 sets out this right:

„(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." See https://www.unicef.org/child-rights-convention/convention-text, website consulted last time on March, 16th, 2021.

[39] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[40] *Ibidem.*

[41] „In all actions concerning children (...) the best interests of the child shall be a primary consideration." See also, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[42] See, for more details about that, https://columbialawreview.org/content/a-childs-voice-vs-a-parents-control-resolving-a-tension-between-the-convention-on-the-rights-of-the-child-and-u-s-law/, website consulted last time on March, 16th, 2021.

[43] *Ibidem.*

evolving capacities. So, it is undeniable that children must be raised by a parent or parents who will best serve their interests. On this subject, parental rights are grounded in the ability of parents to provide the best possible context for childrearing.[44]

4. The psychological component of the concepts „best interests of the child" and „parental authority". Parenting styles and their effects on children

We know very well that the children do not come with instructions, and they certainly do not come with a „pause" button. So the children are not at all easy to raise. What they do come with is an important set of physical and emotional needs that must be met. As it was mentioned before, „failure of the parents to meet these specific needs can have wide-ranging and long-lasting negative effects"[45].

The essential responsibilities that parents must adhere to in order to defend and keep their child's physical and/or emotional well-being are[46]:

1. *provide an environment that is safe* (keep the children free from physical, sexual, and emotional abuse; correct any potential dangers around the house; take safety precautions like use smoke and carbon monoxide detectors, lock doors at night, always wear seatbelts etc.);

2. *provide the children with basic needs* (water, food, shelter, medical care as needed/medicine when ill, clothing that is appropriate for the weather conditions, space / a place where the children can go to be alone);

3. *provide the children with self-esteem needs* (accept the children's uniqueness and respect their individuality, encourage the children to participate in an activity or sport, notice and acknowledge the children's achievements and pro-social behaviors, set expectations for the children that are realistic and age-appropriate, use the children's misbehavior as a time to teach, not to criticize or ridicule);

4. *teach the children morals and values* (honesty, respect, responsibility, compassion, patience, forgiveness, generosity);

5. *develop mutual respect with the children* (use respectful language, respect their feelings, their opinions, their privacy and their individuality);

6. *provide a fair, well structured, predictable and consistent discipline which is effective and appropriate*;

7. *involve in the children's education* (communicate regularly with the children's teachers, make sure that the children are completing their homework, assist the children with their homework, but do not do the homework, talk to the children each day about school, recognize and acknowledge the children's academic achievements);

8. *get to know the children* (spend quality time together, be approachable to the children, ask questions, communicate, communicate and communicate, like Lenin once said[47] „Learn, learn, learn!).

On the other hand, it was also identified *responsibilities* that *parents do not have*: supplying the children with the most expensive designer clothes or shoes available; picking up after the children; cleaning the children's room; dropping everything the parents are doing to give the children a ride somewhere; providing the children with a cell phone, television, computer, or game system; bailing the children out of trouble every time they does something wrong; replacing toys or other items that the children has lost or misplaced; welcoming any or all of the children's friends into the home for social or other activities.[48]

From an emotional point of view, the characteristics of the family environment are dispersed. First of all, we are talking about psychological safety and balance, and secondly, about their opposite characteristics. Family life also includes all the material and spiritual conditions that are offered to the child, especially through psychological security, affection, freedom, independence, intellectual constructivism, appetite for culture and others.[49]

The parenting style can affect everything from how much the child weighs to how he feels about himself. It's important to ensure that the parenting style is supporting healthy growth and development because the way the parents interact with the child and how they discipline him will influence him for the rest of his life. Researchers have identified four types of parenting

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[44] See M. Austin, *op. cit.*, point 2, c. Best Interests of the Child.

[45] See *https://www.parentcoachplan.com/article3.php*, website consulted last time on March, 16th, 2021.

[46] *Ibidem*.

[47] Apparently it wasn't Lenin who invented that phrase. That appears in earlier Lenin's writings. For instance, the first time Lenin used this exact phrasing was in his 1899 article „The reverse direction of Russian Social Democracy", published in „Proletarian Revolution" journal, 1924, no. 8-9 (after Lenin's death) [„While educated society loses interest in honest, illegal literature (...) the real heroes emerge from amongst workers who (...) find quite much of character and willpower within themselves *to learn, learn, and learn*, and to develop conscious social democrats from themselves(...)]".

The original of the quote is traced back to Anton Chekhov, who wrote these words in a context almost directly opposite to how Lenin used them. That was first published in a supplement to highly popular „Niva" magazine in 1896. Lenin could absolutely read that and probably did („We must *study, and study, and study* and we must wait a bit with our deep social movements; we are not mature enough for them yet; and to tell the truth, we don't know anything about them." (Anton Chekhov. My Life, Chapter VII).

See *What is the origin of Lenin's quote „Learn, Learn, Learn"*?, on *https://www.quora.com/What-is-the-origin-of-Lenins-quote-Learn-Learn-Learn*, website consulted last time on March, 16th, 2021.

[48] See *https://www.parentcoachplan.com/article3.php*, website consulted last time on March, 16th, 2021.

[49] For more details about the psychological component of the notion „best interests of the child", see M.-M. Pivniceru, C. Luca, *The best interests of the child. Psychological expertise in case of separation / divorce of parents*, Hamangiu Publishing House, Bucharest, 2016, pages 19 et sequens.

styles: authoritarian, authoritative, permissive and uninvolved.[50]

Authoritarian parents[51] believe kids should follow the rules without exception. Those parents are famous for a „because I said so" answer when a child questions the reasons behind a rule. They are not interested in negotiating, their focus is on obedience and they also don't allow kids to get involved in problem-solving challenges or obstacles. They make the rules and enforce the consequences with little regard for a child's opinion, using punishments instead of discipline. So rather than teach a child how to make better choices, they are invested in making kids feel sorry for their mistakes. Children who have authoritarian parents tend to follow rules much of the time. But, their obedience put a higher risk on them, while they may develop self-esteem problems because their opinions aren't valued, or they may also become hostile or aggressive. Rather than think about how to do things better in the future, they often focus on the anger they feel toward their parents and may grow to become good liars in an effort to avoid punishment.

Authoritative parents[52] have rules and they use consequences, but they also take their children's opinions into account. They validate their children's feelings, while also making it clear that the adults are ultimately in charge. Authoritative parents invest time and energy into preventing behavior problems. They also use positive discipline strategies to reinforce good behavior, like praise and reward systems. Researchers have found that kids who have authoritative parents are most likely to become responsible adults who feel comfortable expressing their opinions. Children raised with authoritative discipline tend to be happy and successful. They are also more likely to be good at making decisions and evaluating safety risks on their own.

Permissive parents[53] are indulgent. They are quite forgiving and they adopt an attitude of „kids will be kids". When they do use consequences, they may not make those consequences stick. They might give privileges back if a child begs or they may allow a child to get out of time-out early if he promises to be good. Permissive parents usually take on more of a friend role than a parent role. They often encourage their children to talk with them about their problems, but they usually don't put much effort into discouraging poor choices or bad behavior. So their children may exhibit more behavioral problems as they don't appreciate authority and rules, often have low self-esteem and may report a lot of sadness. They're also at a higher risk for health problems.

Uninvolved parents[54] tend to have little knowledge of what their children are doing. There tend to give few rules. Children may not receive much guidance and parental attention. Uninvolved parents expect children to raise themselves. They don't devote much time or energy into meeting children's basic needs and they are neglectful but it's not always intentional. Children with uninvolved parents are likely to struggle with self-esteem issues. They tend to perform poorly in school. They also exhibit frequent behavior problems and rank low in happiness.

5. Conclusions

The most significant feelings perpetuated in the family are love and intimacy. Both involve accepting and appreciating the other's uniqueness, and observing their mode of consumption within the family substantiates the child's future behavioral pattern regarding love relationships and the manifestation of his own intimacy. The gestation of a human being is a long process and the psycho-emotional development of the child is as relevant as his cognitive or physical development, because the degree of maturity acquired by the child will depend on that, and also his ability to relate authentically or not, as well as the autonomy that the child will assume it in his evolution.[55]

In the absence of „love"[56], the concept of „parental authority" and for sure the whole mechanism that turns the wheels of his profound understanding will become meaningless. Because loving your children is the most important parental „obligation" in the whole world, although some people might say that there is no duty to love. However, parents do have a moral obligation to love their children. A lack of love can harm a child's psychological, social, cognitive and even physical development.

Parents – biological or adoptive – are those who have the strongest and most direct obligation to care for their children, and this obligation is the basis of their „authority" over those children. Just as a mother's womb is the ideal place for physical and psychological gestation during the first nine months of life, so the natural family is the ideal place to complete that gestation, extending it morally and intellectually.[57] That confidence grounds a sense of security that

[50] For this typology of parenting sytles, detailed below, see *https://www.verywellfamily.com/types-of-parenting-styles-1095045*, website consulted last time on March, 16th, 2021.

[51] *Ibidem*.

[52] *Ibidem*.

[53] *Ibidem*.

[54] *Ibidem*.

[55] C. Rusu, Assuming parental roles. Implications for children's development, in M. Avram (coordinator), Parental authority. Between greatness and decline, Solomon Publishing House, Bucharest, 2018, page 371 et sequens.

[56] „There is only the authority of love, the natural one, that we naturally have since birth, preserved only by love. Authority is not what I want to impose, but just what others recognize in me." See S. Baștovoi, *The price of love*, Cathisma, Bucharest, 2018, pages 80-81.

[57] See M. Moschella, *To whom do children belong? A defense of parental authority*, October, 2015, *https://www.thepublicdiscourse.com/2015/10/15409/*, website consulted last time on March, 16th, 2021.

permits children to develop their independence with the knowledge that someone will be there to pick them up when they fall, literally or metaphorically. As mentioned in the study[58] cited above, «When addressing the rights and obligations of parents in the *Summa Theologiae*, Thomas Aquinas speaks of a child as in some sense „a part" of its parents and as „enfolded in the care of its parents," first physically in the mother's womb, and then in the *„spiritual womb"* of the family. *Aquinas's „spiritual womb" metaphor* profoundly expresses the connection among parental obligations, children's needs, and parental authority.»

It is very important that any cause involving a child can find a solution best suited to his best interests, so that his development will not suffer. It is also clear that the child has rights and he must be heard if he is able to form and communicate his views if the case affects him. Nevertheless, it is evident that the principle of the best interests of the child is, like the concept of „parental authority", most difficult to explain and to settle down. We need to clarify that we cannot see only the rights, but also the responsibilities that the parents have towards their children.

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ON THE PRESUMPTION OF PATERNITY AND THE NEGATION OF PATERNITY

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Abstract

Paternity is the legal link between the father and the child and results from the fact that a man has conceived the child. Paternity may be either from marriage or from outside marriage. The filiation toward the father in marriage is determined by the effect of the presumption of paternity according to the law, and the paternity filiation toward the father outside the marriage is established, either by the recognition of the father or by the court. In the case of medically assisted human reproduction with a third-party donor, the filiation toward the father shall be based on the consent of the mother's spouse or concubine to be considered the child's father.

In the case of the child in marriage, the presumption of paternity is the only way of establishing the filiation toward the father and operates ope legis. If the mother's husband is impossible to be the father of the child, the paternity can be negated, but only by court.

Keywords: *filiation, paternity, paternity presumption, paternity negation, legal time of the child's conception, mother's husband*.

1. General considerations

In the specialized literature[1], filiation is defined as "biological and legal or only legal connection established between two persons by virtue of the concept and birth, i.e. the legal act of adoption and which generates between them certain non-patrimonial and patrimonial rights and obligations governed by special legal rules". In other words, filiation is the connection between the child and his/her parent. The filiation toward the mother (maternity) is based on the birth fact, and the filiation toward the father (paternity) is based on the fact of conception.

Starting from the above, we can say that the filiation toward the father (paternity) is the legal connection between the father and the child and results from the fact of child's conception by a man. Paternity may be either *from marriage* or *outside marriage*.

Ab initio, we underline that, unlike the establishment of filiation toward the mother, which is done according to the same rules, whether the child is born in or outside the marriage, the establishment of filiation toward the father is regulated differently by the Civil Code.

Thus, if the filiation toward the *father in marriage* is determined by the effect of the *presumption of paternity* according to the provisions of art. 408 par (2) Civ.C., the filiation toward the *father outside the marriage* is established, either by the *recognition of the father* or *by the court*, according to art. 408 par. (3) Civ.C.

But it is important to note that, as it has also been shown in the specialized literature, irrespective of[2]the manner in which the paternity relationship has been established, once paternity has been established, *children will benefit from the same legal situation*, without distinguishing as they are from marriage or from outside it, according to article 260 C.civ and Article 16(1) of the Constitution of Romania, where the *constitutional principle of equality of rights* is consecrated.

According to the provisions of Article 409 (1) C.civ, filiation shall be proved by *the birth document* drawn up in the civil status register and *the birth certificate* issued on the basis thereof, and in the case of the child from the marriage the proof shall be furnished by *the birth document* and *the marriage document* of the parents, entered in the civil status registers as well as the corresponding *civil status certificates* [Article 409(2) Civ.C.].

Therefore, it is noticed from those above-mentioned that in the case of the child in marriage, the *presumption of paternity* is the only way of establishing the filiation toward the father and operates *ope legis.* If the mother's husband is impossible to be the father of the child, the paternity can, on the grounds of art. 414 (2) Civ.C. be *negated*[3], but only *in court*.

2. Legal time of the child's conception

Although for the time being, *the date of conception of a child* cannot be determined with certainty, it is particularly important both in the case of the establishment of paternity in the marriage and the paternity outside it[4].

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[1] Teodor Bodoașcă, *Dreptul familiei. Curs universitar,* Edition 3, reviewed and supplemented according to the New Civil Code, Editura Universul Juridic, Bucharest, 2015, p. 370.

[2] Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filatia*, Edition 6, C.H. Beck Publishing House Bucharest, 2018, p. 397.

[3] According to Article 414(2) Civ.C., "Paternity may be negated, if it is impossible for the mother's husband to be the father of the child."

[4] Marieta Avram, *Drept civil. Familia,* 2nd issue, revised and supplemented, "Hamangiu" Publishing House, Bucharest, 2016, p. 388.

For these reasons, the law established *a presumption* determining *the legal time of the child's conception.* Thus, according to Article 412(1) Civ.C., the time interval between the three hundred and one hundred and eightieth day before the child's birth is the legal time of conception. It shall be calculated day by day. These two time limits have been established on a scientific medical basis, which in fact cover *the delayed birth* and *premature birth* of a child[5].

For example, in a case[6], the court stated that "the term is calculated on a day-by-day basis. It is 121 days, which means that the day of birth, which is the departure day of the term (*dies a quem*), is not taken into account, but the day of fulfillment is counted (*dies a quem*)". Therefore, the court specifies in the same case, "if the mother and the presumed father have maintained only one intimate report but it is proven that this one was within the child's conception period, the action in determining paternity is admissible."

It follows from the interpretation of the above that *the legal time of the child's conception* is a *legal concept* and can be defined as „the period of time during which the conception could have taken place, between the three hundred and one hundred and eightieth day before the birth of a child"[7]. *The legal time of conception* serves to determine the father of the child, whether a child born during the marriage or a child born outside it[8].

According to Article 412 par. (2) Civ.C. *scientific means of proof* of the conception of the child may be produced within a certain period of time within the period referred to in paragraph (1) or even outside that period. As noted, the specified article establishes *a presumption of legal time of conception*, which is a *mixed, intermediate, legal* presumption [9].

3. Presumption of paternity

3.1. Concept and basis of the presumption of paternity

As mentioned above, according to article 408(2) Civ.C., the filiation toward the father is established by the effect *of the presumption of paternity*. In other words, "the father is the one that the marriage shows" (*pater is est quem nuptiae demonstrant*). Therefore, by the effect of the legal presumption, the child is exempt from any other evidence relating to the filial relationship with his/her father[10].

Article 414(1) Civ.C. establishes the rule according to which the child born or conceived during the marriage has as his/her father the husband of the mother. Therefore, as stated in a case-law[11], "a recognition of paternity, which produces legal effects, cannot exist, the status of the child born during the marriage being determined by law". In other words, the paternity of these children cannot be established by voluntary recognition by the father.

In literature, *the presumption of paternity* was defined as "the legal means of establishing filiation toward the father, which indicates as the father of the child the husband of the mother from the marriage during which the fact of conception or birth took place, or[12] "the means provided by law of establishing the paternity of the child from the marriage according to which the mother's husband is the father of the child conceived and/or born of that marriage"[13].

Therefore, it follows from the interpretation of Article 414(1) Civ.C that the presumption of paternity is based on the fact of the child's conception during marriage or that of the child's birth during the mother's marriage[14]. In other words, as the courts have also ruled[15], "the presumption of paternity only works for children born or conceived during the marriage".

Therefore, "*the paternity* of the child outside the marriage cannot be established by extending this presumption to the intimate relationship between the mother of the child and another man outside the marriage"[16].

If the mother was married to a man at the time of the child's conception, and at the time of the child's birth the mother had entered into a new marriage, the presumption of paternity "operates in favor of the man in the subsequent marriage (the one who had the capacity of husband at the time of the child's birth)"[17].

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[5] Lucia Irinescu, *Curs de dreptul familiei,* Hamangiu Publishing House, Bucharest, 2015, p. 151.

[6] Bacău court of appeal, civil decision on.776 of August 14, 1996, in „Jurisprudența Curții de Apel Bacău", 1996, pp. 43-44, *apud* Lucia Irinescu, *Filiația față de tată. Practică judiciară,* EHamangiu Publishing House, Bucharest, 2007, p. 12, case 8.

[7] Bogdan Dumitru Moloman, *Dicționar de dreptul familiei,* Universul Juridic Publishing House, Bucharest, 2012, p. 324.

[8] Teodor Bodoașcă, *Opinii privind timpul legal al concepțiunii și prezumțiile de paternitate în statornicirea Codului civil*, in „Dreptul" no. 10/2014, pp. 39-51.

[9] Lucia Irinescu, *Filiația față de tată (Sheet no.22),* in Emese Florian, Marieta Avram (coord.), *Dreptul familiei. Fișe de drept civil*, Universul Juridic Publishing House, Bucharest, 2018, p. 175.

[10] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *Tratat de drept civil român,* volumul I, Colecția Restitutio, All Beck Publishing House, Bucharest, 2002, p. 290.

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[12] Marieta Avram, *op. cit.* (2016), p. 389.

[13] Dan Lupașcu, Cristiana Mihaela Crăciunescu, *Dreptul familiei,* 4th edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 408.

[14] For nuances, see Teodor Bodoașcă, *Dreptul familiei* (2015), pp. 392-393.

[15] Iași Court of Appeal, Civil section, decision no. 1190 of October 27, 1998, in „Culegere de practică judiciară", 1999, pp. 78-79, *apud* Lucia Irinescu, *Filiația față de tată. Practică judiciară,* Hamangiu Publishing House, Bucharest, 2007, pp. 17-18, case 13.

[16] Suceava District Court, Section I Civil matters, civil decision no.451 of June 19, 2020, available on www.rolii.ro (accessed on 13.01.2021).

[17] *Idem*.

We should underline that, in the same case, the court stated that ”the presumption does not apply to children who are born out of the long-term relationship of parental cohabitation, even if the parents were married after the birth of the child”.

But, as I mentioned before, *the presumption of paternity is not absolute*, but is *a relative presumption*, which can be overturned by *any means of proof*, even if the mother and the biological father of the child admit that they are his/her parents. Therefore, from the legal nature point of view, the presumption of paternity *has a mixed character*[18], it being possible to be overturned by *way of legal action in negation of paternity* according to article 414 (2) Civ.C. and article 429-433 Civ.C. In this respect, in a case[19] judged under the auspices of the Family Code, which is now repealed, the court has indicated that ”the legal presumption of paternity, on the grounds of which the child born during the marriage has the mother’s husband as a father, can only be removed by an action of negation of paternity and not by the registration of the child at the civil status office in the name of the mother's concubine". In the same sense, in a recent case[20], the court underlined that ”the presumption of paternity takes effect irrespective of the child’s act of birth, which could show, for example, that the child’s father is someone else than the mother’s husband or that the child’s father is unknown. It was decided that the child born during the marriage benefits from a presumption of paternity, even if the father was not registered in the act of birth and did not bring the action in the negation of paternity”. For reason identity, it is stated in the same decision that, ”the child enjoys the presumption of paternity, even if the father was not registered in the act of birth, and the child conceived during the marriage but born after the marriage ceased or was dissolved, and his/her mother did not remarry before the date of birth. If the mother’s husband is not registered in the civil status register as the child’s father, an action may be brought to ascertain the applicability of the provisions of the New Civil Code, which provide for a presumption of paternity, and to ask for the rectification of the act of birth. This presumption creates in favor of the child a status of a child born by a married woman."

The presumption of paternity of the child conceived during the marriage is based on the *obligation of fidelity of the wife*, which is also the logical condition for the establishment of the presumption of paternity. In other words, the presumption of paternity is based on two ideas, namely: ”cohabitation of spouses and the conjugal faith of the wife”[21].

The court has a special and active role in removing the presumption of paternity. Thus, as it has also been shown in a decision of our supreme court[22], judged under the auspices of the Family Code, now repealed, "(...) the court is obliged to proposed all necessary evidence and also to exercise its active role, ordering *ex officio* the administration of evidence, in order to be able to form a certain conviction as to the fact subject to trial. The promotion of action in negation of paternity resulting in a change in the civil status of the child born during the marriage, on which it cannot be transacted, follows that, in the absence of any other evidence, the mere recognition of the defendant-mother, which may constitute an act of connivance between the parties concerned, is not producing any legal effects”.

3.2. Conditions for the application of the presumption of paternity

For the application of the presumption of paternity, a number of conditions must be fulfilled which, if satisfied, according to the provisions of article 414 (1) Civ.C., *the mother’s husband is presumed the father of the child born or conceived during the marriage*:

- determination of the filiation toward the mother, according to the law, which means that from a legal point of view, the determination of the paternity of the child from the marriage can only be made after the determination of filiation toward the mother (maternity);
- mother's marriage;
- conception or birth of the child during the marriage of his/her mother[23].

4. Negation of paternity

4.1. Concept and regulation

The negation of paternity aims to remove the presumption of paternity established by the law between man and child and serves the presumed father to remove from the family the child conceived by his wife from relations with another man[24]. In other words, the negation of paternity means denying it by means of legal proceedings, the aim being to overturn the presumptions of paternity[25].

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[18] About the mixed nature of the presumption of paternity, the Constitutional Court pronounced under the auspices of the Family Code, now repealed, by decision No 78/1995, published in the Official Gazette no. 294 of December 20, 1995.

[19] Supreme District Court, Decision No. 664/1977 in "Revista română de drept" no. 10/1977, p. 61, *apud* Corneliu Turianu, *op. cit.*, p. 259.

[20] Suceava District Court, 1st Section Civil matters, civil decision No. 451 of June 19, 2020, *op. cit.*

[21] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *op. cit.*, p. 290.

[22] Supreme District Court, Decision no. 261/1988, in "Revista română de drept" no. 1/1989, p. 71, *apud* Corneliu Turianu, *op. cit.*, p. 240, where a note of the author can also be read.

[23] Marieta Avram, *op. cit.* (2016), p. 390.

[24] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *op. cit.*, volume I, p. 296.

[25] For details see Bogdan Dumitru Moloman, *op. cit.* (2012), p. 32.

For example, in a case[26] concerning the negation of paternity, "the court has held that for the admission of an application in the negation of paternity lodged by the child's mother's husband (at the time of birth of the child, current, former husband), unequivocal circumstances must be established to demonstrate that it is impossible for him to be the father of the minor whose paternity is negated. From the evidence produced in the present case, the court has held that, in the context of the questioning taken on xxx, the defendant A.A. recognized that, prior to the beginning of her relationship with him, she was in a different relationship with a man at whom she actually lived in and that on xxx she moved to the claimant's home.

Witness B.B. stated that the defendant confessed to her about one and a half months after she moved to the claimant's home that she suspected that she was pregnant and that she conceived the child with the X.X. with whom she had a previous relationship. The witness also showed that the mother of the defendant also told her that she suspected the child born by her was not the claimant's. The witness also stated that the defendant hid the pregnancy for almost its entire duration, and shortly after she admitted being pregnant because the pregnancy could no longer be hidden, she also gave birth.

Witness C.C. stated that the parties met each other in August 2013 and in September 2013 the defendant moved to the claimant's home and that prior to her relationship with the claimant, the defendant had a relationship with another man, completed shortly before meeting the claimant. The witness also stated that the defendant hid the pregnancy and told her that she gave birth prematurely at 7 months, but the claimant told the witness that he suspected minor Y.Y. was not his child.

The witness D.D. stated that in early September 2013 the relationship of the parties started and in 2014 he learned that the claimant's mother went with the defendant to the family doctor because she felt sick and, on that occasion, the defendant was found to be pregnant and was to give birth in the immediately following period. The witness also showed that the claimant told him he suspected the child born by the defendant was not his own because he learned that, until a short time before the beginning of their relationship, the defendant was in a relationship with another man.

In that case, the DNA test was carried out by the Forensic Medicine Laboratory (...), in which the biological samples of both parties and those of the minor Y.Y. were analyzed and the result of this test concluded that the claimant was excluded from being the biological father of the child Y.Y. In view of the situation *de facto* presented, which resulted from the evidence produced in this case, the court considers that proof was made that it was impossible for the claimant to be the father of the minor Y.Y. (...)".

As we have already mentioned, the paternity of the child from marriage can only be removed by action in the negation of paternity[27]. In accordance with the provisions of article 429(1) Civ.C., the action in the negation of paternity may be started by the mother's husband, the mother, the biological father, as well as the child. The action in the negation of paternity may be started or, where appropriate, continued by their heirs, under the conditions provided for by law[28].

However, on the grounds of article 92(1) Civ.Proc.C., for the protection of the legitimate rights and interests of minors or of persons placed under a prohibition or of those missing, the prosecutor may also bring an action in the negation of paternity if necessary.

4.2. Limitation of the right of action

According to the provisions of Article 430(1) Civ.C., *the right to action of the mother's husband* is subject to a limitation period of three years, "which runs either from the date on which the husband knew that he was presumed as the child's father or from a later date, when he found that the presumption did not correspond to reality".

For example, in a case[29]the defendant negated the paternity of the minor M.M.D., born on October 26, 2006, and claimed he had no intimated relations with the mother of the minor in the last 21 years the court considered that in this case the limitation period started to run on the child's birth date and was obviously fulfilled until the action in negation of paternity was lodged. The court also states that "the security of family relations cannot be disturbed by ensuring that the action in negation of paternity can be carried out without a time limit and without justifying its start with a delay of almost 14 years. Even if the court would held that the defendant had not known the minor's birth at the time this occurred, according to the defendant's statement in the criminal case no. 3043/P/2015, he had knowledge of the minor's birth at the latest in summer 2007". Thus, the court will reject the claim made by the defendant for the negation o paternity as barred by the statute of limitation.

It should be underlined that, as also stipulated in paragraph 2 of article 430 Civ.c., the term does not run against the husband placed under a judicial prohibition, and he can make use of his right to an action in the negation of paternity within three years from the date of lifting of the prohibition. If the husband is placed

[26] Săveni law court, civil sentence no. 48 of February 3, 2020, available on https://www.jurisprudenta.com/jurisprudenta/speta-167ab1sj/ (accessed on January 14, 2021).

[27] The establishment of filiation, the negation of paternity or any other action concerning filiation is subject to the provisions of the Civil Code and produces the effects it provides only in the case of children born after its entry into force (see Article 47 of Law 71/2011).

[28] In the old regulation, according to Article 54(2), sentence I Civ.C., the action in the negation of paternity could only be started by the mother's husband. These provisions were declared unconstitutional by Decision no. 349 of December 19, 2001 of the Constitutional Court, published in Off.G. no. 240 of April 10, 2002.

[29] Petroşani Law court, civil sentence no.770 of June 17, 2020, available on www.rolii.ro (accessed on l3.01.2021).

under interdiction, the action may be started on his behalf by the guardian and, in the absence of the guardian, by a curator appointed by the court [Article 429(3) Civ.C.].

If the husband died before the expiry of the limitation period of 3 years without the action being started, it may be started by his heirs within one year of the date of death [art.430 par. (3) Civ.C.].

As we have already shown, the action in the negation of paternity can also be started by the mother. Thus, according to article 431(1) Civ.C., *the mother can start the action in the negation of paternity* within three years from the child's birth date. The mother may bring an action in the negation of paternity, as a claimant, against the husband/former husband, and if the latter is deceased, the action may be started, pursuant to article 429(4) Civ.C., against the heirs. If the inheritance is vacant, the art. 439 Civ.C. provides that the action may be brought against the commune, the city or, as the case may be, the municipality at the place of the opening of the estate, and the summoning in court of the waivers, if any, is mandatory.[30].

As for *the right of the child to start an action in the negation of paternity*, according to article 433(2) Civ.C., the right to action is not subject to prescription during the child's life. Thus, according to the provisions of article 433(1) Civ.C., the action in negation of paternity is brought by the child, during his/her minority, through his/her legal representative. The child may bring the action in negation of paternity against the alleged father (the husband of the mother or her former husband) or against his heirs [art.429 par.(4) Civ.C.]. If the inheritance is vacant, the action may be brought against the commune, the city or, as the case may be, the municipality at the place of the opening of the estate, the summoning in court of the denouncers, if any, being mandatory[31].

Finally, *the action in the negation of paternity can also be introduced by the alleged biological father*. Thus, according to article 432(1) Civ.C., "the action in negation of paternity introduced by the person claiming to be the biological father can only be allowed if he provides proof of his paternity toward the child". As it can be seen, the lawmaker established a special condition of admissibility of the action in the negation of paternity, in the sense that the alleged father must prove that he is the child's father and not the mother's husband or former husband. The right of action shall not be subject to prescription during the life of the biological father. After his death, the action may be brought by his heirs not later than one year after his death [art.432 par.(2) Civ.C.].

The establishment of the right of action of the alleged biological father, although considered to be an "avant-garde measure"[32], is regarded in the specialized literature[33] as "excessive and unjustified", and at the same time some reservations have been expressed, because in practice, it has been found that the interests of the child often do not match the interests of the alleged father.

4.3. Cases in which paternity may be negated

The law does not list the cases in which the husband of the mother may deny paternity, but merely states, in Article 414(2) Civ.C., the general rule according to which "*Paternity may be negated, if it is impossible for the mother's husband to be the father of the child"*. It is therefore up to the courts to decide on a case-by-case basis.

The concept of "impossible", regulated in Article 414(2) Civ.C., the courts have shown[34]that it means not only the physical or biological impossibility to procreate, but also objective situations or circumstances which make the child's conception impossible in the relations of the spouses, such as the absence of the husband from the country or other circumstances which prevented the existence of intimate relations between the spouses following conflicts which effectively led to the moral impossibility of cohabitation.

In a case[35], in the grounds of the petition for negation of paternity, the claimant showed that it was impossible for him to be the father of the minor because, at the time when the defendant found out that she was pregnant, he was on a mission to Afghanistan, so that, on the date when the child's conception should have taken place, he was not in the country. Thus, as the court found, "(...) the defendant-claimant shows that the claimant-defendant was on a mission to Afghanistan as of 05.09.2010, but before leaving, he insisted on conceiving a child. Thus, in July 2010, both parents carried out the blood tests necessary before a pregnancy and decided to conceive a child in the next fertile period.

The minor EMS was born on 18.05.2011, and according to the ultrasound and discharge note the pregnancy was 40 weeks, so the date of conception was 11.08.2010 when the defendant was in the country. The defendant-claimant also shows that when the claimant-defendant came to the country on a permission he

[30] For developments regarding the right of action of the mother of the child, see Emese Florian, *op. cit.* (2018), pp. 405-406; Cristina Nicolescu, *Dreptul familiei,* Solomon Publishing House, Bucharest, 2020, p. 401.

[31] For developments regarding the legal representation of the child, see Emese Florian, *op. cit*. (2018), pp. 406-407.

[32] Marieta Avram, *op. cit.* (2016), p. 402.

[33] For details see Emese Florian, *op. cit*., (2018), pp. 407-410; Cristina Nicolescu, *op. cit*. (2020), pp. 404-408.

[34] Supreme Court, decision no. 579/1985, in „Revista română de drept" no. 1/1986, p. 70, *apud* Corneliu Turianu, *op. cit.,* pp. 247-248, where an author's note can be read; Supreme Court, decision no. 24/1978, in Ioan G. Mihuță, *Repertoriu de practică judiciară în materie civilă a Tribunalului Suprem și a altor instanțe judecătorești pe anii 1975-1980,* Editura Științifică și Enciclopedică, Bucharest, 1982, p. 29; Supreme Court, decision no. 55/1978, in „Revista română de drept" no. 7/1978, p. 49, *apud* Corneliu Turianu, *op. cit.,* p. 254 and author's note.

[35] Law court district 3 Bucharest, Civil matters, civil sentence no. 17.717 of November 15, 2012, available at www.rolii.ro (accessed on 13.01.2020).

accompanied her to the regular medical visit to see the girl and also signed the contract on stem cell collection in the child's father section (...).

In the file, DNA forensic expertise was ordered, and its conclusions were that the SMA is the biological father of the SEM minor, with a probability of 99.99%. Therefore, in public session of 15.12. 2011, the claimant-defendant SMA asked the court to take note of his waiver at the judging of the petition in negation of paternity".

In another case[36], judged also under the auspices of the old rules in this field, the court underlined that "the mere circumstance that the spouses have lived separated in fact is not such as to lead to the conclusion that the mother's husband is the father of the child born during the marriage, if it turns out that their intimate relations continued during the period when they did not live together."

The courts[37] also considered that 'the mere recognition of the mother of the child that her husband is not the father of the child is not enough, so it is necessary to corroborate this with other means of proof showing that, during the child's conception period, the father was in impossibility to maintain intimate relations with his wife." In another case[38] in which from the marriage of the parties and during the marriage a minor resulted, born on 26.10.2010, the court found that "the birth certificate of the girl shows the filiation toward both parents. Being a minor born during the marriage, filiation is determined on the basis of the presumption of paternity of the spouses.

In the meantime, the parties have separated, with a civil divorce sentence no 2963 of 7.12.2010, in action, with the claimant showing that he was separated *de facto* from his wife, the mother of the minor in question, and that it is impossible for him to be the father of the minor.

In the case, the defendant, by authentic notarial statement, no 250 of 15.02.2011, recognizes that the minor is not the daughter of her former husband, the defendant in question. The defendant also submits to the file a memo showing the status of *de facto* separation from her husband, the fact that the minor is not the child of the defendant and that the minor was registered with the filiation of the father - the mother's husband as at the date of birth she was married to the claimant.

The court, as compared to the positions of the two parties, considers that the minor in question is not the daughter of the claimant, which is why it will admit the action and establish this state of affairs, in relation to the provisions of Article 54 family code, and to the fact that any person interested may challenge the recognition of paternity where it does not correspond to the truth, and in the present case, by the defendant's position, this situation *de facto* has been established. Consequently, the court is to cease the effects of the civil divorce sentence no. 293/2010 in respect of the alimony for the minor I., born on 26.10.2010".

The proof that the mother's husband is not the father of the child can be made, as we mentioned before, by any means of proof. Thus, the judge, a decision of the Supreme Court specifies[39], "*has the duty to produce all proofs with a view to establishing the correct situation de facto, for the purpose of establishing by proofs whether or not the claimant is the father of the child*". In another case[40], the court considered that "the age of the pregnancy at the time of birth can also be determined by the length of the fetus, his/her weight, by the weight of the placenta, as well as by other morphological features. If in relation to these data, established for sure, it is established that it is impossible for the mother's husband to be the father of the child, the action in negation of paternity is to be allowed".

Also, a particular role in proving that the mother's husband is not the child's father is to carry out DNA-type forensic expertise, whereby, as a result of the establishment and comparison of the genetic profiles of the child and the mother's husband, to be proved that it is impossible for him to be the child's biological father[41]. In a particular case[42] where DNA expertise was ordered and carried out[43], the court considered that "DNA expertise is the most complete and most likely modality of genetic expertise, which in no way depends on the prior carrying out of serological or HLA experts examinations (human leukocyte antigen, n.a.). And this is because serological and HLA expertise are also methods of research of paternity or filiation in general, which, as the appellant misunderstood, do not present steps prior to the administration of the proof with DNA expertise. These expertises, serological, HLA and DNA, do not depend on each other, but they may, even if they are independent and may be carried out independently, be used successively to establish filiation and if the serological or HLA expertises are not conclusive, given their lower probability, one can resort to DNA expertise, which has a very high degree of

[36] Supreme District Court, Decision no.884/1976, în „Culegere de decizii", 1976, p. 172, *apud* Corneliu Turianu, *op.cit.*, p. 260.

[37] Supreme District Court, Decision no. 548/1981, "Revista română de drept" no. 12/1981, p. 102, *apud* Corneliu Turianu, *op. cit.*, p. 251.

[38] Moinești Law Court, civil sentence no. 638 of February 23, 2011, available at www.portal.just.ro (accessed on 13.01.2020).

[39] Supreme District Court, Civil Matters section, decision No 1501 of December 31, 1968, in „Culegere de decizii", 1968, p.62, *apud* Marieta Avram, *op.cit*., (2016), pp.394-395, footnote 5.

[40] Hunedoara county district court, civil decision no.1002 of October 9, 1980, in „Revista română de drept" no.4/1981, p.114, *apud* Marieta Avram, *op.cit.*, (2016), p.395, footnote 1.

[41] For details on the forensic expertise of the filiation – form of judicial expertise and legal grounds, see Ion Enescu, Moise Terbancea, *Bazele juridice și genetice ale expertizei medico-legale a filiației*, Medical Publishing House, Bucharest, 1990, pp. 115-134.

[42] Cluj Court of appeal, 1st section, Civil matters, decision no.378/2013, in „Curtea de Apel Cluj – Buletinul Jurisprudenței", 2013, I, p.251.

[43] For details on the genetic bases of the forensic expertise of the filiation, as well as on genes and genetics of populations, see Ion Enescu, Moses Terbancea, *op.cit.*, pp. 135-236.

probability and makes any other expertise on the matter superfluous".

In a case[44] in which the minor's mother refused to submit the minor to a specialized expert examination, the court considered that "it cannot be ignored that, although legally there was no pre-established hierarchy of means of proof, while remaining to the judge to judge in concrete terms the extent to which he can trust them, in a civil action such as the one of negation of paternity, scientific proofs, as the expertise to determine the likely date of conception, the serological and dermatoglific expertise can highlight more rigorously and with greater certainty elements that will allow judges to form conviction regarding the real situation *de facto*. Such scientific proofs, although useful, are not the only one that can be produced, and formation of judges' opinion can be done taking into account the whole evidence produced in the case. Moreover, it is not illegal to decide, when any proofs other than a forensic expertise has been proposed and produced that the mother's husband may not be the child's father, that the court should reject the proof with expertise, considering that there are no indications that such proofs are useful. It should also be noted that, where the producing of the proof with expertise necessarily involves the presence of the parties, such as in the case of serological and dermatoglific expertise, the law does not mean to give any particular value to the behavior of the party refusing to appear before the specialist laboratory or institute, as in the case of refusal of the party to reply to the questioning or to appear proposed and agreed questioning. In the absence of such a legal provision, the judge could only, beyond his/her own prerogatives, give, even with limited effects on the case judged, a certain value or significance of a party's refusal to allow forensic expertise to be carried out, but it remains the possibility of investigating the merits by other means of proof. Finally, although evidence of legal facts can in principle also be provided by presumptions, the basis for the solution of admitting an action in the negation of paternity solely on the mother's refusal to allow the forensic expertise to be carried out makes groundless the decision which would be given, for the law allows the judge to rely on the presumptions only when they have "a certain weight". But such a refusal of the mother could not be considered to permit such a serious conclusion as that her husband is not the father of the child, the interest to be protected-the one of the minor - requiring verifications and the producing of proofs that unequivocally makes the court's conclusion".

Finally, it should be noted that in a case where[45]an out-of-court expertise has been carried out, the court has indicated that "in settling the action in negation of paternity, the case cannot be settled on the basis of an out-of-court proof (DNA expertise carried out to challenge the recognition of paternity), what was not directly produced in the trial of negation of paternity".

5. Conclusions

Our study shows that the purpose of the action in negation of paternity is to remove the presumption of paternity established by the law between man and child and serves the presumed father to remove from the family the child conceived by his wife from relations with another man. In other words, the negation of paternity means denying it by legal action, with the aim of overturning the presumptions of paternity.

The Romanian law, respectively the Civil Code, does not list the cases in which the mother's husband can negate the paternity, but only lays down a general rule, with the courts having this extremely important duty, to decide on a case-by-case basis.

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PARENTS' RIGHT AND DUTY TO CARE FOR THE CHILD

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Abstract

In order to fulfill the obligation to raise the child, parents have a series of rights and duties, among which, the right and duty to care for the child. Both internationally and Europeanly or in national law, the fundamental right of the child to maintain regular personal relationships and direct contacts with both parents, as well as that of the parent of having personal connections (relations) with the minor, his/her child is provided. At the same time, the child has the right to grow up with his/her parents. In this respect, the law provides the rule according to which the minor child lives with his/her parents but does not distinguish between how the parents are married with each other or not.

The forms of accomplishment of the right to have personal relations with the minor child are complex, these being detailed as an example in the laws in this field, among them the right to visit being specified. In the event that the parents do not live together, they will, by mutual agreement, establish the child's home and in case of disagreement between them, the child's home will be established by the decision of the guardianship court, taking into account the best interests of the child. As this study will show, it is in the child's best interest to maintain and consolidate personal relations, not only with the parent at which child does not live permanently, but also with other family members, in a broader sense, with all persons who descend from one another or from one common author, among whom there is a blood community, such as grandparents.

Keywords: *child's right, parents' right, parents' duty, right to have personal relations with the child, best interests of the child, right to visit, family home.*

1. Introduction

Video provides a powerful way to help you Internally, the child's right are observed and guaranteed pursuant to the provisions of the Civil Law and of the Law no. 272/2004 **on safeguarding and promoting the child's rights, republished[1], a normative act regarded as "*an actual code of the child's rights*"**[2] **because it transposed in the Romanian law many of the provisions in the** UN Convention regarding the child's rights[3].

The Civil Law regulates the *parental authority* under Title IV, Book II (On Family), Chapter I (General Provisions), art. 487-502; in Chapter III (The Exercise of Parental Authority), in art. 503-507 and in Chapter IV (Termination of Parental Rights), art. 508-512.

At an international and European level[4], the most significant acts regarding the promotion and safeguarding of the child's rights that Romania is a party to, are the UN Convention of 1989 on Rights of the Child, regarded as "*the act of birth of the protection of the rights of the child*"[5] and the European Convention on the fundamental rights and freedoms[6].

One of the most important components of the protection of the child is the *parental authority*[7], because this protection must be guaranteed, first and foremost, by the *parents.* In this respect, art.487 of the Civil Law stipulates that "parents hold the right and the duty to raise the child, fostering their health and physical, mental and intellectual development, education, learning and professional training, according to the child's own options, treats and needs; they are bound to offer the child the guidance and advice required for a proper realization of the rights granted to the same under the law".

Moreover, art. 36(1) of the Law no. 272/2004 on the safeguarding and promotion of the rights of the child, as republished, stipulates that "both parents are responsible for the raising of their child", while paragraph (2) of the same article states that "the exercise of the rights and the fulfilment of the parental duties should take into account the higher interest of the

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[1] Republished in the Official Gazette no.607 of September 30th 2013, with the renumbering of the texts.

[2] Marieta Avram, *Drept civil. Familia*, 2nd issue, revised and supplemented, Hamangiu Printing House, Bucharest, 2016, p. 476.

[3] Adopted by the General Assembly of the United Nations on November 20th 1989 and ratified by Romania by Law no.18/1990, republished in the Official Gazette no.109 of September 28th 1989.

[4] At a European level, the Recommendation no. R (84) 4 of the Member State Committee of Ministers on parental responsibilities adopted by the Committee of Ministers of the Council of Europe on February 28th 1984, upon the 367th reunion of the minister delegates was the first European instrument specifically addressing the parental rights and, especially, the responsibilities. For an unofficial translation of the document, see https://cristidanilet.wordpress.com/ (accessed on 19.12.2020).

[5] Marieta Avram, *op. cit.* (2016), pp. 475-476.

[6] The Convention was concluded on November 4th 1950 in Rome and ratified by Romania by Law no. 30/1994 on ratifying the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Additional Protocols thereto, published with the Official Gazette no. 135 of May 31st 1994.

[7] It should be highlighted that the notion of *parental authority* is distinct from that of *parental rights and duties*, which, even though encompassed by this notion, are independent and have a distinct structure [Adina R. Motica, *Aspecte generale privind autoritatea părintească*, in Emese Florian, Marieta Avram (coord.), *Dreptul familiei. Fișe de drept civil*, Universul Juridic Printing House, Bucharest, 2018, p. 221].

child and guarantee the material and spiritual welfare of the child, especially through the care provided, through the maintenance of the ***personal relations*** with the child, the assurance of the raising and education of the child, as well as through the legal representation and management of their patrimony" (emphasis added)[8].

The interpretation of these legal provisions, as well as the review of the various opinions expressed in the specialized literature published after[9] or before[10] the adoption of the Civil Law currently in force it follows that, in order to fulfill their obligation to raise the child, the parents have several rights and obligations (duties), including the right and duty of the parents to care for the child[11], which we will analyze in theoretical and practical terms herein below.

2. The Child's Residence

According to the provisions in art. 35(1) of the Law no. 272/2004, republished, the child is entitled *to grow up with his parents.* In this respect, as stipulated in art. 496(1) of the Civil Law, the minor child *resides with the parents*.

Hence, as stipulated in the specialized literature[12], this *is the rule* that applies and, as it may be noticed, the law does not distinguish as to whether the parents are married or not.

In case the parents do not reside together, they will jointly agree on the **child's residence** [art. 496(2) of the Civil Law]. In case the parents are unable to agree on the matter, paragraph (3) of the same article stipulates that the child's residence is established by the custody court's order, after hearing the parents and the child, if the latter is 10 years of age, and subject to the conclusions of the psychological and social security investigation report. Moreover, according to art.2(6) of the Law no.272/2004, republished, in determining the higher interest of the child, the court shall take into account "the child's physical and psychological development, education and health, security and stability, and family belonging needs; the child's opinion, depending on their age and degree of maturity; the child's history, especially considering the situations of abuse, neglect, exploitation or any other forms of bodily violence, as well as the potential risk situations that may occur in the future; the ability of the parents or of the persons undertaking the raising of and caring for the child to respond to the latter's concrete needs; the maintenance of the personal relations with the persons the child is attached to".

Similarly, in a case[13], the court stated that "The decisions made with regards to the minor child must consider the latter's higher interest, stated as a legal principle in Law no. 272/2004. The purpose of the notion is "the full and harmonious development of the personality" of the child, the provision of a "family environment, in a happy, loving and harmonious atmosphere", the preparation for an "independent life in society" and the education in the spirit of the ideals of "peace, dignity, freedom, tolerance, equality and solidarity", principles deriving from the recitals to the UN Convention on the child's rights, ratified pursuant to the Law no. 18/1990".

At the same time, as stipulated in art. 21(1) of the Law no.272/2004, as republished, in addition to the elements stipulated under art. 2(6), the court will also consider aspects such as:

a) each parent's willingness to involve the other parent in the decisions affecting the child and to observe the other parent's parental rights;

b) each parent's willingness to allow the other one to maintain personal relations;

c) the residential status of each of the parents over the past 3 years;

d) the history regarding the parents' acts of violence against the child or other persons;

e) the distance between each dwelling and the educational institution the child attends.

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[8] For further information on the higher interest of the child, see Cristiana Mihaela Crăciunescu, Interesul superior al copilului în exercitarea autorității părintești exclusive de către unul dintre părinți, in Marieta Avram (coord.), Autoritatea părintească. Între măreție și decădere, Solomon Printing House, Bucharest (2018), pp. 10-23.

[9] For further details, please see Emese Florian, Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația, 6th issue, C.H. Beck Printing House, Bucharest, 2018, pp. 538-539.pp. 537-549; Marieta Avram, op. cit. (2016), pp. 488-497; Dan Lupașcu, Cristiana Mihaela Crăciunescu, Dreptul familiei, 4th issue, amended and updated, Universul Juridic Printing House, Bucharest, 2021, pp. 579-586; Teodor Bodoașcă, Dreptul familiei (3rd issue, revised and supplemented, Universul Juridic Printing House, Bucharest, 2015, pp. 565-568; Cristina Nicolescu, Dreptul familiei, Solomon Printing House, Bucharest, 2020, pp. 520-522; Adina R. Motica, Dreptul civil al familiei, 2nd issue, revised and supplemented, Universul Juridic Printing House, Bucharest, 2018, pp. 333-334; Cristina Codruța Hageanu, Dreptul familiei și actele de stare civilă, 2nd issue, revised and supplemented, Hamangiu Printing House, Bucharest, 2017), pp. 206-212; Lucia Irinescu, Curs de dreptul familiei, Hamangiu Printing House (Bucharest, 2015, pp. 205-207; Bogdan Dumitru Moloman, Lazăr Ciprian Ureche, Noul Cod civil. Cartea a II-a - Despre familie. Art. 258-534. Comentarii, explicații și jurisprudență, Universul Juridic Printing House, Bucharest, 2016), pp. 714-721; Bujorel Florea, Vlad Teodor Florea, Dreptul familiei și actele de stare civilă, Hamangiu Printing House, Bucharest, 2019, pp. 190-198; Diana Flavia Barbur, Autoritatea părintească, Hamangiu Printing House, Bucharest, 2016, pp.64-67.

[10] For further details, see Ion P. Filipescu, Andrei I. Filipescu, Tratat de dreptul familiei, 8th issue, revised and supplemented, Universul Juridic Printing House, Bucharest, 2006, pp. 635-647; Alexandru Bacaci, Viorica Claudia Dumitrache, Cristina Codruța Hageanu, Dreptul familiei, 4th issue, All Beck Printing House, Bucharest, 2005, pp. 315-321; Tudor Radu Popescu, Dreptul familiei. Tratat, vol. II, Didactică și Pedagogică Printing House, Bucharest,1965, pp. 281-290.

[11] From amongst the wordings of this right available in the specialized literature, we have opted for this one, regarded as the most suitable one for our study, mentioned by Professor Emese Florian, op. cit., (2018), pp. 538-539.

[12] Emese Florian, op. cit., (2018), p. 539.

[13] Cluj District Court, Civil Division, civil decision no. 113/A of 31 January 2020, available [online] at www.rolii.ro (accessed on 10.04.2020).

Last but not least, as shown in a case[14], "from amongst the relevant criteria, the child's affective relations with each of the parents must be considered, because the parent hosting the child does not simply provide a living area, but must also offer the affective and cognitive environment the child needs. The affective relation between the parent hosting the child and the latter is very important, because the parent is to provide the cognitive, moral and education guidance, which claims for availability, safeguarding, responsibility, attention, valuing, mortal support, affective and intellectual presence". In a different case, it was stated[15] that "the minor child requires a high level of stability, an organized environment for the deployment of his/her daily activity, and the close relation to the mother must be protected, as she is the person able to promptly and fully respond to the child's age-inherent needs. Moreover, the mother must observe the father's connection with the child, which is of essence for the normal development. By establishing the minor's residence at the mother the court appreciates that the child will benefit from a stable family environment, from proper care and education. Even if there are no clues leading to the conclusion that the father is not a responsible person in this regard, considering the growth and development stage of the minor, his higher interest is to create a stable and organized environment, which, hence, triggers the risk of a possible failure to understand and acknowledge the mother's authority".

As stipulated in art. 496(4) of the Civil Law, whether established following the mutual consent of the parents, or through a court order, *the child's residence*, set according to the provisions herein, cannot be changed without the consent of the parents unless the law specifically stipulates otherwise.

3. The right of the child and of the parent to maintain personal relations

Internationally, *the fundamental right of the child* to regularly maintain *personal relations* and direct contacts with both parents *and of the parent* to maintain *personal relations (connections)* with the minor, who is his/her child, was consecrated by art. 21 of the Hague Convention on Civil Aspects of International Child Abduction, of 25 October 1980[16], according to which "the central authorities are bound by the cooperation obligations stipulated under art. 7, in order to ensure the free enforcement of the visiting right and the fulfilment of all requirements applicable to the exercising of this right and in order to remove, as much as possible, the possible obstacles arising in this respect"[17], and it was also taken over in the Convention on Contact concerning Children[18], which, in art. 4, stipulates that the parents and their child "are entitled to constantly obtain and maintain personal relations. These personal relations can only be restricted or excluded if required for the higher interest of the child".

At the same time, at a European level, art. 24(3) of the Charter of Fundamental Rights of the European Union[19] stipulates the *right of any child* to regularly maintain *personal relations* and direct contacts with both parents, unless they are contrary to the child's interest.

In the domestic law, according to art. 496(5) of the Civil Law, the parent the child *does not regularly live with* is entitled to maintain *personal relations (connections)* with the minor, at the respective parent's residence. Nonetheless, *the custody court may limit* the enforcement of this right, of such limitation is in the child's higher interest.

In a case[20] having as subject the limitation of the parent's right to maintain personal relations with the child, the court ordered that "the right to personal relations should by no means be regarded as a right exclusively stipulated under the law in favor of the parent who does not have the same residence as the child. Quite on the contrary, the right to personal relations is a right stipulated in the child's favor, who must be allowed to maintain the personal relations with each of the parents. The refusal of the child as such does not constitute a serious reason for the limitation of the parent's right to personal relations, if the minor does

[14] Huedin Law Court, civil division, civil decision no.19 of 14 January 2016, unpublished, apud Diana Flavia Barbur, Divorțul și partajul bunurilor comune. Practică judiciară, Hamangiu Printing House, Bucharest, 2017, pp. 154-156, case 43.

[15] Cluj District Court, civil division, civil decision no. 354 of 12 March 2020, available at www. rolii.ro (accessed on 10.04.2020).

[16] The Convention was ratified by Romania by Law no. 100/1992, published with the Official Gazette no. 243 of 30 September 1992.

[17] According to art.7 of the Hague Convention on Civil Aspects of International Child Abduction, starting 25 October 1980, "central authorities are to cooperate and promote the collaboration among the competent authorities in their respective states, so as to guarantee the immediate return of the children and enforce the other objectives hereof. Specifically, they are to implement all suitable measures, either directly or through any and all intermediaries: a) to locate children that are illicitly removed or detained; b) to prevent new perils for the child or damages for the interested parties, by implementing or making sure that suitable provisional measures are taken; c) to ensure the willful return of the child or foster amicable settlement; d) for the exchange of information, if found to be useful, regarding the social status of the child; e) in order to provide general information regarding their state's law as to the enforcement of the Convention; f) in order to lodge or facilitate the lodging of legal or administrative proceedings meant to guarantee the return of the child and, if applicable, allow for the organization or actual exercising of the visiting right; g) on order to grant or facilitate, if applicable, the obtaining of legal and judiciary assistance, including the participation of an attorney; h) in order to ensure, in administrative terms, if necessary and advisable, the peril-free return of the child; i) in order to keep each other up to date on the enforcement of the convention and, if possible, to remove the possible perils triggered by such enforcement".

[18] The Convention was signed in Strassbourg on 15 May 2003 and it wass ratified by Romania by Law no. 87/2007, published with the Official Gazette no. 257 of 7 April 2007.

[19] Published in JOUE no. C -326/391 of 26 October 2012.

[20] Satu Mare County, civil division, civil decision no. 1557/23.04.2015, final since no appeal entered, at portal.just.ro, available [online] in summary at https://www.legal-land.ro/restrangerea-dreptului-parintelui-la-legaturi-personale-cu-copilul/ 9 (accessed on 04.12.2020).

not yet hold the required maturity to discern between the advantages and the disadvantages of the maintenance of the personal relations between himself and the parent he/she lives with. The failure to observer the obligation to contribute to the expenses for the raising and education of the minor cannot justify the limitation of the parent's right to maintain personal relations with the minor, other legal remedies being stipulated for such cases under the law. Without minimizing the importance of the children's extracurricular activities, they cannot, as such, justify the limitation of the parent's visiting right, respectively the exertion of this right under improper conditions, because, in the light of the provisions in art. 262(2) of the Civil Law, the exertion of this right can only be limited for sound reasons, taking into account the higher interest of the child".

In another case[21], the court appreciated that "the defendant is not entitled to refuse the relation between the minor and the claimant or to encourage the child's refusal to maintain relations with the claimant, because such relations are entirely natural and, as correctly appreciated by the district court, their absence leads to an emotional unbalance in the child. The defendant's allegations regarding the claimant's ethnicity are both groundless and discriminating, considering that she was married to the claimant and they should together contribute to the cultivation of the minor's personality. The Court reiterated that the divorce of the parties should not affect the relation between the minor and the claimant, in any way whatsoever, and that the claimant's parent capacity is not terminated following the divorce, the latter holding not only the legal obligation to financially contribute to the expenses required for the raising of the child, but also the right and the obligation to be actively involved in the raising of his child and that the cooperation between parents is of essence for the development of a balanced personality of the minor, so that the latter can maintain the natural relations with the father as stipulated under the law".

There are multiple ways in which the *right to maintain personal relations* with the minor child may be realized. They are non-exhaustively detailed in the provisions of art. 18(1) of the Law no. 272/2004, republished, where it is mentioned that letter b) also stipulates the *visiting right*[22]. As also shown in the specialized literature[23], in the observance of the higher interest of the child, *the court of law holds sovereignty* in establishing the most suitable alternative for the minor in the realization of the visiting schedule set in the favor of the parent who does not reside with the minor.

In this respect, for instance, in a case[24] having as subject the dissolution of marriage, the court established the following *visiting schedule* for the father regarding the minor child: 1). Up to the age of 3: every Sunday starting 10am, the minor being picked up from the residence of the mother, and up to 6pm, the father being bound to bring him back to the mother's residence by the indicated hour.

2). After the age of 3: in the odd weeks of the month: starting Friday 6pm and until Sunday 6pm, the father picking up the minor from the mother's residence, and then bringing him back before the indicated hour.

In the odd years: 1) Holy Week (last one) of the Lent (according to the Christian-Orthodox calendar) and the New Year's Eve week, the father picking up the child at 10am on Monday morning and being bound to bring him back to the mother's residence by 6pm on the Sunday of the respective week; 2) during summers, the month of July, the minor being picked up by the father on the first day of the month at 10am and then bringing him back at 6pm on the last day of July.

In the even years: 1) the week prior to the first Easter Day (according to the Christian-Orthodox calendar) and the Christmas week, the father picking up the child at 10am on Monday morning and being bound to bring him back to the mother's residence by 6pm on the Sunday of the respective week; 2) during summers, the month of August, the minor being picked up by the father on the first day of the month at 10am and then bringing him back at 6pm on the last day of August."

In another case[25] where the minors were entrusted to the father for raising and education pursuant to the divorce decision, and the latter did not agree to the mother's travel with the children to her residence

[21] Timișoara Court of Appeal, civil division, civil decision no.892/F of 25 September 2007, available [online] at www.portal.just.ro, apud Elena Roșu, Daniel Andrei T. Rădulescu, Dreptul familiei. Practică judiciară, 2nd issue, Hamangiu Printing House, Bucharest, 2011, pp. 160-162.

[22] According to art.18(1) of the Law no.272/2004, republished, for the purposes of this law, the personal relations may be achieved through: "a) meetings of the child with the parent or with another person holding, according to this law, the right to maintain personal relations with the child; b) the visiting of the child at the latter's domicile; c) the hosting of the child, for a determined period of time, by the parent or by another person the child does not customarily reside with, with or without the supervision of the manner in which the personal relations are maintained, depending on the higher interest of the child; d) correspondence or any other form of communication with the child; e) the transmission of information to the child regarding the parent or other persons who, according to this law, hold the right to maintain personal relations with the child; f) the sharing by the person residing with the child of certain information regarding the child, including recent pictures, medical or school assessments, to the parent or to other persons holding the right to maintain personal relations with the child; g) meetings of the child with the parent or with another person with whom the child developed attachment relations in a neutral location for the child, with or without the supervision of the manner in which the personal relations are maintained, according to the higher interest of the child". (emphasis added).

[23] Gabriela Cristina Frențiu, Relațiile personale dintre copil și părintele la care acesta nu locuiește, in Marieta Avram (coord.), Autoritatea părintească. Între măreție și decădere, Solomon Printing House, Bucharest, 2018, p. 79 and footnote 30, with the decision mentioned there.

[24] Neamț District Court, decision no. 259/AC of 28 May 2015, available [online] at https://www.jurisprudenta.com/jurisprudenta/speta-vr3p0io/ (accessed on 04.12.2020).

[25] Alba Iulia Court of Appeal, minors and family division, civil decision no.24 of 23 February 2009, at www.portal.just.ro, *apud* Elena Roșu, Daniel Andrei T. Rădulescu, *op. cit.*, pp. 156-159.

abroad, according to the visiting schedule set by the tribunal, "the court appreciated that as long as no evidence was submitted in the case as to the fact that the minors' travel to the mother's residence would be detrimental to their interests, she is entitled to maintain personal relations with her children. (...). Hence, the court ordered the defendant to allow the claimant to take the minors to her residence in Spain, between July 1st and 31st during the holidays, as well as to her domicile in Romania during the first winter holiday week. In deciding as such, the court held, in essence, in the light of the evidence submitted in the case, that the claimant does offer the moral and material guarantees required in order for the two minors to spend a month at her residence in Spain during the summer holiday and that the two minors want to visit their mother in Spain, so that the claimant's appeal was judged as grounded".

However, as stipulated under the Law no. 272/2004 on the safekeeping and promotion of the child's rights, as republished, it is in *the minor's interest* to maintain and consolidate his/her *personal relations*, not only with the parent the child does not reside with, but also with the *other members of the family*, and, more broadly, with all the persons descending one from the other or from a common predecessor, with whom they share family relations, such as, for instance *the grandparents*. Similar provisions are included in art.5(1) of the Convention on the personal relations concerning the children of 2003, according to which, "subject to the higher interest of the, personal relations may be established between the child and other parties than the parents, with whom they hold family relations".

In this regard, in a case[26] judged before the court of appeal, the court has shown that "the court on the merits properly concluded that the minor is entitled to maintain personal relations not only with the parent to whom the minor was entrusted, i.e. the mother, but also with the close relatives, by virtue of the family relations, it being in the minor's interest to maintain and consolidate her family relations and considering that the maternal grandmother is a direct relative (...). This is required the more so since the absence of these relations can actually cause emotional unbalances in the minor and in order to provide her with a balanced and normal environment, by encouraging the relations with the biological family".

The Court of Justice of the European Union also ruled on the right of the child to keep, maintain and consolidate the personal relations with the other family members, appreciating that the notion of "*visiting rights*" not only concerns the parents' visiting rights with regards to the child, but also with regards to other persons with whom it is important for the child to *maintain personal relations*, including the *grandparents*. Thus, in a case[27] having as subject a "request submitted by a grandmother in Bulgaria who mentioned that she was unable to maintain quality contact with her grandson, residing at the father's domicile in Greece, and after she had requested, in vain, the support of the Greek authorities, she informed the Bulgarian courts of law requesting them to establish the manner for her to be able to exert her visiting rights in relation to her grandson. She requested to see him periodically, one weekend a month, and to receive him, at her residence, twice a year for two or three weeks during the child's holidays. The first degree and appeal competent courts in Bulgarian rejected the request for lack of jurisdiction, because a regulation of the European Union (Brussels Regulation II a)[28] stipulates that the competency rests with the courts of the child's customary residency member state (in this case, the Greek Courts).

Notified as last instance, Varhoven kasatsionen sad (The Supreme Court of Cassation, Bulgaria) holds that, in order to determine the competent court, it must be set whether the Regulation Brussels II a applies to the grandparents' visiting rights.

In the decision passed, the Court of Justice first finds that the notion of "visiting right" according to the provisions in the Regulation Brussels II, a should be autonomously construed. After reminding that this regulation concerns all the decisions in the field of parental responsibility and that the visiting right is regarded as a priority, the Court shows that the EU legislator choose not to restrict the number of persons susceptible of exerting the parental authority or of benefiting from visiting rights. Thus, according to the Court, the notion of "visiting right" concerns the visiting right not only of the parents in relation to the child, but also of other persons it is important for that child to hold personal relations with, including the grandparents.

The Court further mentions that, in order to avoid the adoption by the various courts of contradictory measures and in the higher interest of the child, the same court should also rule on the visiting right, in principle, the one at the customary residence of the child."

4. Conclusions

To conclude, we emphasize that the *personal relations* between the minor and the parent the child does not customarily live with should always place the

[26] Craiova Court of Appeal, 1st Civil division I, civil decision no. 24 of 21 January 2009, at www.portal.just.ro, *apud* Elena Roșu, Daniel Andrei T. Rădulescu, *op. cit.*, pp. 167-168.

[27] The Decision of the European Court of Justice of 31 May 2018, case C-335/17, Valcheva/Babanarakis, in "Press Release no. 78/18", available [online] at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/cp180078ro.pdf (accessed on 03.12.2020).

[28] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (JO 2003, L 338, p. 1, Special edition, 19/vol. 6, p. 183).

higher interest of the minor first. This means that the minor must have *balanced relations with both parents*, so that their separation and the possible tensions between them affect him as little as possible. Each parent is under the obligation to place the *higher interest of the child first* when exerting the right, respectively the obligations deriving from the same.

The European Court of Human Rights[29] ruled in a similar way, showing, in the case *Monory v. Romania and Hungary* "the possibility of the parent and of the child to mutually enjoy each other's company is a fundamental element of the family life, and the national measures restricting this possibility represent an interference with the right to family life protected by art.8, the states being bound to guarantee the reunion between the children and their parents".

Moreover, in the case *Mustafa and Armağan Akin/*Turkey, no. 4694/03, of 6 April 2010[30], ECHR held that "the claimants – father and son – stated that the terms of an entrusting decision passed by the national court infringed their rights granted under article 8 of the Convention. These terms hindered the son's contact with his sister, who was entrusted to the mother. Moreover, the father was unable to maintain personal relations with both his children together, because the period spent by his son with the mother coincided with the period he spent with the daughter. ECHR regarded the decision of the court to separate the two siblings as an infringement of the claimants' entitlement to the observance of their family right, because it not only prevented them from seeing each other, but it actually made it impossible for the father to enjoy the company of both of his children at the same time".

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[29] CEDO, *Monory v. Romania and Hungary* in https://jurisprudentacedo.com/Monory-contra-Romania-si-Ungaria-Rapire-internationala-Pierderea-legaturilor-cu-un-copil.html (accessed on 04.12.2020).

[30] See, European Union Agency for Fundamental Rights and the Council of Europe, *Handbook on the European Law on the Rights of the Child*, Luxembourg, 2015, p.86, available [online] at fra.europa.eu (accessed on 10.12.2019).

THE PRIORITY OF PUBLIC INTEREST PRINCIPLE IN THE PUBLIC PROCUREMENT CONTRACTS

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Abstract

Important by object, value and general interest for which they are concluded, the public procurement contracts have a dual nature, although they are most often qualified as administrative contracts, with particular characteristics. Based on models known as FIDIC contracts, they contain standard clauses, but also clauses in accordance with the specifics of the contracted works and the need to adapt them to the problems that arise during execution. Terminating them is the last resort the parties should make use, but this can sometimes be inevitable. In such cases, the damages suffered both by the contracting authority and the entrepreneur may be significant.

The concept of "public interest" is assigned a supernatural aura of something that goes beyond the power of understanding of ordinary people, that is, those at whose service state administration should be in its broadest sense. The concept of "public interest", although overused in and by public administration, seems as difficult to define as the concept of "freedom". The "public interest" is for many people just like freedom: we all know what it is until we have to define it, explain it, apply it in concrete circumstances. The "public interest" seems to us, by its very nature, to be an imprecise, evolutionary and random notion. But in all cases, it is subsumed to the idea of the well-being of the public, not of the arbitrary will of the public authority, not of the eventual limited interest of such an entity.

In public administration "public interest" is so often mentioned and invoked that it can be said that it has already become a kind of legal institution but... without rules or with rules hard to identify! But an institution in law may be defined, as is well known, as a set of rules, substantive and procedural rules, set up to regulate legal relations, behaviours, and to take appropriate decisions in specific situations and penalize violations of accepted and known rules. Or shorter: the institution is a uniform set of legal rules that are joined together by object and purpose.

Keywords: *public interest, public procurement, contract, public authorities, contracting authority.*

1. The origins of the concept of "public interest"

Etymologically, the concept of "public interest" comes from English law, whereas that of "general interest" comes from French legal language. Despite what is sometimes claimed, namely that the "public interest" would be an "invention" from the beginning of the last century of an American lawyer named Louis Brandeis[1], it appears to be more like an "invention" of Aristotle. Anyway, we believe that this cannot be considered a serious deed compared to many others that have occurred in the history of intellectual property[2]. We could even add that the "public interest", taken as such, is just an idea. And like any idea, is free, that is to say, it doesn`t belong to no one and it is free for everyone at the same time, so it can be resumed and developed by anyone. But as Law No. 206/2004 on good conduct in research activity considers plagiarism as being also the appropriation of ideas from another person, we have to remember the one who has the right of priority in its formulation, more than 23 centuries ago.

In fact, Aristotle, in his book named ***Politics***, when referring to state revenue and expenditure (which are of general interest), he claimed that for the distribution of public works - jobs or services – it should not be taken into account the principle of quid pro quo, because the state has social policy considerations that have to change the prevailing principle in the private economy. Aristotle also stated that ***"the good is justice, that is, the general interest"***.

In the absoluble monarchies, the king and the state were one, according to the famous and synthical definition of Ludovic's 14th of France autocracy. But the sunset of this perspective on the relationship

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[1] Louis Brandeis (1856-1941), has been a lawyer in Boston (quality in which he has been noted as a defender of the progressive cases and a *pro bono* defender which brought him the "Ombudsman" and the "Robin Hood of Justice" names), the parent of the concept of "right to privacy", his work on the subject, inspired by the new fashion of photography (being appreciated as one that added a new chapter in US law) and then a judge at the US Supreme Court between 1916 and 1939. It has been a critic of monopolies, all-powerful corporations and public corruption.

[2] In the context, we have to remember here that the famous statement attributed to J. B. Kennedy, made by him in his speech from 1961, when he took oath of office: *"Don't ask yourself what the country did for you, ask yourself what you did for the country"* belongs in reality to the Lebanese-American poet and philosopher Khalil Giban, being written more than 30 years before, to encourage their compatriots in their fight against the Ottomans. But it also belongs to Nicolae Iorga, assassinated in 1940, who in one of his writings urged: *"At the end of each day consider not what others have done toward you, but what you have done toward others."* Attributed unfairly, but with obsession to J.F. Kennedy, this had the effect of much repeated lies coming from an authority, which have been accepted as truths since it is useless to be contested!

between the state and the sovereign and on that between the state and its subjects was not far from the moment when it was made, Enlighteners such as Jean-Jacques Rousseau[3] supporting in their works the supreme value of the **general will** (of the sovereign people) and **the general interest by which he understood the common good** and the general act, that is the law. The same Jean-Jacques Rousseau, considered by Edmund Burke[4] as the principal ideologist of the French Revolution, argues that *"**since no man has a natural authority over his fellow human beings, no authority is legitimate unless it is based on the consent of those who submit to him.** Social order is a holy right that underpins all others. This right does not come at all from nature, but is based on agreements (...). Each of us shares the person and all his power under the supreme leadership of the general will; and we receive each as an indivisible part of the whole."*

That J-J Rousseau influenced the revolutionaries is also demonstrated by Le Chapelier[5], who had the initiative, in 1791, to disband the corporations. In his report on the law stated that *"there are no more corporations in the state, **there is only the individual's particular interest and general interest**"*. Interests that are not excluded one from each other. On the contrary, they are enhancing each other.

It is therefore not fair to attribute neither to John Stuart Mill[6] nor to his mentor, Jeremy Bentham[7], the "invention" of this concept of "public interest". But it can`t be excluded their important contribution to its development. However, the one who is considered to have influenced with his ideas regarding the "public interest" the case law is, indeed, Louis Brandies who invoked the concept in 1905 in a work in which he deplored the fact that good lawyers abdicated their duty to use their knowledge and skills for the protection of human beings, to protect the interests of big corporations. In other words, L. Brandies claimed that the public interest was about defending and protecting people, not corporations, whose interests are limited to profit and a small number of beneficiaries. But it was only more than 50 years after Brandies's work that young US law graduates started to define themselves as "**public interest lawyers**" to distinguish themselves from **corporate lawyers**. The concept was meant to warn that **they chose not to represent the interests of strong companies, but to be lawyers of those living in poverty, of the vulnerable**.

However, the concept of "public interest" is also found in the US press legislation of the '20s and this is perhaps the area that best demonstrates that **the "public interest" is imprecise, evolutionary and random**. Thus, for example, a few decades ago, of "public interest" was considered to be informing the public that one or another MP was homosexual or drug-consuming, being irrelevant his possible violent behavior in the family or to people of other colors, or to the fact that an accident has been committed in a state of inebriation. However, nowadays the vision of these types of behavior is completely different and it can be said that if "public policy" and "public interest" are not identical concepts, there is a close connection between them.

Little by little, along with principles such as "transparency" or "accountability", and later "economicity" or "efficient spending of public money", which are seen as the yardsticks of democracy and of the public economies of States (public finances) and rules of law and behaviour in actions without which the administration is not democratic and/or efficient, the concept of "public interest" has become... a principle of public administration and is now considered a foundation of public law. An area in which, although one of the most used terms, the concept of "public interest" is neither defined nor correctly understood.

While in the press, in morals or in pure politics, the concept of "public interest" is by definition evolutionary and non-homogeneous, it is not and cannot be the same in the public administration, a legal definition with a high degree of generality being welcome. Even if in the administration, it must be interpreted and applied in accordance with concrete circumstances. In other words, it's a case-by-case fact. However, it is not easy to define the concept of "public interest". And we believe that understanding and applying it correctly to each case in which it is invoked also involves taking into account the "general interest" and the "private interest".

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[3] Jean Jacques Rousseau (1712 - 1778) became famous in France with an essay about the damaging consequences of the progress of arts and sciences on public morals. Its works "The Social Contract", "Emile" and "Encyclopedia" for which he worked with Diderot and, after writing and publication, have been banned in France, are considered fundamental to the 1789 French Revolution.

[4] Edmund Burke (1729-1797) detested J.-J. Rousseau, accusing him of never practicing a single virtue (there are enough arguments) and named him "*Socrates lunatic of the National Assembly*" (French, n.n).

[5] Isaac René Guy Le Chapier or Jean le Chapier (1754-1794), a French lawyer and a revolutionary politician, was a Member of the National Constituent Assembly and its first president for a short period (3-16 August 1789), dedicated to preparing important laws. Among those that were adopted with his contribution was the law against corporations, guilts, workers' organizations and the right to strike. Suspected of wanting to reinstate Royal Authority, also because of fear of terror fled to London (from where he came back to avoid the seizure of his property), he was charged with espionage, sentenced to death and guillotine on the same day as Malesherbes (lawyer of King Ludovic XVI, With Raymond de Seze).(*http://en.wikipedia.org/wiki/Isaac_Ren%C3%A9_Guy_le_Chapelier*).

[6] John Stuart Mill (1806-1873), utilitarian phylosopher.

[7] Jeremy Bentham (1748-1832) lawyer and philosopher with ideas of amazing timeliness. He promoted individual freedom and free initiative, separation of religion from the state, freedom of expression, universal suffrage, equal rights for women, the right to divorce, decriminalization of homosexuality, abolition of slavery and death penalty, the abolition of corporal punishment, including for children and animal rights.

2. "Public interest" and/or „general interest" and „private interest"

The "Public interest" and "general interest" are often considered in doctrine, especially administrative one, as they appear to be equivalent in terms of one and the same. In this view of the two concepts, the difference between them would only be of a semantic nature, so their different expression would seem to have no consequences in terms of substance. We believe that a difference between these notions, which are, however, interrelated, exists, it is obvious and important. The link is that both are considering an interest belonging to a large number of people. But the differences are not just about semantics. In particular, we do not believe that the terms "public" and "general", or those of "public interest" and "general interest", are equivalent and (always) interchangeable. The public interest is seen from the perspective of the authority. General, from a crowd perspective. This differentiation criterion is not enough either, but it still seems important to us: we do not have general institutions, we have public institutions and even the legal fiction called the Public Ministry.

As regards the "private interest" or "personal interest", it is most often seen in opposition to the "public interest" and/or the "general interest". Here things are relatively simple: the "private interest" and "public interest" or "general interest" cannot be in conflict or should not be in conflict. When the two categories of interest are fundamentally to the contrary, either the "private interest" is illegitimate, or the alleged "public interest" or the alleged "general interest" is contrary to the constitutional order, fundamental rights and freedoms of citizens, and in this case, it ceases to be a real "public interest" or a "general interest".

The concept of "public" itself has multiple meanings in law depending on the various branches of law. And within the same field, it depends on the context in which it is used. For example, the concept of "public" in criminal law is very distant from that of the public in administrative law, but it has no single meaning under criminal law either.

The most general meaning is the term "public" and "public interest" in administrative law (in which it is also considered to be the most important[8]), but also here the nuances may differ. In general, in administrative law, the term "public" refers to the state, to the whole population, to what is made available to all. However, public institutions do not only work to satisfy "general interests" or "public interests". Whenever they act, they also follow, even if only mediated, a private interest. And when all legitimate private interests are satisfied, the action of the public entity is of a "general interest" or a "public interest".

Public law (never called a general law) governs relations between public entities and between such entities and individuals, whereas private law consists of rules governing relations between individuals, understanding by private individuals, all those who do not hold a public office or are not in the exercise of public office. However, we note that the public interest and the general interest are protected both by rules under public law and by rules under private law. That the limitation of the rights of the data subject is justified by the need to protect the legitimate interests of all, i.e., the general interests, and that these general interests are implemented and protected by public institutions. But these entities are not called upon to defend only the general interests of the population, but also the individual interests, and when such an entity acts to protect an individual interest, its action also aims at protecting the general interest.

However, we do not believe that the concepts of "public interest" and "general interest" are equivalent and interchangeable, and the distinction between the two concepts can be easily seen and achieved when it comes to rights and freedoms, to the interests that are protected by the law: general interests by public law rules, legitimate interests of individuals under private law rules.

For the proper assessment of the relationship between the public interest and the private interest, we have to remember here that it is also a principle of law that which states that the authority acting in the name of the achievement of the "public interest", even when its action is intended to protect or penalize the rights of a private individual, is allowed only what the law expressly allows it, while the individual is allowed everything that the law does not expressly prohibit him.

3. The public interest and the priority of the public interest in public procurement contracts.

Europe's fallen behind at the number of kilometers of highways achieved over the last 30 years (we are last among EU Member States) but first in terms of the price per kilometer of highway built, Romania has paid huge amounts of money in compensation to contractors with whom it has contracted highway works and this cannot be in line with the public interest, the general interest or the particular interest. We believe that the (multiple) reasons of this state of affairs are also a wrong vision of the administration and of the entity representing the Romanian state in contracting for such works and as far as the public interest is concerned, the way in which it is intended to be truly accomplished.

The factual situation which led to the applied research from which this Paper was born is as follows (it comes as a study-case):

The BBB – Beneficiary (a contracting authority) announced in 2015 the organization of a tender for the construction of a highway segment and made available

[8] C. Clipa, "The concept of public interest, between legal definitions and economic speculation", *Romanian Magazine of Private Law* (Universul Juridic) no. 1/2019.

to bidders, inter alia, a geotechnical study carried out in 2007 and updated in 2011. The Geotechnical study classified the location of the auctioned segment of the highway as having a moderate geotechnical risk. The maps provided were not in line with the situation on the ground at the time of the tender. In addition, at the time of the tender, the beneficiary had not completed the procedures for expropriation of all the land necessary for the construction of the highway.

The tender was won in 2016 by the contractor AAA, with an agreed execution deadline of 18 months, of which 6 months for the design work and 12 months for the actual execution of the construction works. Under the contract, the works were scheduled to be completed by summer 2017.

After the conclusion of the contract for the execution of works, which also stipulated the time limits for the land to be given and the order to start works to be issued, the beneficiary requested twice to extend the date for the start of works by more than 5 months, the reason invoked being that the beneficiary was not provided with the funds (for the first 4-month extension) and that of non-completion of the expropriation procedures (for the second extension). The contractor accepted the beneficiary's requests and undertook (by the signed amendment) not to request penalties from the beneficiary for these extensions to the date of the location's handover and of the start of the works.

By conducting the geotechnical studies related to the design phase of the works, the contractor has found that the geotechnical risk level of the site is high and not moderate, as established by the beneficiary study of 2007/2011, that construction works and archaeological works were necessary in addition to those envisaged at the time of the conclusion of the contract and that those new elements involved a significant extension of time but also higher costs, given their scale and difficulty. The beneficiary, however, refused to grant the requested time extensions (the cost extensions being also rejected) and penalized the contractor's failure to implement the work schedule by terminating the contract.

Upon termination of the contract, the **contractor AAA**:

(i) has sued the contracting authority because the contracting authority has unduly terminated the contract;

(ii) has requested that the contract be terminated by judicial decision on the fault of the contracting authority;

(iii) has claimed damages of 60 million lei from the contracting authority and a significant amount of money as costs.

In turn, the Beneficiary BBB:

(i) has made a counterclaim requiring the contractor to pay interest for not fulfilling the obligations on term and to pay a half (1/2) of the costs of advice paid in the course of the performance of the contract;

(ii) resumed in 2020 the procedure for tendering and awarding works, completed in 2021 at a price of 9 million lei per kilometer higher than the one contracted with AAA.

By the judgment delivered in December 2020, both the AAA's main claim and the BBB's counterclaim were accepted by the court, a common fault was found in the failure of the contract and the beneficiary was forced the entrepreneur to pay damages of 20 million lei, whereas the entrepreneur had to pay damages of 3 million lei to the beneficiary. The court held that the beneficiary limited its claims to the payment of penalties and part of the advice given during the execution by the engineer, although the damage suffered as a result of the failure of the contract was higher.

One of the defenses of the Beneficiary during the process was that the termination of the contract was justified by the principle of priority of the public interest and of its primacy over the principle of freedom of contract.

The beneficiary has thus indicated that:

(i) ***in the settlement of disputes relating to the entering, execution and termination of an administrative contract, shall be taken into account the rule that the principle of freedom of contract is subordinate to the principle of priority in the public interest***;

(ii) ***while the principle of "contract is the law of the parties" applies to private contracts****, the administrative contract* ***contains four types of powers exercised by the public authority****, namely: (A) the power of direction and control which may be shown in instructions and orders; (B) the right to impose penalties for delays; (C) unilateral modification power under the public interest which is one of the fundamental characteristics of the administrative contract and (D) unilateral termination of the contract*;

(iii) ***the parties are not on an equal position in public procurement contracts***, as this is manifested in *the right of the administration to lay down, as a matter of principle, certain contractual terms (the so-called regulatory part of the contract) which cannot be negotiated with the entrepreneur and subsequently to unilaterally amend the terms imposed on the entrepreneur, in accordance with the public interest*;

(iv) that ***works on the public infrastructure of the state serve the public interest and aim at developing infrastructure in line with current needs and EU requirements****, so that they must have* ***the shortest possible deadlines for completion, that does not go far beyond the term assumed by entrepreneurs when signing the contracts***;

(v) that in public procurement contracts *the parties are obliged to accept certain regulatory clauses laid down by law or subsequent regulatory acts, but also have the power to negotiate other contractual clauses, however,* ***where the public interest so requires****, or where the performance of the contract is*

too difficult for particular, or has failed to perform his obligations as a result of default, the contract can be terminated unilaterally without recourse to justice;

(vi) that public procurement contracts *are also characterized by the special forms necessary for their conclusion, i.e., the specifications which contain some of the terms of the contract to be concluded, **with entrepreneur having only the possibility of accepting or refusing to conclude the contract***;

(vii) that *contracts for the design and execution of road infrastructure works are financed from public and European funds, which are strictly monitored and that any application by the contractor must be duly substantiated*;

(viii) *as a general rule, entrepreneurs do not respect the deadlines to which they commit and, during the execution of the contract, they seek to make use of any situation arising during the execution of the contract in order to obtain the extension of the execution period and the related additional costs*;

The court, it has rightly examined, this defense of the beneficiary, noting and expressing observations, judgments and arguments which can be summarized as follows:

(A) The public procurement contract has indeed the characteristics and characteristics shown by the beneficiary. However, the court added, *these contracts are concluded for **the purpose of meeting general needs** and it is undeniable that the road infrastructure is of **major public interest***, the special regulation of this type of contract being justified by the method of financing and the high value of the infrastructure, the need for public funds to be spent economically and effectively, whether from state budget or European funds;

(B) In the light of their value and importance, and of the needs to be satisfied by the performance of the contracts, the conclusion of the contracts requires that the public authority draw up complete, accurate and updated documentation, such that the tenders and the appointment of the successful tenderer make it possible to carry out the contracts **in line with the need to achieve public interest objectives**.

(C)The fact that **the parties are not on an equal footing in public procurement contracts does not mean that the procuring entities may abuse their position and that the principle of contractual balance, involving related rights and obligations, can be ignored**. This does not mean that the public authority is entitled to impose the performance of the contract on a timely basis and to impose sanctions, including that of termination of the contract, where the non-performance according to the terms of the contract or non-performance of a contractual obligation by the performer is also due to fault (higher, lower or exclusive) of the public authority.

(D) In public contracts, too, the rights and obligations of the parties to the contract must be established in a manner which respects the principle of contractual equilibrium but also which makes it possible both for the contracting authority and the entrepreneur to fulfill their obligations.

(E) the inequality between the parties in public procurement contracts and the way in which they are financed *does not transform the contractual relationship of public procurement contracts into one of subordination. On the contrary, their value and the public interest call for deeper cooperation by contracting parties even in the case of private contracts, because both the public authority and the entrepreneurs have to work together to satisfy the public interest.*

In our opinion, other arguments can be added to the those of the court. And we begin here by mentioning the contractual imbalance, to the extent that it exists and makes it impossible to perform the works, to carry out the contract and thus to carry out the public interest. Obligations which cannot be met by entrepreneurs cannot be imposed in the name of the public interest and contractual balance must also exist in such contracts. The contractual imbalance exists whenever the real costs of the contractor would be higher than the real value of the works performed. The contractual imbalance, whether it does exist, it makes impossible to carry out the contract and to satisfy the public interest, because it does not meet the public interest that the entrepreneur is unable to fulfill his obligations, whose effects are propagated in the chain. However, this does not create wealth: the benchmark of "public interest" is ultimately the well-being of all.

However, despite its importance, public procurement laws have not defined the "public interest" and do not provide criteria for its assessment. By trying to identify such criteria, we should first recall that the "public interest" must be identified, as "public order" by the judge, on a case-by-case basis, obviously with due regard for the general principles of law, the rules of law relating to incidents and the particular case in which they apply.

Indeed, despite its importance, neither Ordinance no. 34/2006, which governs the contract from which the rose the dispute which is subject to our comments, nor Law no. 98/2016 (applicable to award procedures initiated after the date of its entry into force), defines the “public interest” or the “public interest priority”.

A legal definition of the "public interest priority" is, however, stated in the Law no. 477/2004 on the Code of Conduct for contracting staff of public authorities and institutions, which states that ***“the priority of the public interest is a principle that contractual staff have the duty to consider the public interest above the personal interest in the performance of their duties”***. Form this definition we understand that **although the public interest is superior to the personal interest, these interests are not mutually exclusive and are interrelated**.

The doctrine, in the few dedicated works, defines the "public interest", similar to the definition of "legitimate public interest" met in the law on administrative litigation, as ***"that interest which aims***

***at the rule of law and constitutional democracy, and this implies the guarantee and observance by the institutions and public authorities of the legitimate rights, freedoms and interests of citizens, meeting community needs, carrying out the competence of public authorities" and/or "performing the service tasks in accordance with the principles of efficiency, effectiveness and cost-effectiveness of resource spending"* (article 2 (1)(r) of the Law no. 554/2004)[9].**

It follows that even according to the administrative law and doctrine:

(1) the public interest aims at **guaranteeing and respecting citizens' rights and freedoms**;

(2) **the public interest does not annihilate the private interest**, on the contrary, it is intended **to guarantee and leverage it**;

(3) achieving the public interest means **satisfying the general interest, the needs of the population** and

(4) the public interest obliges the beneficiaries of budget funds and public money, to spend them in accordance with the principles of transparency, efficiency and cost-effectiveness. However, as the **"resources"** (public money) are made up of and on the basis of contributions from the public, private persons, it follows that the aim pursued and the obligation of the authority to make transparent and effective use of financial resources is also imposed in respect of the legitimate interests of citizens.

These conclusions are not, however, sufficient where the public interest is called into question for a decision to terminate public procurement contracts, in particular those of the type from which the dispute analysed in the present paper arose, that is to say, contracts of high value and the realization of which the public authority is interested and which involve not only substantial material resources. Then it is necessary to examine the practical application of the principle to the present case.

In contractual matters, the common sense of interest obliges all participants in the legal life to be bound by the contractual rules they have themselves agreed, the fact that these rules are laid down in purely civil law contracts (the rules of which are, however, to a large extent applicable), either of administrative law being devoid of special legal significance.

Generally seen, **the interest** appears to be **a concern to obtain success, advantage**. Nor from this point of view the two categories of interest (public and private) does not exclude each other: the public interest can only be that of gaining an advantage for the general population, **but neither should the particular interest be seen as merely to obtain advantages or profits for personal purposes, and this is because part of the profit (and not only part of the profit itself) is the source of revenue to the state budget or, where appropriate, local budgets, by compulsory levies (taxes and duties) due according to the law**. In other words, the realization of the private interest, of the profit, part of which is to be paid as taxes on the state budget in order to secure the funds necessary for the realization of the general interest expenses.

In the case of public procurement contracts, the interest, satisfaction of the interest is also the reason for the **selection** of any legal entity **between two or more options** available to that entity and is the reason for **reasonable, profitable** (material and moral) **actions**, which is the reason why **any decision maker makes a decision, an act or commits an action**. And in the case of public authorities, who do not have their own interest in what they do, and who work and act not for themselves but in the general interest, their decisions must take this interest into account as a matter of priority. The correct decision of the acquiring authority depends on the correct identification and determination of the general interest and in determining it, the criterion of opportunity is one of those which even determines the legality of the decision.

In this respect, it should be noted that the Ordinance no. 34/2006, in article 287^7 (2) (introduced by the Ordinance no. 19/2009), provides when decisions must be taken as to whether or not such contracts are to be maintained. The provisions contained therein, although concern requests for **suspension and interim measures** which may be ordered by the courts in the event of such requests, are to be considered as being of principle for public contracts and, *mutatis mutandis*, they shall apply in all those circumstances in which the fate of such contracts is called into question.

According to this law:

(1) when dealing with an application for suspension or interim measures, the court must take into account **the likely consequences of the measure for all categories of interests likely to be harmed, including that of the public interest**;

(2) the court **may not order** the measure of suspension or interim measures if **their negative consequences could be greater than their benefits**; and

(3) that a decision **not to take provisional measures must not prejudice any other rights** of the person making the request for suspension or for interim measures.

We believe that if the legislator has provided for **provisional measures**, by definition, that they have to be time-limited, reduced and revisable (such strict rules) and made their adoption/disposal conditional on **any possible consequences**, requiring that **losses should not be greater than the benefits**, even more so, **these rules are applicable when the very existence and/or performance of public contracts is at issue**, i.e. when decisions are much more important than the time-limited measures, as is the case with termination of contracts. Such measures may be

[9] For the interpretation of article 2 (1)(r) of the Law no. 554/2004: E. Marin, *The administrative law no. 554/2004. Comments on articles*, Bucharest (Hamangiu, 2020), p. 30 and G. Bogasiu, *The administrative law commented and annotated*, Bucharest (Universul Juridic, 2018), pp. 58-134.

decided and/or ordered only with due regard for all interests and not only for the public interest, and in particular with due regard for, on the one hand, **the fact that measures with negative consequences greater than the benefits may not be ordered in the name of public interest**, and, on the other hand, the fact that measures taken on the grounds of the public interest cannot harm the rights and legitimate interests of other participants in the legal life.

4. Conclusions

We believe that the legislator has imposed an opportunity criterion not only for the provision of an investment in the budget and for the conclusion of public procurement contracts (article 42 of Law no. 500/2002 on public finances), but also when a measure is to be taken by the public authority concerning the termination of a public contract, because the main public interest is that of the performance of the contract, the public interest being satisfied by the achievement of the objective (obviously respecting the rules governing spending public money), and not by abolishing the contract that causes substantial material damage and extends the time required to achieve the goal. And where the losses resulting from such a measure taken by the contracting authority outweigh the benefits, the measure giving rise to such effects cannot be considered appropriate, cannot be considered to be in line with the "public interest".

We are, of course, convinced that the identification of the real public interest in public procurement contracts, in particular highway construction contracts, is a delicate matter, the good decision, the desirable decision involving complete information, the correct and fair assessment of these contracts, taking into account the concrete circumstances of the execution and problems arising during the performance of the contract, establishing whether or not there is justification for the performance of the obligations, interpreting the terms of the contract to the extent necessary to produce the useful effects for which the contract has been concluded, **assessment by the decision maker of the direct cost and time impact of its decision and the subsequent impact arising from the postponement of meeting the general interest which is the achievement of the objective.**

In addition, it is necessary to analyze and assess objectively the fulfillment of its obligations by the decision-maker (authority). It is necessary that the decision-maker not having fault in performing the contract, or contributing by his actions or inactions to the failure of the contract, the public interest – because in such situation, the parties' unequal position, the decision-making and supervisory powers of the authority may not be invoked by the authority to cover possible non-compliance with its contractual obligations or factual circumstances having an impact on the ability to fulfill obligations which were not fully and correctly addressed by the authority at the auction stage and at the time of the conclusion of the contract.

In the present situation, we believe that **the criterion of opportunity for termination of the contract was not fulfilled either**, given that the realization of the section of highway contracted with the entrepreneur whose contract was terminated was not recontracted until 2021 and that the financial losses are also significant, even taking into account only the price differences per kilometer of highway between the contract that was terminated and the contract concluded in 2021. However, as regards public expenditure, opportunity is also a criterion of legality: in the present case, the losses resulting from termination of the contract are high (in our view huge and difficult to identify in full), plus those necessary to conclude the new contract at a much higher price, which means that the termination measure was not legal in this respect.

It is true, however, that comparing and weighing the benefits and losses of such decisions is not easy. But it is in the public interest that this should happen. In the public interest it is also the obligation that the tenders for highway works be carried out on the basis of complete and correct documentation.

Termination of public contracts should be an extreme measure, desirable only in those situations where the breach of contractual obligations by any co-contractor has no other remedy given its severity.

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SMART CONTRACTS TECHNOLOGY AND AVOIDANCE OF DISPUTES IN CONSTRUCTION CONTRACTS

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Abstract

Claims and disputes had become endemic in the construction industry and, in spite of the continuous developments of the standard forms of contracts and consensual dispute resolution schemes from the past years, there is no indication that the incidence of claims and disputes is decreasing. Traditionally it is considered that the most often contractual disputes result from inappropriate or unclear risk allocation in the contract, or from breach of contract. However, recent studies suggest that these are only the apparent causes of disputes, the most profound one being the improper behavior of the parties involved in the contract determined by their asymmetric information and conflicting interests regarding the contract. This paper analyzes the most popular disputes avoidance methods and techniques currently used in construction industry, the most common causes of construction disputes, the behavioral risk as the main source of construction disputes, and how the available information and digital technologies would be embraced in the near future to prevent the disputes in construction contracts in an efficient manner.

Keywords: *construction contracts, avoidance of disputes, technology, smart contracts, blockchain, Building Information Modeling (BIM).*

1. Introduction

Prevention of claims and disputes is a constant preoccupation of the professionals involved in the construction industry, an industry known, *inter alia*, for its adversarial culture. In spite of the continuous development of methods and techniques used for avoidance of such claims and disputes, their number remain significant, involving substantial resources for their settlement.

This paper analyses the methods and techniques currently used in the construction industry for avoidance of contractual disputes, the most common causes of these disputes, and how the information technologies developed in the recent years may help the contracting parties to prevent the disputes in construction contracts in the near future.

2. Methods and techniques currently used in the construction industry for avoidance of contractual disputes

2.1. Standardisation of construction contracts and balanced allocation of risks

The practice of using standard forms of contract for construction and engineering projects is credited to have its origins in the nineteenth century in England. The early editions of *Hudson's Law of Building, Engineering and Ship Building Contracts*, such as the one published in 1895, contained standard forms of construction and engineering contract prepared by the War Department, the Builders' Association and the Institute of British Architects, and the London County Council[1].

In the UK standard forms of construction and engineering contracts are produced by a number of industry bodies. The most widely used form of construction contracts are the contracts in the Joint Contract Tribunal ("JCT") suite, the New Engineering Contract ("NEC) suite, and the suite of contracts published by the Institution of Civil Engineers ("ICE")[2]. Standard forms of contract are also produced by other English industry bodies including the Association for Consulting and Engineering ("ACE"), the Royal Institute of British Architects (the "RIBA"), the Institution of Chemical Engineers ("IChemE"), the Institution of Mechanical Engineers ("IMechE"), and the Royal Institute of Chartered Surveyors ("RICS"). Domestic government contracts are often in a form from the General Conditions for Works Contracts suite ("GC/Works")[3].

In international construction and engineering projects it is common for parties to use standard forms of contract produced by the International Federation of Consulting Engineers ("FIDIC"). Moreover, in several countries from Central and Eastern Europe (including Romania), the FIDIC standardised conditions of contracts became mandatory elements of local public procurement law[4].

In addition to the standard forms produced by the aforementioned entities, it may be noted that there are

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[1] J. Bailey, *"Construction Law"*, Routledge, 2011, page 116.

[2] In August 2010 ICE announced that it is withdrawing from the ICE Conditions of Contract following the ICE Council's decision in 2009 to solely endorse the NEC3 Suite of Contracts.

[3] J. Bailey, *op. cit.*, page 123.

[4] L. Klee at al., "International Construction Contract Law", Wiley Blackwell, 2015, page 93.

a number of institutional bodies or governments which produce standard form construction and engineering contracts that are used widely in those jurisdictions. These include (among many others) the European International Contractors ("EIC"), the Canadian Construction Documents Committee, the Swiss Society of Engineers and Architects, the Swedish Construction Contracts Committee, the Danish Construction Association, the German DVA, the Joint Contracts Working Committee (Hong Kong), the Hong Kong government itself, the Singapore Institute of Architects ("SIA"), the Engineering Advancement Association of Japan ("ENAA"), the International Chamber of Commerce, and the World Bank.

The most widely used form of construction contracts in Romania in both private and public projects are the contracts in the FIDIC suite. For a certain period the use of FIDIC conditions of contracts for public works was mandatory for the public authorities[5]. However, the FIDIC standardised forms were replaced in 2018 by the national standard construction contracts conceived by the Romanian Government[6].

The common purpose of standard construction and engineering contracts is to provide a coherent and predictable framework for the performance of the contract works, the making of payments, the administration of the contract and the project, and the determination or adjustment of the parties' respective rights and obligations. In this regard the issuing professional bodies put a great emphasis on the clarity of contractual provisions and procedures concerning such matters as the contractor's scope of works (and the quality of works required), the contract price and the timing and amount of payments, the contractor's time for completion and the effects of delay, the ordering and performance of variations, insurance, taking-over, guarantees and dispute resolution.

The cornerstone of the said standard construction and engineering contracts is the idea that a clear and balanced pre-allocation of responsibilities between parties in respect of certain risks that may transpire during the contract's execution is determinant for the avoidance of prolongation of construction completion times, of wastage of resources, and of disputes.

In this respect in the construction literature it was emphasized that[7]: *"Proper risk identification and equitable distribution of risk is the essential ingredient to increasing the effective, timely and efficient design and construction of projects. If the parties to the construction process can stop thinking in an adversarial manner and work in a cooperative effort towards obtaining an equitable sharing of risks based upon realistic expectations, the incidence of construction disputes will be significantly reduced."*

In the same manner, pursuant to another opinion[8]: *"In practice, an inefficient allocation (of an unclear risk or of a risk that the party is not able to control) will result in speculative claims, disputes, or even contractor bankruptcy."*

From this perspective, it is considered[9] that, *"provided they are not significantly altered"* by the parties, the standard construction and engineering contracts *"guarantee a balanced and efficient risk allocation"* and, thus, a reduced likelihood of disputes to the benefit of the parties.

Standard contracts provide risk allocation solutions for, *inter alia*, natural risks (such as unforeseeable physical conditions, exceptionally adverse climatic conditions or natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity), political and social risks (such as war, hostilities, invasion, rebellion, terrorism, revolution, insurrection, civil war, riot, commotion, disorder, strike, or lockout), economic and legal risks (inflation, shortage of materials, equipment or labor, changes in legislation), assigning responsibilities and liabilities to each contracting party regarding performance of works, organisation, time frames, guarantees, insurance, errors in technical documentations and payment.

2.2. Consensual forms of dispute resolution

For a significant period, the disputes resulted from construction and engineering contracts used to be referred to courts or arbitration.

The substantial length and costs related to these dispute resolution processes made the parties to resort to them only towards the end of a construction project, when the works were completed or nearing completion. As it was noted in the construction literature[10]: *"To invoke a formal dispute resolution procedure mid-way through a project has the potential to divert vital*

[5] The obligation for public authorities to use the FIDIC conditions of contracts for public works was firstly introduced in the Romanian public procurement law by the Common Order no. 915/465/415/2008 for the approval of general and particular conditions of contracts at the conclusion of the contracts of works issued by the Ministry of Economy and Finance, Ministry of Transporation and Ministry of Development, Public Works and Houses, subsequently abrogated by Order no. 1059/2009 issued by the Romanian Ministry of Public Finance. The obligation to use the FIDIC conditions of contracts was reintroduced by the Government Decision no. 1405/2010 regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds.

[6] The Government Decision no. 1/2018 for the approval of general and particular conditions of contract for certain categories of public procurement contracts related to the investment objectives financed by public funds replaced the former standardised public procurement contracts based on FIDIC conditions of contract, previously mandatory for the road and railway infrastructure works only, with new ones, extending in the same time their applicability to all the investment objectives financed by public funds.

[7] B. Shapiro, "Transferring Risks in Construction Contracts", 2010, page 5, available at: http://www.shk.ca/wp-content/uploads/2013/02/Transferring-Risks-in-Construction-Contracts-BSS.pdf.

[8] L. Klee et al., op.cit., page 18.

[9] L. Klee et al., op.cit., page 18.

[10] J. Bailey, *op. cit.*, page 1422.

resources from the continuation of the project works, at the expense of progress."

On a different note, in the same time, in the construction projects with a higher degree of complexity, the parties were often confronted with the lack of an efficient tool for the settlement in due course of the various contractual disagreements affecting the contemplated progress of works.

This situation led to the development in the last decades of consensual forms of dispute resolution that seek to achieve a consensual resolution of a dispute, rather than a resolution of a dispute through the determination or assessment of the parties' rights and obligations by a court or an arbitral tribunal. It was believed that a resolution of disputes by non-adversarial means or, at least, by adversarial process of a kind pre-agreed by parties, conducted by experienced construction and engineering specialists instead of persons not so familiar with technical matters (*e.g.* by judges or lawyers), will lead to the voluntary and quick compliance of the parties with the solutions established by consensus and/or with the decisions issued by the said specialists to the benefit of the contract.

In this respect, these days, the construction and engineering contracts contain dispute resolution provisions that regulate the conditions, steps, procedures and timelines which must be observed by parties for settlement of their disagreements. Such provisions commonly involve the notification of a dispute by an aggrieved party, followed by participation of the parties in a non-adversarial process (*e.g.* negotiation, conciliation, or some other form of attempted resolution), and in case the dispute is not resolved by agreement, the dispute is then to be resolved by an adversarial form of dispute resolution (*e.g.* expert determination, dispute board, arbitration or litigation).

For instance, FIDIC conditions of contracts provide that all contractual disputes are to be adjudicated in the first instance by a dispute board. The dispute board, called the "Dispute Ajudication Board (DAB)", "Dispute Board (DB)" or "Dispute Avoidance/Adjudication Board (DAAB)", normally comprises three (3) independent and impartial highly experienced engineers appointed by parties at the beginning of the contract. The scope of the DAB/DB/DAAB is to maintain the awareness of progress and potential problems by regular visits on site, as well as to ensure the resolution of disputes at an early stage. The DAB/DB/DAAB's decision on a dispute is obtainable within 84 days from reference to decision, is contractually binding with immediate effect, and becomes final and binding unless at least one of the parties challenges it by giving the other party notice of its dissatisfaction with the decision within 28 days from the issue of the decision. If the decision becomes final, it cannot be further challenged by either party at arbitration.

Thereafter, pursuant to FIDIC conditions of contracts, before commencement of arbitration, the parties shall attempt to settle their dispute amicably. As far as the scope of the amicable settlement stage is concerned, the construction literature[11] noted that this is mainly: *"to ascertain whether there is sufficient common intention to try to avoid the necessity of arbitration by seeking a mutually acceptable settlement."* Since at this stage the parties have already a determination of their dispute by the DAB/DB/DAAB, it is supposed that they have sufficient elements to negotiate and reach an agreement in good faith.

The final stage of dispute resolution mechanism provided by FIDIC conditions of contracts is the referral of dispute to arbitration.

Last but not least, it is noteworthy that by the Romanian national standard construction contracts, which replaced the FIDIC conditions of contracts in public works in 2018, the dispute resolution provisions switched from the FIDIC philosophy of dispute resolution back to the classical pattern, involving the notification of dispute by the aggrieved party (by a so-called "notice of disagreement"), followed by parties' attempt to settle the dispute by a non-adversarial process (by direct negotiation or by mediation), and in case the dispute remain unresolved, its referral to arbitration.

2.3. Relational contracting. Alliancing contracts

Relational contracting or relationship contracting arrangements aim to minimize disputes by recognizing and developing common interests among contracting parties. Project participants are encouraged to proactively manage and resolve conflicts and problems, targeting common objectives and reduced transaction costs.[12]

One of the most recognized modes of relational contracting is alliancing.

As it was noted in the construction literature[13]: *"In an alliancing model, the parties effectively abandon traditional rights of action, other than in limited circumstances. Their interests are aligned by a preagreed equitable sharing of risks and rewards in such a way that the parties are stimulated to collaborate to achieve maximum profit in relation to the delivered value."*

The key difference between traditional contracting methods and alliance contracting is that while the traditional contracting methods are based on the philosophy of fair and balanced allocation of risk to

[11] E. Baker, B. Mellors, S. Chalmers, A. Lavers, *"FIDIC Contracts: Law and Practice",* Informa Law, 2009, page 541.

[12] M.M. Rahman, M.M. Kumaraswamy, *"Joint risk management through transactionally efficient relational contracting"* in *Construction Management and Economics (online)*, Taylor & Francis (Routledge), vol. 20(1), pages 45-54.

[13] J.S.J. Koolwijk, "*Alternative Dispute Resolution Methods Used in Alliance Contracts"* in *Journal of Professional Issues in Engineering Education and Practice*, January 2006, page 44.

the parties, specific risks being allocated to parties who are individually responsible for managing the risk and bearing the risk outcome, in alliancing all project risk management and outcomes are collectively shared by the participants.

Alliance contracts generally include a so-called "no-blame" or "no disputes" clause where the parties agree not to litigate, except in limited circumstances. The intention of this approach is to avoid the adversarial or "claims-based" culture of the traditional construction and engineering contract, and in turn encourage the parties to find solutions to problems, rather than to deny responsibility and seek to blame others. To give effect to this, alliance contracts have traditionally not included a formal dispute resolution procedure but sets up a model of agreed behavioural principles to drive decision-making processes and issue resolution instead, serving to align the parties' objectives in relation to the project and reduce the risk of litigious disputes between the parties.

Generally, the alliance disagreements and disputes are resolved exclusively by the alliance leadership team, the emphasis being put on resolution by agreement, and not by resolution by reference to an independent person (*i.e.* a judge, arbitrator or expert). In this manner, the absence of an independent dispute resolution mechanism and, in particular, of a dedlock-breaking contractual mechanism compels the members of alliance leadership team to make their best endeavours to resolve disagreements themselves. In the exceptional circumstances in which the alliance leadership team is unable to resolve a disagreement, despite pursuing all reasonable opportunities to remedy it, the parties to the alliance may agree to termination.

The alliance cases analyzed in the construction law literature[14] revealed that parties to a project alliance adopted various approaches in their attempt to prevent disputes and motivate the alliance parties working together to achieve the same goals.

For instance, the *Acton Peninsula Alliance* was formed for the construction of the National Museum of Australia in the city of Canberra, Australia. In this project the parties have agreed to use a "no-blame" clause, waiving their rights to go to court or arbitration over a dispute. Only in case of an event of willful default by an alliance partner the "no-blame" clause could have been bypassed. However, no disputes were actually brought in front of a court or referred to arbitration in connection with the said project.

Another alliance, the *Waardse Alliantie*, was formed for the construction of a railroad project in the south of the Netherlands. In this project, when a dispute came up it was referred to the alliance leadership team to be resolved by negotiations. Whenever the alliance leadership team was unable to resolve a disagreement, the dispute was referred to minitrial, judged by a panel of "wise men" appointed by the alliance parties. The decision taken in this regard by the panel was non-binding for the parties, yet it was further discussed by the alliance leadership team, which subsequently tried to solve the dispute internally. If one of the alliance parties could not agree with the non-binding resolution, that party could refer the dispute to arbitration, seeking a binding solution. No disputes were referred to arbitration in this project.

Unlike traditional contracting, only a limited number of standard form alliancing contracts are available, including the NEC4 Alliancing Contract, TAC-1 (Term Alliance Contract) and FAC-1 (Framework Alliance Contract)[15], the last two being published by the Association of Consultant Architects and King's College London.

3. The most common causes of construction disputes in the recent years

Claims and disputes had become endemic in the construction industry and, in spite of the continuous developments of the standard forms of contracts and consensual dispute resolution schemes from the past years, there is no indication that the incidence of claims and disputes is decreasing.

In the attempts to identify the most proeminent causes of disputes, exhaustive studies and research into causes of disputes were conducted in the construction literature, being considered[16] that: *"Identifying common causes and consequences of unresolved conflicts and claims would allow for more effective dispute avoidance as well as more efficient resolution of 'unavoided and unavoidable disputes'"*. The results of these studies were centralized by P. Fenn[17] (please refer to Figure 1 below).

However, as noted by another author[18], the direct comparison of these results is "neither possible nor useful, because of the diverse industry cultures and differing methodologies and terminologies used in data collection, analysis and outcome presentation".

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[14] J.S.J. Koolwijk, *op.cit.*, page 45-46.

[15] TAC-1 (Term Alliance Contract) and FAC-1 (Framework Alliance Contract) are published by the Association of Consultant Architects and King's College London.

[16] G. Younis, G. Wood, M.A.A. Malak, *"Minimizing construction disputes: the relationship between risk allocation and behavioural attitudes"* in *Construction Management and Economics (online)*, Taylor & Francis (Routledge), vol. 20(1), page 732.

[17] G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731 (adapted from P. Fenn, *"Rigour in research and peer review"*, in *Construction Management and Economics*, 1997, vol. 15, pages 383-385, and P. Fenn, (2006) *"Conflict Management and Dispute Resolution"*, in D. Lowe, and R. Leiringer, *"Commercial Management of Projects"*, Blackwell Publishing, Oxford, pages 234-269.

[18] M.H. Kumaraswamy, *"Consequences of construction conflict: a Hong Kong perspective, Journal of Management in Engineering"*, 1998, vol. 14(3), pages 66–74, cited in G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731.

Emphasizing the need for a deeper analysis of the causal connection between conflicts, claims and disputes, in 1997 M.H. Kumaraswamy conducted a questionnaire survey on sixty-one (61) contemporary construction projects in Hong Kong[19], identifying the root and proximate causes of construction claims and disputes (please refer to Figure 2 below). The findings of the survey revealed a new perspective over the causes of disputes, *i.e.* that the behaviour and actions of the contracting parties play a major role in the apparition of disputes.

Last but not least, other authors as G. Younis, G. Wood, and M.A.A. Malak[20], and P. Mitropoulos and G. Howell[21] structured the causes of disputes in three (3) basic elements: project uncertainty, contractual issues and opportunistic behaviour.

While the project uncertainty is trying to be mitigated by the pre-allocation of risks between contracting parties, and the disagreements resulted from imperfections of contracts are expected to be mitigated by the multi-tiered contractual dispute resolution schemes, there are little remedies against the opportunistic behaviour of the contracting parties.

Figure 1 - Categorising Causes of Dispute (adapted by G. Younis et al. from P. Fenn)

Al Momani [15]	Causes of delay: poor design, change orders, weather, site conditions, late delivery, economic conditions, and increase in quantity.
Alkass *et al.* [16]	Strikes, rework, poor organization, material shortage, equipment failure, change orders, act of God.
Bristow and Vasilopoulous [17]	Five areas unrealistic expectations: contract documents, communication lack of team spirit and change.
Colin *et al.*[18]	Six areas: payment, performance, delay, negligence, quality and administration.
Diekmann *et al.* [19]	Three areas: people, process and product.
Heath *et al.* [20]	Seven areas: contract terms, payment, variation, time nomination, re-nomination and information.
Hewit [21]	Six areas: change of scope change conditions, delay, disruption, acceleration and termination.
Kululanga *et al.* [22]	Four sources of dispute: (1) errors, defects and omissions in the contract documents, (2) underestimating the real cost of the project in the beginning, (3) changed conditions and (4) stakeholders involved in the project.
Madden [23]	Three categories: legal, technical and quantum.
Molenaar *et al.* [24]	Three categories: people issue, process issue and project issues.
Rhys Jones [25]	Ten areas: management, culture, communications, design, economics, tendering pressures, lay, unrealistic expectations, contracts and workmanship.
Semple *et al.* [26]	Four areas: acceleration, access, weather, and changes.
Sykes [27]	Two areas: misunderstandings and unpredictability.

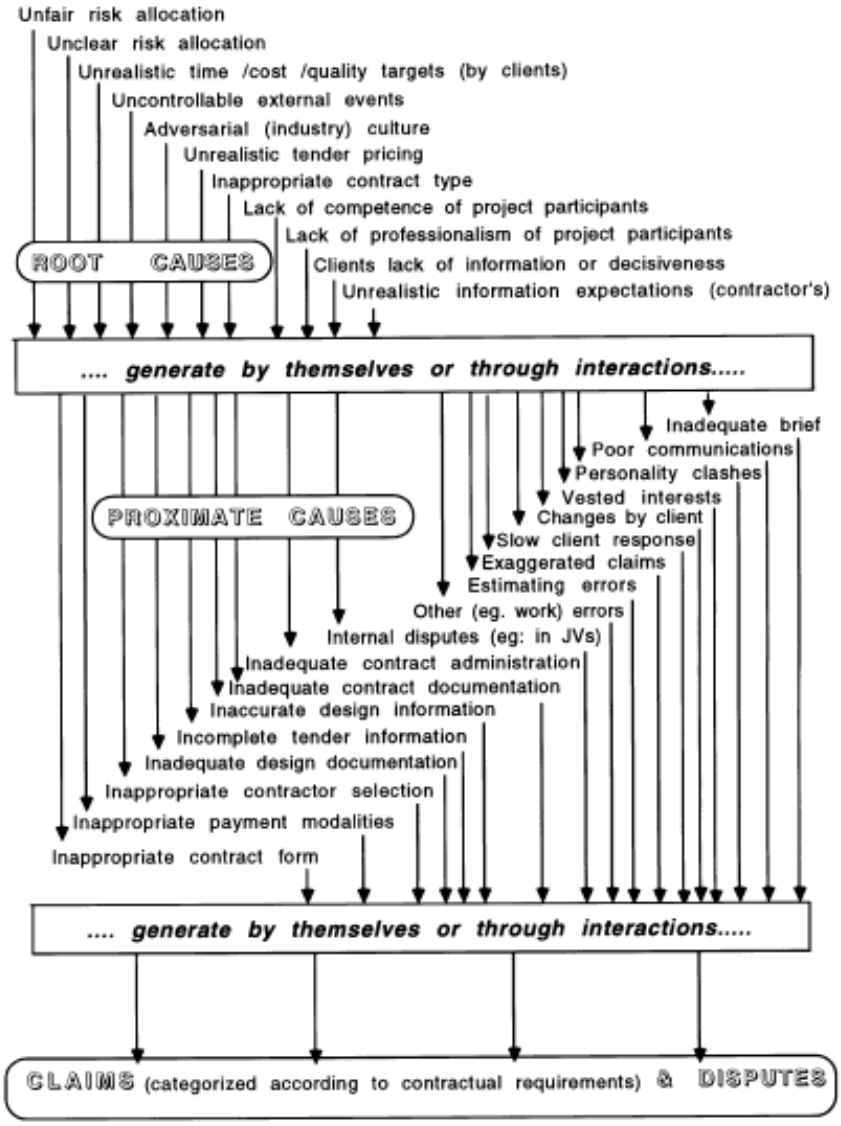
[19] M.H. Kumaraswamy, *"Conflicts, claims and disputes in construction engineering"*, in *Construction and Architectural Management*, 1997, vol. 4(2), pages 95-111.

[20] G. Younis, *et al.*, *op. cit.*, page 731.

[21] P. Mitropolous, G. Howell, *"Model for understanding, preventing and resolving project disputes"*, in *Journal of Construction Engineering and Management*, 2001, vol 127(3), pages 223-231, cited in G. Younis, G. Wood, M.A.A. Malak, *op. cit.*, page 731.

4. Opportunistic behaviour in construction contracts. The agent-principal theory

Figure 2 - The Root and Proximate Causes of Disputes (pursuant to M.H. Kumaraswamy)



From the legal perspective, the contracts are governed by the principle of *Pacta sunt servanda* according to which any agreement based on the consent of the parties to it, is binding, and must be executed in good faith.

However, as construction and engineering literature noted[1], once a contract is concluded the situation of the parties changes in one of bilateral dependence. This bilateral dependence together with the cost of using the legal system to arbitrate contractual disputes and the cost of an eventual termination of the contract favours the apparition of opportunistic behaviour whereby the parties pursue to improve their economic position, deviating from the initial understanding from the conclusion of contract[2].

The academic literature defined the "opportunistic behaviour" as *"an act or behaviour of partnership motivated by the maximization of economic self-interest and occasioned loss of the other partners"*[3], or as "*the behaviour when the agent can*

[1] C.Y. Chang, G. Ive, "Reversal of bargaining power in construction projects: meaning, existence and implications", in Construction Management and Economics, Routledge Taylor & Francis Group, 2007, vol. 25(8), page 846.

[2] H.I. Unsal, J.E. Taylor, *"An empirical investigation of opportunistic behaviour in project networks and its impact on market efficiency"*, in *The Engineering Project Organization Journal*, Routledge Taylor & Francis Group, 2011, page 96.

[3] R. Sönmez, *"Value Creation through Social Alliances: Theoretical Considerations in Partnership Relationships"*, in V. Potocan *et al.*, "Handbook of Research on Managerial Solutions in Non-Profit Organizations", IGI Global, 2017, pages 205-231.

provide the principal with incomplete or distorted information, can pursue self-interests notwithstanding formal and conventional norms, and make profit regardless the owner's interests"[4].

The reasons and circumstances that favours the opportunistic behaviour of the contracting parties have been extensively studied by the economic literature within the so-called "principal-agent theory".

Agency relationships, in which one party (the principal) delegates work to another (agent), are the cornerstone of economic life. In construction field common examples of agency relationships include employer (principal) and contractor (agent), employer (principal) and engineer (agent), contractor (principal) and subcontractors (agents), employer/ engineer/ contractor (principals) and their employees (agents).

The principal-agent problem (also known as "agency dilemma" or the "agency problem") typically arises where, due to the contrary interests and information asymmetry of the parties, the agent does not act in the best interest of the principal. The information asymmetry, defined as any situation where *"the principal and the agent are not in possession of the same information at the same time"*[5], include hidden characteristics, hidden information, and hidden intentions.

Generally, the literature[6] considers that there are two (2) types of opportunism: (i) the "ex-ante opportunism" which may occur when an agent misrepresents its qualifications or abilities, or submit abnormally low bids before entering into the desired principal-agent relationship, normally referred to as "adverse selection", and (ii) the "ex-post opportunism" which may occur after the contract conclusion where the agent is not putting in the agreed effort, typically referred to as "moral hazard".

In order to cope with the agent opportunism, it is considered[7] that the principal has two (2) main options: (i) to invest in information systems to control the agent opportunism, or (ii) to try to align the interests of the agent with its own interests by providing suitable incentives.

While the economic literature has traditionally analyzed the principal-agent relationship from the perspective of the opportunistic behaviour of the agent only, usually defined as "*self-interest seeking with guile"*[8] , recent studies[9] have also taken into consideration the opportunistic behaviour of the principal, describing it as *"self-interest seeking with dominance"*.

In this respect it was noted[10] that: *"self-interest seeking with dominance is facilitated by the authority relationship between the principal and the agent. It is an asymmetric distribution of power and transaction specific investments which give rise to opportunistic principal behavior, leading to situations where an abuse of authority can be observed, resulting in distorted economic performance".*

Same as in case of the opportunistic behaviour of the agent, there are also two (2) types of opportunistic behaviour of the principal: (i) the "ex-ante opportunism" may occur when the principal misrepresents the contractual situation, e.g. in terms of the quantum and nature of works, completeness or correctness of design, available permits and authorizations, site and underground conditions, production pressures, adequacy of equipment, construction costs, allocated budget, expected price adjustments, etc., leading to "adverse selection", and (ii) the "ex-post opportunism" where after the contract conclusion the principal illegally interferes with the autonomy of the agent, undermining the performance of the contract by its instructions and control activities.

Even though standardized forms of contracts provide contractual mechanisms and guarantees to limit the opportunistic behaviour of the parties, the enforcement of such mechanisms and guarantees fundamentally depend upon the good faith of the parties as well as the efficiency of judicial system and discretion of courts[11] .

Under these circumstances the questions arises whether the new information technologies developed in the past years may be of use in preventing and mitigating the opportunistic behaviour of parties in construction and engineering contracts, and thus to prevent the disputes that may occur in such contracts.

5. Using information technology to prevent the disputes in construction contracts

5.1. What are smart contracts

"Smart contract" is a concept used to describe a computer code that automatically executes all or parts of an agreement and is stored on a blockchain-based platform[12].

[4] D.A. Zhdanov, *"Agency Cost Management in the Digital Economy"*, in M. Y. Kuznetsov *et al.*, "Challenges and Opportunities of Corporate Governance Transformation in the Digital Era", IGI Global, 2019, pages 130-151.

[5] A. Ceric, *"Strategies for minimizing information asymmetries in construction projects: Project managers' perceptions"*, in *Journal of Business Economics and Management*, 2014, vol. 15(3), pages 424-440.

[6] D.N. Wagner, *"The Opportunistic Principal"*, in *Kyklos*, John Wiley and Sons Ltd., 2019, vol. 72(3), page 4.

[7] D.N. Wagner, *op. cit*., page 4.

[8] O. Williamson, *"The economic institutions of capitalism. Firms, markets, relational contracting"*, New York, 1985, cited in D.N. Wagner, *op. cit*., page 6.

[9] D.N. Wagner, *op. cit*., page 6.

[10] D.N. Wagner, *op. cit*., page 6.

[11] C. D'Alpaos *et al.*, *"Time overruns as opportunistic behavior in public procurement"* in *Journal of Economics*, Springer-Verlag Wien, 2013.

[12] S.D. Levi et al., "An Introduction to Smart Contracts and Their Potential and Inherent Limitations", in Harvard Law School Forum on Corporate Governance, 2018, page 1.

In a more comprehensive definition[13] "smart contract" was described as *"a computerized transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as payment terms, liens, confidentiality, and even enforcement), minimize exceptions both malicious and accidental, and minimize the need for trusted intermediaries. Related economic goals include lowering fraud loss, arbitration and enforcement costs, and other transactions cost".*

Utilizing a smart contract, contractual terms agreed by the parties can be converted into a programming language and be verified and enforced by a decentralized verification system, without the intervention of the contracting parties. Thus, during the performance of the contract, the agreed transaction, exchange or contractual action will automatically be executed after the occurrence of an event or after a specified time period, exactly as it was agreed by the parties at the conclusion of the contract.

5.2. Smart contracts and the blockchain technology

A blockchain, sometimes referred to as "Distributed Ledger Technology (DLT)", is essentially a digital ledger of transactions that is duplicated and distributed across a network of computer systems (the "nodes"). Each block in the chain contains a number of transactions, and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant's ledger. The records are immutable, meaning that no participant can alter a transaction after it has been recorded to the shared ledger. If a record includes an error, a new transaction must be added to reverse the error, both transactions remaining thereafter recorded in the shared ledger.

As it was noted in the literature[14], the blockchain *"acts as infrastructure for smart contracts to be executed across a distributed network (those nodes validating and updating the distributed ledger) rather than being executed and adjudicated by centralized organizations (such as a judicial system). Furthermore, information stored in blockchains are a new potential trusted source of information to trigger those contracts […]. Because the contractual obligations of smart contracts are written into code - and will be enforced in a decentralized way across a blockchain network - contracting parties can have greater confidence that performance will be carried out."*

5.3. Smart contracts and Building Information Modeling (BIM)

In some situation in order to trigger the execution of contract the smart contracts as computer code might have to refer to external data, provided by a third-party information source (generally referred to as an "oracle"). As it was noted in the literature[15]: *"Preferably those oracles - including temperature readings, prices of other goods or any other event relating to the contract - are reliable and can be predetermined in contract negotiation".*

In construction industry, the common data environment (CDE) used in Building Information Modelling (BIM) might be such third-party information source, playing the role of the oracle for the construction smart contracts.

Building Information Modelling (BIM) is often described as a highly collaborative process that allows architects, engineers, real estate developers, contractors, manufacturers, and other construction professionals to plan, design, and construct a structure or building within one 3D model. The cornerstone of BIM is that all the parties involved in the construction and lifecycle management of constructed assets are brought to the same platform, working collaboratively and sharing data (information).

These data (information) in a BIM model are shared through a mutually accessible online space known as a common data environment (CDE), and can be used to improve accuracy, express design intent from the office to the field, improve knowledge transfer between the involved parties, reduce variation orders and field coordination problems, and provide insight into existing construction for other related projects later on.

Being available in real-time to all the involved parties, these data (information) reduce the information asymmetry and prevent disagreements and disputes resulted from the incomplete or delayed availability of information. Last but not least, BIM is usually seen as an effective tool to support claims and disputes under the contract, being able to provide reliable contemporary records, created, obtained or produced at the same time with the facts or events upon which the claim or dispute is based.

Depending on how much information is being shared and managed throughout the entire construction process, there are different levels of BIM that can be achieved for various types of projects:

a) *Level 0 BIM: Using paper-based drawings and/or digital prints, zero collaboration between parties.*

b) *Level 1 BIM: Using 2D construction drawings and some 3D modelling* - this level implies the electronic sharing of data carried out from a common data environment (CDE) usually managed by the contractor. Level 1 BIM doesn't involve much collaboration, each party publishing and managing their own data.

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[13] N. Szabo, "Smart Contracts", 1994, cited in F. Möslein, "Legal Boundaries of Blockchain Technologies: Smart Contracts as Self-Help?", Philipps-Universität Marburg, pg. 2, available online at: https://ssrn.com/abstract=3267852.

[14] D.W.E. Allen et. al, "The Governance of Blockchain Dispute Resolution", in Harvard Negotiation Law Review, vol. 25:75, 2019, page 79.

[15] D.W.E. Allen et. al, op. cit., page 81.

c) *Level 2 BIM: Teams work in their own 3D models* - at this level all parties use 3D CAD models but sometimes not in the same model. However, the way in which parties exchange information differentiates it from other levels. Information about the design of a built environment is shared through a common file format.

d) *Level 3 BIM: Teams work with a shared 3D model* - at this level everyone involved in the project uses a single, shared project model. The model exists in a "central" environment and can be accessed and modified by everyone. This is called Open BIM, meaning that another layer of protection is added against clashes, adding value to the project at every stage.

e) *Level 4 BIM: Time* - this level adds to the information model comprised by BIM the element of "time". Thus, this level includes scheduling data that helps outline how much time each phase of the project will take or sequencing of various components.

f) *Level 5 BIM* adds cost estimations, budget analysis, and budget tracking to the information model. When working at this level of BIM, project owners can track and determine what costs will be incurred during the length of the project.

g) *Level 6 BIM* ensures accurate predictions of energy consumption requirements and empowers parties to build structures that are sustainable.

5.4. Using the smart contracts technology in enforcing the contractual will of the parties expressed at the conclusion of contract

The experience acquired so far by the international construction industry shows that the actual tools, mechanisms and procedures used to prevent the disputes in construction and engineering contracts are insufficient, not being any indication that the incidence of claims and disputes would have decrease in the past years as a result of using such tools, mechanisms and procedures. Irrespective of the clarity of contractual provisions regarding allocation of risks and of the multi-tiered contractual dispute resolution schemes, any attempt to prevent claims and disputes by bureaucratic measures (contractual procedures) of which enforcement depend at the end of the day exclusively upon the good faith of the parties, proved to be not enough to ensure the voluntary compliance of the parties with their own contractual will as recorded at the date of contract conclusion.

The adversarial culture of construction industry, the cost of using the legal system and the substantial time needed to arbitrate contractual disputes transformed the tools, mechanisms and procedures initially intended to prevent the claims and disputes in construction contracts into efficient weapons of opportunistic behaviour, used by the parties to deviate from the initial understanding from the conclusion of contract and to dishonestly improve their economic position within the contract.

Illustrative in this regard are the experience encountered in the recent years with the use of contractual adjudication in prevention of construction disputes in civil law countries, including Romania. Initially intended to ensure the speedy resolution of disputes by a board of experienced construction specialists, adjudication shortly became itself a major source of disputes between the contracting parties. Matters as appointment of dispute boards' members, consequences created by this type of dispute resolution mechanism over limitation, the duration and costs of adjudication proceedings, and enforcement of dispute boards decision were opportunistically used by the contracting parties to delay and even block the resolution of contractual disputes by their referral to arbitration for an indefinite period. It is noteworthy that in Romania these problems have been solved only by removal of adjudication as mandatory condition precedent to arbitration from the applicable standardised construction contracts starting with 2017.

From the opportunistic behaviour perspective, the complexity of construction projects is currently given by the number of individuals involved in development of respective projects and, respectively, in management of contractual obligations. The more individuals involved, the more contrary interests, both contractual and personal, that are needed to be harmonized. While theoretically it is widely recognized that establishing a collaborative culture and aligning the involved parties' contrary interests are the best ways to ensure the smooth performance of a contract, implementing these principles into construction projects proved to be extremely difficult and time-consuming.

Under these circumstances the necessity of identifying new ways to ensure the voluntary compliance of the contracting parties with their own will as recorded at the date of contract conclusion, while disciplining their contractual behaviour appears to be evident. In this regard, smart contracts technology, in conjunction with blockchain technology and Building Information Modelling (BIM) present undeniable advantages to become the next generation of dispute avoidance tools and mechanisms used in construction and engineering projects.

As to how these technologies could be implemented in construction projects, it is noteworthy that the construction and engineering industry is currently one of the most prepared for a quick switch to the digital management of contracts. The use of standardised detailed contracts (which may be easily translated into smart contracts/computer codes) is already a common practice in the industry both in common and civil law countries. In the same time the use of Building Information Modelling (BIM) is spreading throughout the industry, many countries already mandating the use of BIM in all major infrastructure projects that receives central public funding.

It is not hard to imagine how these technologies will work in the real life. Once a construction and

engineering contract will be concluded in writing, a corresponding smart contract, translating the will of the contracting parties in computer codes will be created. Thereafter, the contract will automatically execute the contractual actions based on the contemporary, real-time data (information) received from the common data environment (CDE) created within the BIM process. The security and immutability of records and contractual actions will be ensured by the blockchain technology.

The most important advantage of smart contracts technology is that, once the required conditions are fulfilled (pursuant to data shared by the involved parties in CDE), the contractual obligations are executed automatically, in seconds, without human intervention. This means that all contractual procedures, which under traditional construction contracts depend by the will of a certain individual, *e.g.* application for an interim certificate, certification of works, determination, payment, contractual notices, etc., and usually take significant time to be concluded, will be executed instantly, without the delays usually generated by human behaviours and their opportunistic interests.

Adoption of smart contracts technology in construction and engineering contracts is not without challenges and risks for the contracting parties.

For instance, one of such challenges would be how quick the amendments made to the text-based version of the contract might be included in the computer codes of the same contract. Having in mind that the blockchains are immutable, amending a smart contract will be far more complicated than modifying a traditional text-based contract, or a standard software code that does not reside on a blockchain. In this regard in the literature[16] it was emphasized that: *"amending a smart contract may yield higher transaction costs than amending a text-based contract, and increases the margin of error that the parties will not accurately reflect the modifications they want to make"*.

Other matters of concern may include the allocation of risks and liabilities between the contracting parties for coding errors, and for the situations where the common data environment (CDE) would be unable to supply the data (information) necessary for self-execution of contract, would provide erroneous data or simply it would go out of business.

Last but not least, even though it is expected that implementation of smart contracts technology to discipline the contractual behaviour of the parties, reducing the disputes generated by their opportunistic behaviour, it is also expected that these types of disputes to be replaced by disputes in relation to the computer codes corresponding to the text-based contract.

6. Conclusions

The disputes which occurred in construction projects are usually caused by one or more of the following three (3) elements: project uncertainty, contractual imperfections, and opportunistic behaviour of the contracting parties and their representatives.

While the matter of project uncertainty was traditionally mitigated by the pre-allocation of risks between the contracting parties, and the disagreements resulted from imperfections of contracts by the multi-tiered contractual dispute resolution schemes, so far there were little remedies against the opportunistic behaviour of the contracting parties meant to ensure the voluntary compliance of the parties with their own will as expressed at the conclusion of the contract.

The development in the recent years of new information technology tools like smart contracts, blockchain and Building Information Modelling (BIM) will provide in the near future an efficient remedy against the disputes resulted due to the opportunistic behaviour of the contracting parties.

However, as it was emphasized within this research, this remedy comes with its own challenges and risks which must be taken into consideration by the contracting parties at the conclusion of the contract accordingly.

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- Government Decision no. 1/2018 for the approval of general and particular conditions of contract for certain categories of public procurement contracts related to the investment objectives financed by public funds replaced the former standardised public procurement contracts based on FIDIC conditions of contract, previously mandatory for the road and railway infrastructure works only, with new ones, extending in the same time their applicability to all the investment objectives financed by public funds.

INTERIM RELIEFS IN THE AGE OF SMART CONTRACTS TECHNOLOGY

Cristian Răzvan RUGINĂ*

Abstract

Contractual behaviour of the parties in construction contracts is fundamentally influenced by the availability and effectiveness of the remedies which might be obtained during the contract in court or by arbitral proceedings to ensure the proper and timely performance of the contractual obligations. In particular, the interim reliefs can play an important role in preventing and correcting any possibly abusive behaviour of the parties, as well as in maintaining throughout the contracts of the contractual balance established by the parties at the outset of the construction contracts. The paper analyses the interim reliefs currently used in construction contracts in Romania, the relation between the contractual behaviour of the parties and the length of interim reliefs proceedings, and how the interim reliefs might look in the near future, in the age of smart contracts technology.

Keywords: *construction contracts, interim reliefs, first demand guarantees, smart contracts technology, online dispute resolution (ODR).*

1. Introduction

Contractual behaviour of the parties in construction contracts is fundamentally influenced by the availability and effectiveness of the remedies which might be obtained during the contract in court or by arbitral proceedings to ensure the proper and timely performance of the contractual obligations. In particular, the interim reliefs can play an important role in preventing and correcting any possibly abusive behaviour of the parties, as well as in maintaining throughout the contracts of the contractual balance established by the parties at the outset of the construction contracts.

This paper analyses the jurisdiction of courts to settle the disputes resulted from the standard construction and engineering contracts currently used in Romania**,** the available interim reliefs procedures, the correlation between the duration of the proceedings and efficiency of the interim measures procedures, and how interim reliefs would be adapted in order to respond to the new needs and challenges created by the adoption of new technologies in the construction industry.

2. Standard construction and engineering contracts currently used in Romania and jurisdiction of courts to settle the disputes resulted therefrom

The most widely used form of construction contracts in Romania in private construction and engineering projects are the contracts in the FIDIC suite 1st Edition (1999) and 2nd Edition (2017), in particular the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (the "Red Book"), and Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works Designed by the Contractor (the "Yellow Book").

In public projects the use of FIDIC conditions of contracts was mandatory for the public authorities for a certain period.

By the Government Decision no. 1405/2010 *regarding the approval for the use of some conditions of contract of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation infrastructure of national interest financed by public funds* ("G.D. no. 1405/2010") it was imposed to all the units subordinated or under the authority of the Ministry of Transportation and Infrastructure the obligation to use the General Conditions of Contract of FIDIC Yellow Book or Red Book at the execution of public works.

On 1 March 2011, the Ministry of Transportation and Infrastructure issued Order no. 146/2011 *regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from the field of transportation road infrastructure of national interest financed by public funds* ("Order no. 146/2011"), whereby it approved standard forms of particular conditions of contract, appendix to tender and contract agreement for execution of public works. Later on, Order no. 146/2011 was amended by Order no. 600/2017 *for the amendment of annex no. 1 of the Ministry of Transportation and Infrastructure's Order no. 146/2011 regarding the approval of particular conditions of contract for plant and design build, and for building and engineering works designed by the employer of the International Federation of Consulting Engineers (FIDIC) for the investment objectives from*

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the field of transportation road infrastructure of national interest financed by public funds, issued by the Ministry of Transportation on 13 May 2017, effective as of 13 June 2017.

However, the FIDIC standardised forms were replaced in 2018 by the national standard construction contracts conceived by the Romanian Government, by the Government Decision no. 1/2018 *for the approval of general and particular conditions of contract for certain categories of public procurement contracts related to the investment objectives financed by public funds.* These construction and engineering forms of contracts not only replaced the former standardised public procurement contracts based on FIDIC conditions of contract, which were mandatory for the road and railway infrastructure works only, but also extended their applicability to all the investment objectives financed by public funds.

As far as the courts which have jurisdiction to settle the disputes resulted from such standard construction and engineering contracts is concerned, three (3) situations can be encountered:

a) The dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce (the "ICC"), the court vested with the administration of the arbitral cases being the ICC International Court of Arbitration;

b) The dispute shall be finally settled under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania;

c) The dispute shall be finally settled under the rules of Law no. 101/2016 *regarding the remedies and ways of appeals in the field of the award of public procurement contracts, sectoral contracts and works and service concession contracts, as well as for the organization and functioning of the National Council for Complaints Settlement* ("Law no. 101/2016") and Romanian Civil Procedure Code by the civil sections of state tribunals.

It is noteworthy that, in principle, jurisdiction to settle the applications for interim reliefs lies with the courts which, according to the contract, have jurisdictions to settle the substantive merits of the disputes.

3. Interim reliefs procedures currently available in Romania for the matters resulted from performance of standard construction and engineering contracts

3.1. The emergency arbitrator procedure under the Rules of Arbitration of the International Chamber of Commerce

Pursuant to Article 29 and Appendix V – *Emergency Arbitrator Rules* of the ICC Rules of Arbitration entered into force on 1 January 2021, a party that need urgent temporary relief that cannot await the constitution of an arbitral tribunal may make an application in this regard to the Secretariat of the ICC International Court of Arbitration.

Only parties that are signatories to the arbitration agreement that is relied upon for the application or successors to such signatories may recourse to the emergency arbitrator procedure. The emergency arbitrator procedure cannot be used if: (i) the arbitration agreement under the ICC Rules of Arbitration was concluded before 1 January 2012, (ii) the parties have opted out of the emergency arbitrator procedure; or (iii) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.

If and to the extent that the President of the ICC International Court of Arbitration considers, on the basis of the information contained in the application for interim measures, that the conditions required by the ICC Rules of Arbitration for recourse to emergency arbitrator procedure are satisfied, the Secretariat of the ICC International Court of Arbitration shall transmit a copy of the Application and the documents annexed thereto to the responding party.

Thereafter, the President of the ICC International Court of Arbitration shall appoint an emergency arbitrator within as short a time as possible, normally within two (2) days from the receipt of the application for interim measures by the Secretariat of the ICC International Court of Arbitration.

Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator.

The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two (2) days from the receipt of the file from the Secretariat.

The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

Pursuant to Article 29 para. (2) of the ICC Rules of Arbitration, the emergency arbitrator's decision shall take the form of an order. The order shall be made no later than fifteen (15) days from the date on which the file was received by the emergency arbitrator. The President of the ICC International Court of Arbitration may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.

According to Article 29 para. (3) of the ICC Rules of Arbitration: *"The emergency arbitrator's order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator."*

3.2. The emergency arbitrator procedure under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

Pursuant to Article 40 para. (3) and Annex II – *Emergency Arbitrator* of the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania entered into force on 1 January 2018 ("CCIR Rules of Arbitration"), a party that need urgent temporary relief that cannot await the constitution of an arbitral tribunal may apply for appointment of an emergency arbitrator.

After the receipt of an application for the appointment of an emergency arbitrator, the Secretariat of the International Commercial Arbitration of the Chamber of Commerce and Industry of Romania shall send the application to the other party.

The President of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania shall appoint an emergency arbitrator within 48 hours from receipt of the application by the Secretariat of the said Court.

Once an emergency arbitrator has been appointed, the Secretariat shall promptly inform him about this circumstance and shall refer the file to the emergency arbitrator.

According to Article 7 of Annex II – *Emergency Arbitrator* of the CCIR Rules of Arbitration, within two days from its appointment, the emergency arbitrator shall establish an interim procedural timetable and also decide with respect to the need to provide security, as well as with respect to the period in which the party against which the interim or conservatory measure is requested may submit its answer to the request.

Pursuant to Article 7 of Annex II – *Emergency Arbitrator* of the CCIR Rules of Arbitration, the emergency arbitrator's decision shall take the form of a procedural order.

Any procedural order with respect to the interim or conservatory measures shall be issued no later than ten (10) days from the date when the appointment was communicated to the emergency arbitrator by the Secretariat. The President of the of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania may extend this period upon the reasoned request of the emergency arbitrator.

The procedural order of the emergency arbitrator shall be binding upon the parties when rendered.

The arbitral tribunal is not bound by the procedural order or by the reasons held by an emergency arbitrator and may amend or cancel the interim or conservatory measures taken by the emergency arbitrator.

3.3. Inadmissibility of the emergency arbitrator procedure under the Romanian law (Civil Decision no. 76/2019 of the Bucharest Court of Appeals)

In 2019, the Bucharest Court of Appeals rendered the Civil Decision no. 76[1] whereby it annulled a procedural order issued by an emergency arbitrator under the CCIR Rules of Arbitration, considering that the emergency arbitrator procedure contravenes to the Romanian imperative legal provisions and public policy, pursuant to the Romanian Code of Civil Procedure the state courts having exclusive jurisdiction to hear requests for provisional measures and interim reliefs before the constitution of an arbitral tribunal.

In this regard, the Court found that, in principle, the parties are free to establish procedural rules for conducting the arbitration proceedings, as long as such rules do not contradict imperative legal provisions or public policy.

However, as it results from the provisions of Article 585 of the Romanian Civil Procedure Code, before or during the arbitration proceedings, the jurisdiction to settle the applications for interim or conservatory measures belongs to the state tribunal in whose area the arbitral tribunal is seated, while during the arbitration proceedings, such applications can be settled either by the state tribunals or arbitral tribunals, at the claimant's choice.

In view of the aforementioned arguments, the Bucharest Court of Appeals emphasized that *"establishment of a special proceeding which would allow to an emergency arbitrator to settle the applications having as object interim measures/conservatory measures before the initiation of the arbitration proceedings represents a derogation from the imperative provisions of art. 585 para. 1 and 4 of the Civil Procedure Code, which is forbidden by the provisions of art. 541 para. 2 of the Civil Procedure Code."*

It is noteworthy that the considerations of the Bucharest Court of Appeals' Decision no. 76/2019 are applicable not only to the procedural orders issued by an emergency arbitrator under the CCIR Rules of Arbitration, but also to any other orders issued by an emergency arbitrator under any other rules of arbitration, whenever by the arbitral agreement the seat of arbitration has been chosen to be in Romania.

3.4. Interim and conservatory measures adopted during the arbitration proceedings under the Rules of Arbitration of the International Chamber of Commerce

Pursuant to Article 28 of the ICC Rules of Arbitration entered into force on 1 January 2021, once the arbitration proceedings have started, and the arbitration tribunal received the file from the Secretariat, at the request of any party, the arbitral

[1] Please refer to Court case no. 2739/2/2019 - National Company for Administration of Roads Infrastructure v. JV Copisa Constructora Pirenaica S.A. - Copisa Construcţii S.R.L.

tribunal may order any interim or conservatory measures it deems appropriate and may make the granting of any such measure subject to appropriate security being furnished by the requesting party.

Any such measure shall take the form of a reasoned order, or of an award, as the arbitral tribunal considers appropriate.

During the arbitration proceedings, the parties may also apply for interim or conservatory measures to any competent judicial authority.

The ICC Rules of Arbitration do not provide a mandatory time frame in which the arbitral tribunal should issue the order/award regarding the interim or conservatory measures, the length of such procedure depending mainly on the availability of arbitrators.

3.5. Interim and conservatory measures adopted during the arbitration proceedings under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania

Same as in situation of the ICC Rules of Arbitration, the arbitral tribunals constituted under the CCIR Rules of Arbitration may grant at the request of any interested party any interim or conservatory measures that it deems appropriate. In this regard, the arbitral tribunals have the power to order the party requesting an interim or conservatory measure to provide the necessary security in connection with the measure requested.

In any case, pursuant to the provisions of Article 40 para. (4) of the CCIR Rules of Arbitration, a request for interim or conservatory measures referred by a party to a state court is not incompatible with the arbitration agreement or with the CCIR Rules of Arbitration.

Similar to the ICC Rules of Arbitration, the CCIR Rules of Arbitration do not provide a mandatory time frame in which the arbitral tribunal should issue the order/award regarding the interim or conservatory measures, the length of such procedure depending on the availability of arbitrators.

3.6. Injunction order issued by the state courts

Pursuant to Article 585 of the Romanian Civil Procedure Code before or during the arbitration proceedings, the parties may request to the tribunal in whose area the arbitral tribunal is seated to grant interim or conservatory measures by way of an application for injunction order (in Romanian *"Ordonanță președințială"*). The parties may also recourse to such an application for an injunction order whenever pursuant to the contractual provisions the state courts have jurisdiction to settle the disputes resulted from the construction and engineering contracts.

According to Article 997 of the Civil Procedure Code there are several conditions which need to be fulfilled to application to an injunction order to be approved:

a) Likelihood of success on the merits (*fumus boni iuris*) - which requires the party requesting interim relief to show a reasonably arguable case or a reasonable probability of prevailing on the merits;

b) Risk of irreparable harm (*periculum in mora*) - this condition requires that relief may be granted only if the applicant demonstrates that it may suffer "irreparable" damage or injury in the absence of such injunction order;

c) Emergency of matter which led to the application for injunction order;

d) No prejudgment on the merits of the dispute - the application for an injunction order cannot deal with the substantive merits of the case.

The parties will be summoned in accordance with the rules on summons in urgent proceedings, and the defendant shall be provided with a copy of the application and of the supporting documents. However, the Civil Procedure Code do not set a mandatory, fixed time frame for such summons in urgent proceedings, the urgency of the matter being determined by the judge on a case-by-case basis.

In situations of extreme urgency, the injunction order may be rendered on the same day the application is received by the court, with the court issuing its decision in writing, *ex-parte*, without a hearing.

Pursuant to the provisions of Article 999 para. (3) of the Civil Procedure Code, the application must be settled "urgently" and "with priority", not being admissible the evidence whose administration requires a long time. The issuance of the injunction order may be postponed for a maximum of 24 hours, while the reasoning of the injunction order must be issued in no more than 48 hours from the order.

The injunction order is subject to appeal which must be filed in no more than five (5) days from the order was rendered if the parties were summoned, or, alternatively, from receipt of the reasoned decision in writing by the parties if the injunction order was issued *ex parte*.

3.7. Inadmissibility of the injunction relief in disputes regarding the first demand guarantee resulted from public procurement contracts (Decision no. 27/2020 of the High Court of Cassation and Justice – The Panel for Resolution of the Matters of Law)

By the Decision no. 27/2020, rendered on 2 March 2020, the High Court of Cassation and Justice decided that: *"In application of the provisions of Article 997 of the Civil Procedure Code and Article 53 pars. (2) of Law no. 101/2016 regarding the remedies and ways of appeals in the field of the award of public procurement contracts, sectoral contracts and works and service concession contracts, as well as for the organization and functioning of the National Council for Complaints Settlement, with the subsequent amendments and subsequent additions, establishes that the procedure of the injunction order is not admissible*

in the matter of suspension of the execution of a performance guarantee related to a public procurement contract."

In deciding so, the High Court of Cassation and Justice considered that, being an annex to the public procurement contract, the performance guarantee is an integral part of it, and the applications and actions to which the parties are entitled are those provided by the special law, respectively Law no. 101/2016, which refers to settlement of disputes resulted from public procurement contracts.

Under these circumstances, the existence of the special law – Law no. 101/2016 – which provides for the possibility to file an application for suspension of the execution of performance guarantee until the settlement of the substantive merits of the dispute based on Article 53 para. (2), allow for the interested party to use this procedural way only.

4. Suspension of the execution of first demand guarantees – the most frequent object of the applications for interim reliefs

All the construction and engineering standard forms of contracts used in Romania contains provisions regarding the obligation of the Contractor to provide to the Employer first demand letter of guarantee to ensure its contractual obligations (i) to repay the advance payment received from the Employer at the outset of the contract, (ii) to perform its obligations in a proper and timely manner, and (iii) to constitute the retention money guarantee.

All such first demand letters of guarantee are subject to the Romanian Civil Code and Uniform Rules for Demand Guarantees, 2010 Revision, ICC Publication No. 758 ("URDG").

Pursuant to Art. 2321of the Civil Code, the letter of guarantee is defined as *"the irrevocable and unconditional commitment by which a person, called the issuer, undertakes, at the request of a person named authorizing officer, in consideration of a pre-existent obligational relation, but independent of it, to pay a sum of money to a third party, named the beneficiary, in accordance with the terms of the assumed undertake."* The so-assumed commitment is executed at the first and simple request of the beneficiary, if the text of the letter of guarantee does not provide otherwise. The issuer of the letter of guarantee may not oppose to the beneficiary the exceptions based on the pre-existent obligational relation and cannot be held to pay in case of abuse or obvious fraud.

However, pursuant to Article 20 of the URDG, the issuer of the letter of guarantee (*i.e.*, the guarantor) has the obligation to examine any demand of payment received under the guarantee if it is a complying demand and to ensure the requested payment under the guarantee in no more than five (5) days after the receipt of the respective demand form the beneficiary (*i.e.*, the Employer).

Given the short period in which the authorizing officer (*i.e.* the Contractor) may resort to the interim reliefs in order to suspend an eventual abusive demand of the beneficiary regarding the payment under the letter of guarantee for a temporary period, and the numerous applications for interim reliefs related to the execution of such letter of guarantees issued under the construction and engineering forms of contracts, a question was raised as to the efficiency of the procedural means available to the Contractor in this regard.

5. The results of the research regarding the efficiency of the procedural means available to the Contractor to suspend an eventual abusive payment requested by the Employer under the letter of guarantee

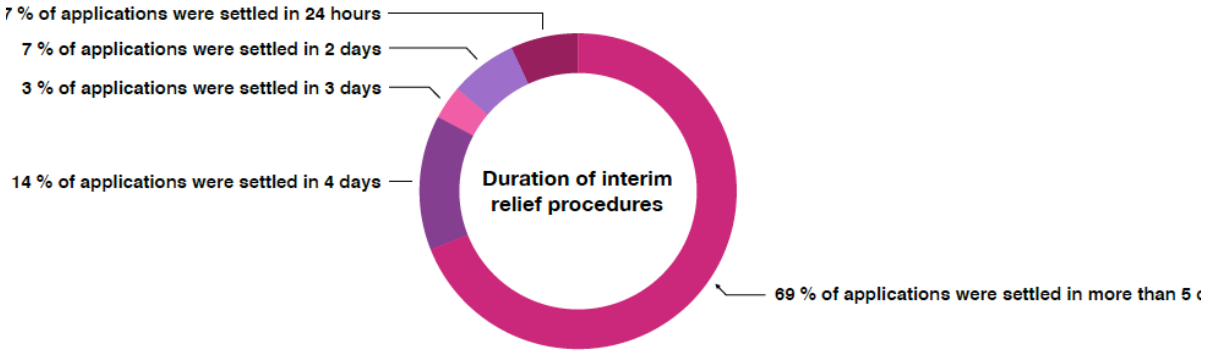
In order to analyze if the existent procedural means are sufficient to ensure a proper and timely juridical protection for a Contractor confronted with the abusive demands of payments made by the Employer under the standard construction and engineering forms of contracts applicable in Romania, we performed a research, taking into consideration the applications for interim reliefs registered with the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania and Bucharest Tribunal, and settled by the aforementioned institutions in 2019.

2019 was an extremely relevant year for such a study, because the number of applications for suspension of demands made by the Employer under the standard construction and engineering forms of contracts applicable in Romania was relatively high. This was due to the fact in 2019 it was encountered an important number of disputes between contractors and their employers, generated especially in connection with the construction of large public infrastructure projects like motorways, railways and civil buildings.

The study has taken into consideration the applications for interim reliefs by way of: (i) the emergency arbitrator procedure under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, (ii) interim and conservatory measures adopted during the arbitration proceedings under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, and (iii) injunction procedures in front of the state courts, by reference to the period of no more than five (5) days in which the issuer of the letter of guarantee (*i.e.*, the guarantor) has the obligation to examine any demand of payment received under the guarantee if it is a complying demand and to ensure the requested payment to the beneficiary (*i.e.*, the Employer), pursuant to the provisions of Article 20 of the URDG.

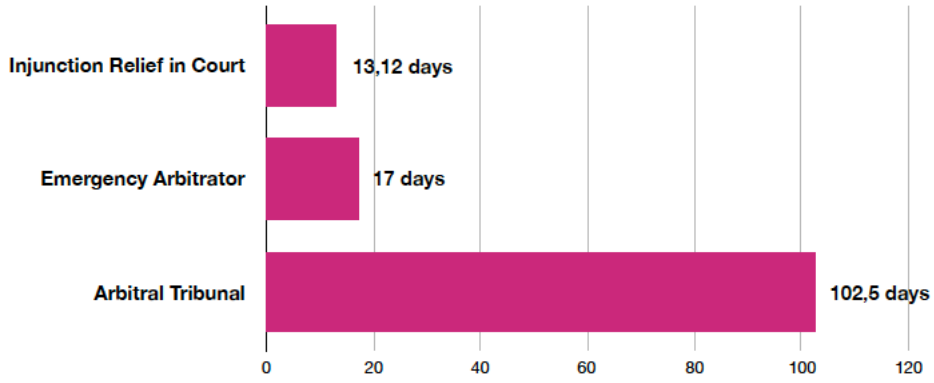
The results of the research revealed that 7% of the applications were settled by way of an *ex parte* proceedings in 24 hours. A total amount of 24% of the applications were settled in less than five (5) days, while in 69% of the cases, the interim relief proceedings exceeded five (5) days (please refer to Figure 1).

Figure 1 – Duration of the interim relief procedures



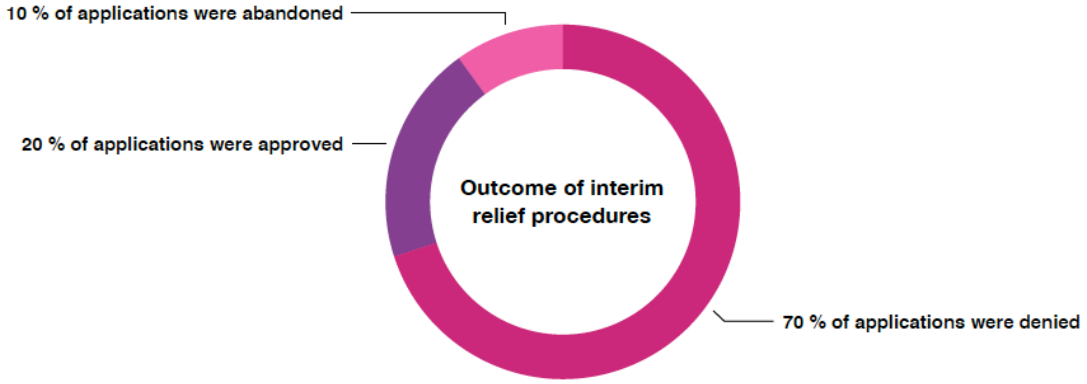
As far as the average duration of the interim relief procedures is concerned, in all three (3) types of procedural mechanisms, the average period needed for settlement of the applications were far above the five (5) business days provided by Article 20 of the URDG (please refer to Figure 2).

Figure 2 – Average duration of the interim relief procedures



From the perspective of the decisions adopted by the relevant courts with regard to the applications for interim reliefs, only 20% of the applications were

Figure 3 – Outcome of the interim relief procedures



approved, 70% being denied. Another 10% of the applications were abandoned because they remained without their object due to the excessive length of the proceedings, the letters of guarantee being executed within the five (5) business days period (please refer to Figure 3 below).

As a preliminary conclusion, it has to be noted that in practical life the effective duration of the interim relief proceedings is not aligned with the urgency imposed by the tight term provided by Article 20 of the URDG for payments to be made under first demand guarantees.

Other causes which delay the timely settlement of applications for interim reliefs lies in the constraints of the internal administrative proceedings of the courts, limited availability of arbitrators and judges, or in the insufficient understanding of the emergency of the matters referred to the relevant courts.

6. The necessity to align the dispute resolution proceedings with the new needs and challenges created by the adoption of new technologies in the construction industry

The experience acquired so far by the international construction industry shows that in many cases the management of the applicable dispute resolution procedures is not coordinated with the particular needs and requirements of the parties involved in construction and engineering contracts.

This circumstance, together with the adversarial culture of construction industry, the cost of using the legal system and the substantial time needed to arbitrate contractual disputes nurture the opportunistic behaviour of the parties materialized in deviation from the initial understanding recorded at the conclusion of contract to dishonestly improve their economic position within the contract[1].

Under these circumstances a careful adaptation of the existent dispute resolution procedures to the actual speed of the contractual mechanisms and economic exchanges specific to the construction industry is highly needed.

It is also noteworthy that the new information technologies like smart contracts, Building Information Modelling (BIM) and blockchain, expected to be fully implemented in the following years in construction projects, will come with their own legal risks and challenges which will require a re-design of the existent dispute resolution means and procedures in order to be addressed accordingly.

"Smart contract" is a concept used to describe a computer code that automatically executes all or parts of an agreement and is stored on a blockchain-based platform[2]. Once a construction and engineering contract will be concluded in writing, a corresponding smart contract, translating the will of the contracting parties in computer codes will be created. Thereafter, the contract will automatically execute the contractual actions based on the contemporary, real-time data (information) received from the common data environment (CDE) created within the Building Information Modelling (BIM) process. The security and immutability of records and contractual actions will be ensured by the blockchain technology.

The most important advantage of smart contracts technology is that, once the required conditions are fulfilled (pursuant to data shared by the involved parties in the CDE), the contractual obligations are executed automatically, in seconds, without human intervention. This means that all contractual procedures, which under traditional construction contracts depend by the will of a certain individual, *e.g.* application for an interim certificate, certification of works, determination, payment, contractual notices, etc., and usually take significant time to be concluded, will be executed instantly, without the delays usually generated by human behaviours and their opportunistic interests[3].

Automatic, instantaneous execution of contractual obligations will need adapted dispute resolution means and procedures, including new ways to obtain interim reliefs if necessary.

The analysis of the online dispute resolution systems and processes (commonly known as "ODR") developed in the recent years for blockchain dispute resolution can provide an accurate picture on how application for interim reliefs related to smart contracts would be settled in the near future.

a) **Juris** - The Juris framework operates where the parties adopted the Juris code in their smart contract. Once a dispute arises, the parties can suspend the contract and access the system through the Juris dashboard.

Same as in cases of dispute resolution clauses included in the traditional construction contracts, Juris comprise a multi-tiered dispute resolution process starting with a stage of mediation that can help the parties to reach a consensual agreement, called "SELF Mediation".

If parties are unable to reach an agreement, they can access the next stage of the process, *i.e.* "SNAP" (Simple Neutral Arbitrator Pool) where the parties receive a judgment by neutral jurors who anonymously vote on the case, and also provides a brief opinion on the case. After receiving the jurors' decision, the parties may return to the SELF stage and reach a consensual agreement.

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[1] For supplementary information regarding the opportunistic behaviour of the parties to a construction and engineering contract, and the implementation of smart contracts, Building Information Modelling (BIM) and blockchain technologies into construction industry, please refer to C.R. Rugină, *"Smart contracts technology and avoidance of disputes in construction contracts"*, 2021, page 10.

[2] S.D. Levi *et al.*, *"An Introduction to Smart Contracts and Their Potential and Inherent Limitations"*, in Harvard Law School Forum on Corporate Governance, 2018, page 1.

[3] C.R. Rugină, op. cit., page 10.

The final stage is the PANEL (Preemptory Agreement for Neutral Expert Litigation), provided for complex disputes that require the most experienced jurors (High Jurists) or for those disputes in which parties would like to reach a legally binding award under the N.Y. Convention. The decision of the PANEL must be reached within thirty days and once rendered, the smart contract between the parties will be rescinded, and the award will be automatically enforced.

It is noteworthy that on Juris platform the disputes are settled by three (3) types of jurors: (i) novice jurists (new users who can participate in discussions and evaluate disputes in SNAP stage but cannot decide cases), (ii) good standing jurists (jurors who vote on SNAP) and (iii) high jurists (professional arbitrators with high experience on Juris platform). The jurors may advance from one category to another based on the experience acquired on the platform and the quality of their decision-making which are evaluated by Juris by its reputational system for jurors.

b) **Sagewise** – The platform is able to identify the flaws of a smart contract (*e.g.*, coding error, security issues, contract does not reflect parties' will recorded at the conclusion of the contract), to suspend its execution allowing a dispute resolution process to take place, and to ensure the enforcement of the resolution.

In order to benefit of the services provided by Sagewise platform, the parties are required to include in their smart contract the "Sagewise SDK", a coded contractual clause which is the equivalent of the traditional dispute resolution clause.

Sagewise operates as a facilitator between the parties, using a combination of tools like suspension of the smart contract, time blocks and alerts which warn the parties on coding errors or other unforeseen events, contract allow the parties to prevent its execution prior to the occurrence of the imminent default. Sagewise also allows the parties to amend the contract and resolve the dispute through a resolution process conducted via a smart contract.

In the first stage of the resolution process parties are given the opportunity to resolve the dispute by reaching a consensual agreement by amending the code, changing the terms of the contract, etc. This interaction takes place while the execution of the smart contract has been suspended.

If this stage is unsuccessful, the smart contract will move on to the next phase, involving a human third-party facilitator, and expert advice on choosing a dispute resolution provider among those offered through Sagewise. It has to be emphasized that Sagewise does not itself provide dispute resolution services.

The resolution of disputes reached through the provider can be enforced by creating a new smart contract.

c) **RHUbarb/PeopleClaim** – This platform is based on the contribution of a numerous community of users, allowing people to submit claims and have the community resolve them based on the wisdom of the crowds.

The dispute resolution process is public, the parties being allowed to invite experts from the community (e.g., lawyers, doctors) to offer feedback on their case.

The RHUbarb dispute resolution mechanism is based on "poll verdicts". As it was noted in the literature: *"Conducting polls is a quick, inexpensive and democratic avenue for reaching decisions that are based on a broad consensus"*[4]. In any case, jurors whose vote was in the minority will be penalized. The results of the poll can serve either as a binding arbitral decision or as an expert opinion to be used by the parties in their negotiation or mediation endeavors or be submitted in court or arbitration.

Another avenue which may be used for dispute resolution on RHUbarb is the so-called "self-funding processes" in which jurors are rewarded for being collaborative and innovative in proposing creative solutions to the benefit of the parties.

There are also several other ODR platforms like Kleros, ECAF, Jury Online, Mattereum, Aragon, Jur which proposed various methods for resolution of disputes resulted from the performance of smart contracts.

Irrespective of the method used for dispute resolution, it is noteworthy that in the majority of situations, once a dispute has arisen, such platforms ensure the suspension of the performance of smart contracts until the merits of the dispute is settled, either by the consensual agreement of the parties, by vote of jurors, or otherwise. However, in all cases the resolution on the merits of the dispute cannot exceed thirty (30) days.

7. Conclusions

The experience acquired so far by the international construction industry and the research performed in 2019 with regard to applications for interim reliefs by way of: (i) the emergency arbitrator procedure under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, (ii) interim and conservatory measures adopted during the arbitration proceedings under the Rules of Arbitration of the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania, and (iii) injunction procedures in front of the state courts, reveals that in many cases the management of the applicable dispute resolution procedures is not coordinated with the particular needs and requirements

[4] O. Rabinovich-Einy, E. Katsch, *"Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution"*, in *Journal of Dispute Resolution*, Vol. 2019, page 68.

of the parties involved in construction and engineering contracts.

In the same time the new information technologies like smart contracts, Building Information Modelling (BIM) and blockchain, expected to be fully implemented in the following years in construction projects, will come with their own legal risks and challenges which will require a re-design of the existent dispute resolution means and procedures in order to be addressed accordingly.

Under these circumstances a careful adaptation of the existent dispute resolution procedures to the actual speed of the contractual mechanisms and economic exchanges specific to the construction industry is highly needed.

The online dispute resolution systems and processes (ODR) like Juris, Sagewise, RHUbarb, Kleros, ECAF, Jury Online, Mattereum, Aragon, Jur, developed in the recent years for blockchain dispute resolution, provide valuable insights on how application for interim reliefs related to smart contracts would be settled in the near future in order to ensure the best juridical protection for the parties to a construction and engineering contract.

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- O. Rabinovich-Einy, E. Katsch, *"Blockchain and the Inevitability of Disputes: The Role for Online Dispute Resolution"*, in *Journal of Dispute Resolution*, Vol. 2019;
- S.D. Levi et al., *"An Introduction to Smart Contracts and Their Potential and Inherent Limitations"*, in Harvard Law School Forum on Corporate Governance, 2018.

TACIT COLLUSION UNDER COMPETITION LAW: PRICING ALGORITHMS

Stella Solernou SANZ*

Abstract

A great level of transparency, resulting from data sharing (exchange of information), combined with use of algorithms may lead to reciprocal price or production control by competitors. Algorithms eliminate elements of spontaneity in market and may result in supracompetitive prices. But the collusive effect can also occur even if economic operators do not have this intention. Not always there is an express or implied agreement that fits within the concept of "restriction of competition", as traditionally delimited by European case law in the sense that companies agree to eliminate their independence or freedom to defining their business strategy. In these cases, there may not even have been any concerted practice; each operator, using specific algorithms, which observe and analyse competitors' historical price data, sets its own prices and determines those of rivals. According to the European Commission, in the context of e-commerce, European retailers are already starting to set their prices on the basis of those set by their competitors, using automatic computer developments.

In this way it unilaterally provokes collusion (higher prices). This makes it difficult to apply article 101 TFEU, since it requires some kind of concerted practice involving the idea of agreement. It is necessary to analyse whether it is possible to reinterpret the rule in such a way as to include the phenomenon of tacit collusion.

Keywords: *Pricing Algorithms – Restriction of Competition - Tacit Collusion*.

1. Introduction: Is Tacit Collusion a new phenomenon?

Tacit or implicit collusion refers to the behaviour of a number of undertakings which, as a result of observing each other, but taking their decisions independently, align their business strategy and apply supra-competitive (restrictive) prices. In short, they give up competing with each other, without having agreed to do so.

Tacit collusion is not a new phenomenon, but what is new is the economic context in which it can occur today. Parallel behaviour has been common in duopolies or oligopolies: the small number of competing companies facilitates a high level of transparency in market and thus the risk of price uniformity increases[1]. That is the case of gas station markets, with a small number of suppliers and a high degree of homogeneity in the product offered[2].

Despite its negative effects (those of explicit collusion), it has not generated as much concern (neither for competition authorities nor for legal literature) as it does today with the digital markets and artificial intelligence. The degree of transparency that can be achieved in the new technological environment extends tacit collusion to markets with a large number of competitors, even with a not-so-homogeneous supply. What used to be anecdotal can now become the general rule.

This raises the question of whether existing Competition Law provides a solution to tacit collusion and, if not, whether there is a need to address its regulation. Some of the studies on the subject (doctrinal and institutional) conclude that current law does not provide answers to this problem.

This paper aims to identify and clarify these legal gaps. However and at the same time, we can also find arguments in existing Competition Law to counteract the collusive effect of algorithms, with particular emphasis on the case law of the Court of Justice of the European Union. Finally, some legal solutions are proposed, with the aim of preventing the existence of algorithms with harmful effects on the market: to extend liability for collusive effects to those agents who have an obligation to monitor the algorithm («*culpa in vigilando*» doctrine).

2. What is an Algorithm?

The study of competition law has always required a balance between legal and economic aspects. But in recent times new disciplines, and the need for their understanding, have been introduced into our field: mathematical and computational sciences. It is therefore necessary to introduce, even in a very basic way, what an algorithm consists of.

Competition authorities have begun to familiarize themselves with these concepts, trying to understand how they work. The Competition and Markets Authority of the United Kingdom defines them as a very precise computational calculation procedure, where a value or set of values is taken as a starting value or set of values (in the case of pricing algorithms they take a given price as an input) and, after a process, this

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[1] OECD, Algorithms and Collusion: Competition Policy in the Digital Age, 2017.

[2] Weche / Weck (2021), 5.

results in a value or set of values as an output (final price)[3].

For its part, the German authority (Budendeskartellamt) considered it necessary to break down the different classes of algorithms from a technical point of view, in order to be able to determine the level of human involvement in the final price determination process[4]. And so, it distinguishes between static algorithms and self-learning algorithms, depending on the degree of autonomy they develop. The former are simpler; its behavioral parameters are initially designed and do not change, they remain over time, even though it is nourished by new information. What does vary is the final price if the entry price (that of a competitor, which has been observed by the algorithm itself) changes. It is said that these algorithms are easily interpretable by humans, since their descriptive nature allows to deduce the strategy and the final result of the algorithm itself.

On the contrary, self-learning algorithms develop a more complex computational process that improves their performance as more tasks they perform, as they gain more experience from more data, from more information. In fact, they are changing their own parameters, to the point of being able to move away from the rules originally designed, making it more difficult to predict their behaviour. The mathematical process is the one that makes the decision about the result that it understands most optimal. There are three types: "unsupervised learning", "supervised learning" and "reinforcement learning"[5]. These are the so-called Black Box algorithms, because it is hard to figure out how they get to a certain result[6].

3. Relationship between transparency and algorithms

3.1. Secrecy or Transparency in Competition

Information is an essential element of the competitive process. It is difficult to develop an economic activity in market without taking into account certain data: prices, customers, levels of demand, competitors' reactions or lack of reaction to any competitive effort, etc. To the extent that information has special relevance for economic life, it acquires its significance for competition. These circumstances justify that the disclosure or exchange of data between competitors must be analysed from an Antitrust Law perspective. In order to determine whether the communication of data between undertakings competing in the same market is restrictive of competition, a preliminary question must be resolved. To the extent that information entails transparency in market, it will be necessary to analyse whether it is beneficial or detrimental to it.

This question was discussed in Germany last century in connection with the so-called "doctrine of Hidden Competition" (Geheimwettbewerb). According to it, each company must autonomously set the strategy it intends to follow in market. Faced with the uncertainty of the competitors' offer, the entrepreneur will try to adjust his overall service as much as possible, both in terms of price and the content of his ancillary services. The strictest interpretation of this principle is that effective competition requires the prohibition of any transmission of data and exchange of information among competitors[7].

However, the idea that any level of market transparency is restrictive of competition and detrimental, and should therefore be prohibited, was criticized by many authors[8]. Certainly, it is not possible to support a general principle of Hidden Competition when there are so many rules in the current legal systems that establish transparency obligations. Today it is understood that effective competition requires a situation of perfect information[9]. A well-informed customer will have the necessary elements to choose the product or service best suited to his needs, which will lead to a higher level of demand with regard to the offers presented to him. In turn, the more data the entrepreneur has about his competitors' products or services, the more possibilities he will have to improve his performance compared to those of his competitors. Consequently, the production and dissemination of information can represent a positive activity for the consumer and for a proper functioning of market. But at the same time transparency can have restrictive effects on competition. Under certain circumstances, the exchange of information may be a collusive practice because it encourages and even incentivizes the standardization of competitors' conduct; in some cases, it may be used as a necessary tool for the implementation or reinforcement of a collusive agreement.

Thus, it can be concluded that information is characterized by its ambivalent nature in relation to the competitive process, since, depending on the context in which it is given, it will entail a benefit or a restriction of competition[10]. The criteria for distinguishing when

[3] Competition and Markets Authority (CMA): Pricing algorithms. Economic working paper on the use of algorithms to facilitate collusion and personalised pricing, 2018, 9.

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[7] Hoppmann (1966), 97.

[8] Behrens (1963), 85-86; Benisch (1990), 937-949; Dreher (1992), 27-28.

[9] Berti (1996), 563.

[10] Kilian (1974), 292; Wagner-von Papp (2004), 29-31; Benisch (1990), 948-949; Berti (1996), 591-592.

these positive or negative effects occur can be drawn mainly from resolution of the European Union institutions.

3.2. Market transparency in the context of algorithms

A great level of transparency, resulting from data sharing (exchange of information), combined with use of algorithms may lead to reciprocal price or production control by competitors. Algorithms eliminate elements of spontaneity in market and may result in supracompetitive prices. This is what happened in the UK between two competitors selling posters and frames online through Amazon's platform. Both companies agreed not to sell below the price of the other; they used software that automatically checked the prices, controlled them and adjusted them to the competitor. In this case algorithms were used not (or not only) to determine price, but to monitor compliance with a prior collusive agreement and to correct any deviation from that agreement.

But the collusive effect can also occur even if economic operators do not have this intention. Not always there is an express or implied agreement that fits within the concept of "restriction of competition" (art. 101 TFEU), as traditionally delimited by European case law in the sense that companies agree to eliminate their independence or freedom to defining their business strategy. In these cases there may not even have been any concerted practice; each operator, using specific algorithms, which observe and analyse competitors' historical price data, sets its own prices and determines those of rivals. According to the European Commission, in the context of e-commerce, European retailers are already starting to set their prices on the basis of those set by their competitors, using automatic computer developments.

4. Algorithms and collusion

4.1. Concept of collusion

The concept of collusion has always been associated with supra-competitive pricing by competing firms. But this result, without any additional requirements, does not fit into the classic legal-economic concept of collusion. In this regard, it has been said[11]:

"… [c]ollusion is difficult to grasp by law. Liability concerns market conduct (possibly with structural consequences), and can only be attributed to market participants. This is why, whereas cartels and joint dominant position are prohibited, collusion as a market outcome is not."

The economic theory of collusion revolves around one idea: to induce competing firms to set supra-competitive prices. To that end, undertakings apply patterns of reward and punishment towards their competitors. Competitors who maintain a more profitable outcome (higher prices) than under competitive conditions are rewarded. On the contrary, competitors who deviate from that result are penalized[12].

Based on economic theories, the legal concept of "collusion" has always been based on the idea of "concertated practice", where there is a fundamental volitional component, some kind of consent (concurrences of wills - meeting of minds). In this sense, undertakings can simply adapt their own behaviour unilaterally to the current or expected behaviour of their competitors, adjusting or aligning their prices (Judgments ECJ of 16 December 1975, case 40/73, Suiker Unie; of 8 July 1999, case C-49/92 P; Com. v. Anic Partecipazioni SpA; of 4 June 2009, case C-8/08, T-Mobile Netherlands; of 26 January 2017, case C-609/13, P Duravit)[13]. Within the framework of Unfair Competition Law, it has always been said that imitation is a natural response of the market. In other words, it is recognised that there is a natural interdependence among competitors which should not be penalised[14]. According to this idea, tacit collusion is not prosecutable by legal operators.

4.2. Analysis of Algorithms from a Competition Law point of view

There are a variety of scenarios regarding the use of algorithms and collusion. A first approach allows us to see to what extent Competition Law is applicable or not.

4.2.1. Algorithms that help to enforce and monitor a collusive agreement

Under this context, the algorithm does not affect the existence of collusive coordination, since it already exists. On the contrary, it does affect the effectiveness of the collusion. The use of this algorithm does not affect the mandatory application of article 101 Treaty on the Functioning of the European Union (or article 1 Spanish Competition Law – LDC-). Its importance for Competition Law becomes apparent when fixing the sanctions by competition authorities, given the increased anti-competitive effects.

This is what happened in the UK between two competitors selling posters and frames online through Amazon's platform. Both companies agreed not to sell below the price of the other; they used software that automatically checked the prices, controlled them and adjusted them to the competitor. In this case algorithms were used not (or not only) to determine price, but to monitor compliance with a prior collusive agreement and to correct any deviation from that agreement (Decision of the Competition and Markets Authority, case 50223, 12th August 2016).

[11] Weche / Weck (2021), 4.
[12] Harrington (2018), 6; Bundeskartellamt (2020), 4.
[13] Weche / Weck (2021), 5.
[14] Robles Martín-Laborda (2018), 93.

It is also possible to find examples in relation to vertical agreements. That was the case Asus, Denon & Marantz, Philips and Pioneer (European Commission Decision of 24 July 2018). Manufacturers imposed minimum prices on online distributors of their products; if they did not comply, they stopped supplying them. Manufacturers used sophisticated monitoring tools to control the resale price setting in the distribution network and to intervene quickly in the event of price falls.

In these cases, whether the algorithm is static or self-learning does not affect the existence of the collusive agreement itself. But it can be relevant for determining the sanction, trying to assess how it has increased the chances of effectiveness of the agreement and, therefore, with a more or less damaging result.

4.2.2. Use of the same algorithm by competitors involving price alignment

The legal assessment is different depending on whether competitors are aware or not that they are using the same algorithm.

If they are aware, but they have not agreed to use the same algorithm, there are difficulties in applying art. 101 TFEU, since the idea that this provision requires concertation seems to be unanimous.

However, the Spanish Competition Law expressly prohibits consciously parallel practices (art. 1 LDC). This aspect of the Spanish Act has hardly been applied in practice by competition authorities, but it is now relevant within the framework of algorithms. It is questionable whether this type of tacit collusion is punishable under Spanish Law when the Treaty on the Functioning of the European Union does not prohibit it. It should be recalled that Regulation (EC) 1/2003 (art. 3. 2) precludes the application of national law that prohibits agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) of the Treaty. The answer to that question must be affirmative, because prohibiting consciously parallel conduct does not frustrate the objectives of European competition law, but rather strengthens them.

The issue is different when the algorithm was designed to use self-learning methods and when implemented autonomously, it came to set prices on a par with those of competitors. It has been said that there is "algorithmic communication"[15]. In this scenario, it is more difficult to find the volitional element. It does not seem to be enough to solve it with a "more economic approach".

If the collusive outcome is to be avoided, a prior firewall must be established. It should therefore be considered to make the economic operator liable for the risk of the activity it carries out, so that, in its contractual relationship with the designer or developer of the algorithm, the latter would assume obligations to supervise its operation. The technical possibilities of supervision and the costs of such a system should be analysed.

On the other hand, it is possible that the algorithm is sold indiscriminately and that the buyer is unaware that its competitors are using it and may lead to a standardization of commercial conduct. Moreover, they may conclude that price alignment is a natural response. In those cases, it would not even be possible to speak of consciously parallel conduct under Spanish Competition Law. Would it be possible to hold them liable in the sense described above?

Conversely, if competitors have somehow agreed to use the same algorithm, they are certainly looking to coordinate their behaviour. It is called "Hub and Spoke" and fits into the traditional legal concept of collusion: competitors are actually giving up unilaterally determining their business strategy. As soon as some complicity is revealed, even through passivity, the case law of the EU Court of Justice fits it into the concept of concertation (Judgment of 22 October 2015, C-194/14, AC-Treuhand AG v. European Commission).

4.2.3. Algorithm Developer's Responsibility

Competitors may be unaware that they use the same algorithm, unlike the algorithm developer. The latter may benefit from the collusive result, provided that the algorithm succeeds in increasing the turnover of each competitor (his customers) through price parallelism. The developer of the algorithm finds incentives in this behavior. The question therefore arises as to whether he can be held responsible for the collusive effect or outcome.

The European Court of Justice has held that an undertaking may be held liable for agreements or concerted practices having an anti-competitive object when it intended to contribute by its own conduct to the common objectives pursued by all the participants and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to accept the risk (Judgment of 8 July 1999, Commission v Anic Partecipazioni, C-49/92; Judgment of 21 July 2016, VM Remonts, C-542/14).

On other occasions, the Court has used the role of facilitator for restrictive conducts. The company does not participate in the market in which the collusion occurred, but its participation was necessary to implement the cartel (Judgment of 22 October 2015, AC-Treuhand AG, C-195/14 P).

It remains doubtful whether the algorithm developer alone can be held liable, even if competitors are not responsible because eventhough they also benefit of collusion, they are unaware of it.

4.2.4. Adjusting the price to competitors by using my own algorithm

In this case, an undertaking individually uses a custom-designed algorithm that aligns its prices with

[15] Schwalbe (2018), 594.

those of the competitor. Consciously parallel conduct falls on only one subject and not on his competitors. This is a case of unilateral collusion. But it is questionable whether there is a damaging result for the market, in the sense of supra-competitive prices. As the European Court of Justice has traditionally said (Judgment of 16 December 1975, cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, Suiker Unie v. Com.):

"(…) it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors (…)".

5. Conclusions

1. Collusive effect alone is not prohibited. Both the economic and legal concepts of collusion require a common strategy aimed at obtaining supra-competitive prices. The absence of such association has traditionally been an obstacle to the punishment of so-called tacit collusion. The problem may have been anecdotal so far. But with the digital revolution and the use of increasingly precise algorithms, competitors can dispense with any contact. They can collude without any prior agreement.

2. Only the Spanish Competition Law (article 1) makes it possible to prosecute some of these conducts, by prohibiting consciously parallel practices. But it also does not solve all possible anti-competitive scenarios.

3. Part of the literature begins to propose measures to sanction collusion where supra-competitive prices (harmful to the market and consumers) are proven to exist, without any additional requirements[16]. In this way, the problems of tacit collusion would be overcome.

4. It would also be desirable to consider whether responsibility for the collusive effect should be attributed to the company developing the algorithm and the company using it. It would be part of the liability rules for risky activities.

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[16] Weche / Weck, *cit.*, 9.

PATERNALISM IN CONSUMER LAW

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Abstract

When carried out by the state, paternalism was often decried as coercive, questioning in itself the liberty of the individual and always alluding to the latter's presumed incapacity to decide and to choose. Paternalism claims that most individuals are not capable to decide for themselves and argues that authority should take much of this burden off their shoulders.

At its most basic level, consumer law is a special area of law dealing with protection of a universal status and that is why many of the protective measures can be seen as paternalistic, although even a kernel of truth couldn't resist to a real analysis.

The paper starts from the observation that both opponents of the idea of protection, and ardent followers of paternalism extended to the widest possible area, has the same tendency to wrongly generalize the paternalistic qualification of almost any element of protection.

The paper addresses three issues: paternalism – coercive and non-coercive, libertarian paternalism and paternalistic libertarian nudges, consumer law and its specific protection with special regard to consumer status, and the crossing area between consumer law and paternalism.

The main purpose of this study is to convey an objective clear method to distinguish this crossing area between consumer law and paternalism and what exactly in this area is actually of a real paternalistic substance and what is not genuine.

Keywords: *consumer protection, paternalism, freedom to choose/ of choice, free will, incentive.*

1. Introduction

This paper starts from an observation justified by the need to understand the importance of clearly establishing the meaning of paternalism, from the perspective of consumer protection.

As a rule, no clear distinction is made between the paternalistic or non-paternalistic nature of a protection measure, the tendency being always to extend the qualification, for instance of considering as paternalistic some acts or policies that cannot be included in this category.

A paradox is that the same tendency to wrongly generalize an extended paternalistic qualification of almost any element of protection, belongs to both opponents of the idea of protection itself, detractors of paternalism and the principle of equity, and ardent followers of paternalism, expanded to the widest possible area, who claim that this would provide the strongest possible protection.

Thus, the supporters of libertarian ideology[1], or those who consider any idea of protection unnecessary, but also those who want to denigrate protection, otherwise of a completely different nature, conferred by consumer law, show an interest in qualifying any policy or act as paternalistic in nature, precisely in order to compromise the idea of paternalism itself, to present it as an exaggeration, either as a violation of individual freedom or as something simply out of place.

Proponents of paternalism[2], on the other hand, wishing to emphasize how useful such widespread protection would be, end up ignoring the real significance of paternalism, its well-defined role, and probably not intending, puts it into the very hands of the opponents of paternalism, deriding the precise importance of this ideology.

Given that elements of paternalistic ideology have penetrated consumer law, the importance of the approach lies in following the true sense of paternalism, so that it fulfills its purpose properly, without being unnecessarily extended for either praise or denigration, keeping the purpose of consumer protection clear.

Paternalistic protection should not be confused with the protection specific to consumer law, as they refer to dangers of a different nature.

This paper compares an ideology and a branch of law both having in common the ideal of protection.

As paternalism is concerned, this ideal comes with a price. It can be the price of free choice of the one who is protected. Free will is the "starting point" of law, and freedom represents the "substance and determination" of law and the determination of will.[3]

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[1] A reference work for the ideology that the state is not entitled to impose hierarchies of values on individuals is Friedrich A. Hayek, *Drumul către servitute*, [The Road to Serfdom], translated by Eugen B. Marian, fourth edition, (Bucureşti: Humanitas, 2014).

[2] For example, the phrase „libertarian paternalism" was coined in Richard H. Thaler, Cass R. Sunstein, *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăţie şi fericire* [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (Bucureşti, Publica, 2016), 19.

[3] Georg Wilhelm Friedrich Hegel, *Principiile filosofiei dreptului sau Elemente de drept natural şi de ştiinţă a statului* [Elements of the Philosophy of Right], translated by Virgil Bogdan and Constantin Floru, (Bucureşti: Univers Enciclopedic Gold, 2015), (my English translation), 28.

The legal science was qualified as "a part of philosophy"[4] and the philosophy of consumption must search and define the justification and nature of protection provided to the consumer.

The paper is structured in three chapters.

The first chapter (no. 2) deals with paternalism, intending, in its first part, to identify the basic features of this ideology, both when it comes to coercive paternalism and "recommendation" paternalism, and to explain libertarian paternalism in its second part. Also, the libertarian paternalism section contains brief considerations on libertarianism, an explanation of the concept of libertarian paternalism, and in particular a detailed examination and also a classification of libertarian nudges, as exemplified in the reference doctrine.

The second chapter (no. 3) is dedicated to consumer law, dealing with its fundamental institutions and considerations concerning the consumer, in order to highlight the latter's relationship with two different types of protection.

The third chapter (no. 4) defines the crossing area between consumer law and paternalism, pointing out the need for a clear distinction between the protection specific to consumer law and that specific to paternalism, and the criteria that consumer paternalism must meet in order to be considered genuine and beneficial.

2. On Paternalism

2.1. Paternalism and its main features

Paternalism is a land of perpetual non-emancipation. The individual placed in the group targeted by paternalistic policies is always thought to be incapable to take proper choices, just because in that group there are, indeed, many individuals who cannot decide. Therefore, the rule of majority applies to this individual, remaining of too less importance how capable to decide he might be.

The basic feature of paternalism is the protection of the individual from himself.

I use the term "authority" as a general concept meant to represent the party in power, who can retrieve somebody's freedom of choice, decide for the latter and impose its decision. This authority can be a public institution or a private entity or simply a person in a leadership position entitling it to decide for other people. The act of authority materializes in paternalistic policies or acts which either dictate certain behaviours or influence towards them.

Paternalism is an ideology that claims that, in certain circumstances, an institution, public or private, a person in power, could and should either decide and choose instead of other individuals placed under its influence, on the grounds that the latter would not be able to take appropriate decisions for themselves, or try to influence, to persuade them to take decisions that are considered favourable, without depriving them of their freedom of choice.

The first type of paternalism is therefore more brutal, when the authority takes over the freedom of choice of those under its power, in order to protect them from the likelihood of acting wrongly about themselves.

In the second form of paternalism, the freedom of choice stays with the individual, but the authority claims the power to influence him to decide in a certain way. In this regard, it has been noticed that „paternalism is no longer a political or a moral issue, it is an element of individual deliberation."[5]

Regardless of the type of paternalism, the premise on the one hand is the individual not being able to take the right decisions, to discern what is good for himself and, on the other hand, that the authority is considered more rational than him, more qualified to realise how he should act.

When referring to paternalism, we must establish why is the authority the one that always knows better, why the paternalistic policy or act should be applicable to individuals otherwise perfectly responsible just because there are many others who are not, what exactly is the reason of the incapacity to take the right decision, what is the significance of a right decision, what is the protected interest and whose interest is protected, when paternalism is genuine, when it is good or bad. Three elements are concerned: the authority, the individual and the decision.

The fundamentals of paternalism are based on the assumption that, in certain circumstances, people prove not to be so rational and mature as they should, and consequently either their freedom to choose needs to be confiscated, or they simply ought to be guided, but not coerced, towards the most favourable choice. But in exchange to their liberty, the authority should return something even more valuable, as an expression of a principle of fairness and ethics.

The coercive paternalism could be summarized in an old sentence: „Try and convince them, but do act even against their will, when the reason of justice demands it."[6] Therefore, it is the mere interest of the individual that compells the authority to limit his liberty of choice and to assume taking decisions on his behalf. The choice belongs to an authority that is entitled to impose it on others. The reason why the authority chooses is that it would be too dangerous for the protected person to decide for himself, and, on the other hand, the consequences could be harmful to others.

[4] Idem, 22.

[5] Christophe Salvat, *Is Libertarian Paternalism an Oxymoron? A Comment on Sunstein and Thaler (2003)*, https://hal.archives-ouvertes.fr/hal-00336528, 2.

[6] Marcus Aurelius, *Gânduri către sine însuşi* [*Meditations*], translated by Cristian Bejan, bilingual editon, (București: Humanitas, 2018), (my English translation), 199.

The presumed lack of discernment in taking decisions, stemming either from the experience of observing the numerous cases in which individuals could not properly decide for themselves, or from the consequences generated by their unthoughtful behaviour, lays the foundation of paternalism. Therefore, the authority is thought to be more rational, more responsible than the individual, just because in so many cases the latter couldn't prove himself dilligent enough. In other words, somebody needs to be considered mature enough to decide and to impose that decision. It was assumed that the one who exercise paternalism over others is the one who knows well enough the „ends, values and interests" of the one who is paternalized.[7] Paternalism is a materialization of the prediction that people and humanity as a whole will have to be protected from the dangers entailed by their own power.[8]

We already know that the protected party is presumed incapable to decide what is favorable to him. The choice is made for the paternalized and the result of this choice is imposed on him. In coercive paternalism, the protected person cannot choose to disobey what the authority had decided for him.

It was observed that people do not know what they want or what is good for them, that they cannot create a legislative system and that they have to be tought what to desire.[9] But what is the significance of a right decision, and what makes a decision right or wrong? Is it imperative for the paternalistic policy or act to be understood as good and useful for the one whose liberty to choose was taken away, or only the mere compliance will do? When talking about what can be considered good or bad for someone, we must admit that the notion is relative. What a certain person would consider as good for himself, another individual could see it as not so good, or even bad. The kind of benevolence that could be accepted in paternalististic matters is the one that keeps the individual safe, not necessarily happy, because happiness is relative, but safe, safe from injuries, from sickness or from poverty.

It is generally accepted that the role of the state, for „as much as it is able", is to ensure a good life for all citizens and to create the material conditions for it.[10] The state was thought to be a product of art, compared to Leviathan, an „artificial man", of superior strength, designed to protect man, and invested with an artificial soul, namely sovereignty.[11] Its duty is to ensure safety for the people.[12] The state has an obligation to protect citizens from accidents.[13] The state is not allowed to abdicate from the call of giving its citizens the best protection, and this duty cannot fall into abeyance.

Self-advertised as paternalists, certain authors emphasized that the state has a duty to promote the best ways of life among the people, beyond their preferences or beliefs.[14]

As for the individuals, they must help each other in choosing right from wrong.[15] But what if a coercive paternalistic policy or law comes to be imposed on individuals otherwise perfectly rational and precisely informed in respect to a certain problem targeted by the paternalistic measure? They will have to accept the measure just because it provides protection to other individuals, not so responsible. The responsible individual will take advantages from the behaviour imposed on others, since, if they had been left free to choose, they might have compromised the efficacy of the responsible individual's decision.

It may be considered incorrect by some people to be unable to reach their goals or sometimes to even abnegate their hopes, because there are some who would not exhibit self-discipline and realism and then they should be protected from the consequences of their own faults.[16] The individual's inability to choose should derive not from the very misinformation by the authority, but only from natural human limits. Anyway, even these limits are doubtful and relative, if we are to consider the long-standing process of infantilizing adult consumers.

For a policy or law to be considered genuinely paternalistic, the protection must be channeled primarily to the individual's best interest, and secondly to others' interests. In other words, it must be in the best interest of the individuals to follow an advantageous path, even dictated or suggested by someone else. Authority's best interest is to ensure that individuals do not go astray.

One should not smirk about paternalism, for sometimes it could be of essence. To analyze it deprecatingly would mean ignoring the evidence of the individual's natural inclination to act to his detriment, to ruin good occasions in a moment of aberration. An intelligently oriented policy could help in abating and alleviating the negative consequences of a chaotic and uninspired freedom of choice.

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[7] Christian Coons and Michael Weber, *Introduction: Paternalism – Issues and trends* in *Paternalism. Theory and Practice* (New York: Cambridge University Press, 2013), 14.

[8] Yuval Noah Harari, *Homo Deus: Scurtă istorie a viitorului*, [Homo Deus: A Brief History of Tomorrow], translated by Lucia Popovici, (Iași, Polirom, 2018), 25.

[9] Jean-Jacques Rousseau, *Despre contractul social sau Principiile dreptului politic*, [On the Social Contract; or, Principles of Political Right], translated by Lucian Pricop, (București: Cartex, 2017), 58-59.

[10] Robert Skidelsky, Edward Skidelsky, *How Much Is Enough?: Money and the Good Life*, (London: Penguin Books, 2013), 168-169.

[11] Thomas Hobbes, *Leviatanul*, [Leviathan: Or the Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil], translated by Alexandru Anghel, (București: Herald, 2017), 5.

[12] Idem, 6.

[13] John Stuart Mill, *Despre libertate*, [On Liberty], translated by Adrian-Paul Iliescu, (București: Humanitas, 2017), 142-143.

[14] Robert Skidelsky, Edward Skidelsky, *op. cit.*, XiX.

[15] John Stuart Mill, *op. cit.*, 113.

[16] John Rawls, *Political Liberalism*, expanded edition, (New York: Columbia University Press, 2005), 186.

Also, to ignore paternalism's dark side, and to accept uncritically an authority's coercive act, would mean to abjure the principles of individual liberty and freedom of choice.

One can be taken aback by the apparent contradiction between the two perspectives, but an abiding theory calls for strong, although perhaps not apodictic arguments.

One opinion highlights that, when the understanding capability of an ordinary adult is not enough „for a heathy decision", legal paternalism can be seen as acceptable.[17] In this regard, another argument states that „most people have not yet reached maturity to be independent" and the degree of emotional development is much lower then the degree of technical and intellectual development.[18]

A balanced, moderated opinion concluded that it is wrong not to interfere in individual choices at all, but the interference must be performed with caution, doubt and a critical sense.[19]

Some laws and policies, as those mentioned below, are considered paternalistic, and therefore are regarded as controversial.[20]

Thus, a law that requires motorcyclists to wear helmets or passengers in cars to wear seatbelts is, indeed, an example of genuine paternalism. On the other hand, taxes on cigarettes could not be considered paternalistic, because high taxes never apply only to harmful products. Taxation policies cannot be examples of genuine paternalism, higher taxes being based, in fact, on pragmatic reasons, mainly targeting reliable sources. It applies arbitrarily to alcohol as to common fuels. Nor bans on trans-fats could be considered paternalistic because the consumer can always choose between the products present on market and is able to freely consume unhealthy food. Regulations on prescription of medical drugs could be considered paternalistic because consumer can be mislead in their use. Regulations on recreational drugs are not paternalistic, because their use is always harmful, both to the consumer and to others.

2.2. Libertarian Paternalism

2.2.1. Brief considerations about libertarianism

To narrow the debate on the subject of paternalism to a mere sentence, libertarianism is an utterly distinct ideology, abhorrent to coercive paternalism and abhorrent from any restraint on the individual liberty of choice.

The consequences entailed by state interference with individual freedom of choice, would lead, in libertarian view, to an encroachment upon the very essence of human existence.

If state and individual interests fight for supremacy, each party conceitedly claiming its superiority with lack of clairvoyance and a merely obstinate determination never to concede defeat, the social landscape would encompass just the accumulated frictions and is never to improve.

Libertarian „*laissez-faire*" ideology means that the common man is allowed „to choose and act freely" without being subjected to an external, dictatorial will.[21] In this regard, it has been asserted that man must be free to pursue his interest.[22] He must, also, receive useful advice in his choices, but the final decision must belong to him.[23] Therefore, this „useful advice" must be a proper instrument to make it possible for the individual to realize his own interest. But what if, despite following this useful advice, his interest still remains unfulfilled? Can the individual blame the adviser for not giving him the proper counsel or we'll have to establish the duty of the counselor as a mere gesture of generosity or, at the most, as an obligation of diligence? It can be noticed that, even the libertarian ideology admits the importance of appropriate counseling of individuals, to ensure achieving the goal of their full freedom.

On the other hand, if society encourages the infantilization of man, it is to blame for the consequences of its policy.[24] This opinion asseverates that the authority can easily take advantages from the individual's gullible nature, all the more naive as the state himself finds appropriate to cultivate this state of perpetual childhood of the mind.

Furthermore, when the authorities offer help recklessly and without balance, accustoming individuals to always count on others, and never on themselves, the authorities contribute to the abandonment of morality and the accentuation of neglect.[25]

The state must make people „no longer need its help"[26], must cultivate the independent spirit in his citizens. Also, the state must not discriminate his citizens, must not dictate a certain hierarchy of values

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[17] Russell Blackford, *The Tyranny of Opinion. Conformity and the Future of Liberalism*, (London and New York: Bloomsbury Academic, 2019), 28. The auhor offers here, as an example, the need, in certain cases, to regulate the validity and content of medical prescriptions.

[18] Erich Fromm, *Fuga de libertate*, [Escape from Freedom], translated by Cristina Jinga, (Bucureşti: Ed. Trei, 2016), 16.

[19] Russell Blackford, *op. cit.*, 27.

[20] Christian Coons and Michael Weber, *op. cit.*, 1.

[21] Ludwig von Mises, *Planificarea libertăţii şi alte eseuri*, [Planning for Freedom: And Other Essays and Addresses], translated by Gabriel Mursa, (Iaşi: Ed. Universităţii „Alexandru Ioan Cuza" Iaşi, 2012), 62.

[22] Adam Smith, *Avuţia naţiunilor*, [The Wealth of Nations], translated by Monica Mitarcă, (Bucureşti: Publica, 2011), 340.

[23] John Stuart Mill, *op. cit.*, 114.

[24] Idem, 122.

[25] Benjamin Constant, *Despre libertate la antici şi la moderni*, [The Liberty of Ancients Compared with that of Moderns], translated by Corina Dimitriu, (Iaşi: Ed. Institutul European, 1996), 211.

[26] Alexis de Tocqueville, *Despre democraţie în America*, [Democracy in America], translated by Magdalena Boiangiu, Beatrice Staicu, Claudia Dumitriu, (Bucureşti: Humanitas, 2017), 602.

and impose them upon individuals, thus favoring some of them.[27]

A controversial libertarian idea is that when individual harm is only probable, and not certain, he is to decide whether or not to face the danger of such harm, so he must only be warned, but not prevented from exposing himself. [28]

Therefore, the common denominator of these two ideologies, paternalism and libertarianism, is the individual's need for guidance, even though the solutions to this need are utterly different.

2.2.2. The concept of "libertarian paternalism"

As far as we can admit that paternalism can exist without restricting the individual freedom of choice, the concept of libertarian paternalism could be accepted as a part of the paternalistic ideology.

Libertarian paternalism was created as a happy medium between two opposite ideologies: paternalism and libertarianism.

The proponents of libertarian paternalism ideology set forth their theories from the ideas that the influence on people's choices cannot be avoided[29] and that paternalism does not always involve coercion[30].

As for the individual, this ideology highlights that „in many domains, people lack clear, stable, or well-ordered preferences"[31] and consumers should nor feel abashed by their need of help. Thus, „[w]e're more likely to need help choosing the right mortgage than choosing the right bread."[32]

Man was said to be „a creature of strong and irrational drives, credulous, untutored, ritualistic."[33] In this angle, paternalism was seen as a logical response to man's natural incapacity to act with a proper degree of caution; „Paternalism is not morally good or wrong, it is a logical consequence of individuals' bounded rationality."[34]

It has been asserted that „paternalism" exists when the choice is influenced in such a way that it helps those concerned „to live better, according to their own assessments".[35] The authors recommend libertarian paternalism, which they describe as „relative, diffuse, malleable, and non-intrusive"[36], the choice residing with those influenced by the paternalistic policy and being not restricted by the person in power.

Libertarian paternalism does not constrain individuals to act in a certain way, and only guides them to take the best decisions. Individuals do not constrainedly comply with the rules dictated by some authority, planner or person in power, but they are invited to consider options that could grant them a frame of reference in acting more rationally.

The suggestion made by the planner should not be an abasement for the consumer, the latter being perfectly free not to follow the planner's nudge.

In paternalistic libertarian view, the planner is always benevolent and always unselfish. It has been observed that being benevolent is just the choice of the planners, paternalism being just one option among others[37] and, consequently, we should distinguish between the choice that is made by a person as a planner and the choice that is made by a person as a person.[38]. The authority does not have to be presented as someone who gives of its selfless care to help the individual, because some interest must always be the cause of any act.

The libertarian paternalism does indeed constitute the perfect way to understand how paternalism penetrates consumer law and how probably it becomes to mistake the genuine for the false paternalism.

Comparing the nudgee with a novice chess player playing against someone more experienced and loosing because of his inferior choices, without the helpful hints[39], it could be relatively uninspired if we help ourselves regarding sellers and suppliers as consumers'oponents, even enemies. Chess players are opponents, rivals in a fair game, but we could not state the same about the relationship between a seller or a supplier and a consumer, where the latter should aim to satisfy consumer's expectations, not to defeat him. Consumer is not playing games with every seller or supplier he meets, he buys things not to compete with anybody, but only because he needs products and services, for which he pays, therefore he is entitled to be treated with respect.

A mandatory cooling-off period for door-to-door sales was offered as an example of libertarian

[27] Friedrich A. Hayek, *op. cit.*, 88.
[28] John Stuart Mill, *op. cit.*, 143.
[29] Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 26.
[30] Idem, 28.
[31] Cass R. Sunstein, Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review, Volume 70, Fall 2003, Number 4, 1161.
[32] Richard H. Thaler, Cass R. Sunstein, *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăţie şi fericire*, [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (Bucureşti, Publica, 2016), (my English translation), 123-124.
[33] Robert L. Heilbroner, *The Worldly Philosophers. The Lives, Times, and Ideas of the Great Economic Thinkers*, 7th edition rev., (Penguin Books, 2000), 246. The author refers to the ideas of Thorstein Veblen, who emphasized the predatory character of businessmen towards the naivety of the common men.
[34] Christophe Salvat, *op. cit.*, 4.
[35] Richard H. Thaler, Cass R. Sunstein, *op. cit.*, (my English translation), 19.
[36] Ibidem.
[37] Christophe Salvat, *op. cit.*, 8.
[38] Idem, 9.
[39] Cass R. Sunstein, Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, The University of Chicago Law Review, Volume 70, Fall 2003, Number 4, 1163.

paternalism.[40] Actually, this time frame, was not granted to the consumer to think if he really needs the product he just bought, but personally and peacefully to check the quality and the features of the product. A paternalistic measure would have meant the possibility for the consumer to simply change his mind, completely unrelately to the assessment of the product.

If libertarian paternalism is, indeed a form of paternalism, then it should keep intact its basic principle of protecting individual from himself.

For libertarian paternalism to fulfill its guiding function, the information offered to the individuals must be abundant and relevant and the options must be numerous. Thus, when information is limited, „countless options increase the costs of decisions without increasing the likelihood of accuracy", and „when choosers are highly informed, the availability of numerous options decreases the likelihood of error and does not greatly increase decision costs".[41]

Libertarian paternalism was said to have „made the mistake of making rational people pay for the irrational" by guiding their choice.[42]

It was also shown that the most adapted to the real needs of the people is „the doctrine of the well-understood interest".[43] Exactly this kind of understanding is the essence of ideologies such as paternalism, libertarianism and libertarian paternalism.

2.2.3. The libertarian paternalistic nudges

The instruments recommended and used by the libertarian paternalist ideology are called nudges[44], namely suggestions issued by an authority, acting as a planner, meant to guide the choice of somebody that can be subjected to this influence, towards a self-advantageous and always free decision. Libertarian paternalistic nudges are instruments meant to protect the individual from himself, by guiding his choice, with or without indicating to the latter what exactly to choose, in matters in which he can always decide what is best for him.

Although the authors of libertarian paternalism are displaying a wide range of examples as nudges, other opinion tends to narrow the sphere of libertarian nudges, so only choice-independent nudges can be truly called libertarian nudges, when the person in power, the choice builder, increases the rationality of the person's decision, providing useful information, „while remaining agnostic about what choice should be made".[45]

At the same time, the choice-dependent nudges, meaning nudges that seek to steer decision in particular ways, should allow an easy escape of the choice favoured by the authority or the person in power.[46] A choice-dependent nudge is when the nudger, by taking advantages on the irrational tendencies, drives the nudgee „toward a particular outcome".[47]

According to this opinion, choice-independent nudges do not favour a particular choice and „are agnostic" as to the „right" choice to make. Their goal could be, for example, to provide consumers with nutritional informations, favouring individual rational choice.[48] A choice-independent nudge is designed to reduce costs, to provide more comprehensible informations or that encourage care when choosing.[49] In this opinion three types of nudges are acceptable, being choice-independent nudges: „educative, simplifying, and deliberative".[50] Only deliberative nudges could raise „epistemic paternalism concern".[51] This opinion is questioning the libertarian character of nudges created to indicate the way to follow to the nudgee. A libertarian nudge cannot, according to this opinion, hide any suggestion as to how the individual should act.

It is perfectly true that selfless proper information is the most elegant and correct way to guide somebody towards rational behaviour, without suggesting a certain choice, but libertarian paternalism claims the very legitimacy of the planner's right to influence the nudgee, starting from the premise that this kind of influence cannot be avoided. It is about the right of the nudger to indicate the best choice for the nudgee, so as the latter to come to enjoy a better happier existence.

In fact, all ideologies are fighting a perpetual battle to influence and to guide, and we should allow for it when objectively analyzing their purposes. In any ideology, informing, no matter how important and essential it would be for the individual, cannot be other than a tool to facilitate influence, an excuse meant to legitimate a subtle orientation of some people towards something.

Not only libertarian character should be questioned in certain examples, but mostly the paternalistic character of some nudges.

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[40] Idem, 1187-1188.
[41] Idem, 1197-1198.
[42] Muriel Fabre-Magnan, *L'institution de la liberté*, [Institution of Liberty], first edition, (Paris: PUF – Presses Universitaires de France, 2018), (my English translation), 207.
[43] Alexis de Tocqueville, *op. cit.*, (my English translation), 614.
[44] After Richard H. Thaler and Cass R. Sunstein's book called *Nudge: Cartea ghionturilor pentru decizii mai bune legate de sănătate, bogăţie şi fericire*, [Nudge: Improving Decisions About Health, Wealth, and Happiness], translated by Smaranda Nistor, (Bucureşti, Publica, 2016).
[45] Gregory Mitchell, *Libertarian Nudges*, Missouri Law Review, Vol. 82, Iss. 3, 2017, Art. 9, 697.
[46] Idem, 698.
[47] Idem, 701.
[48] Ibidem.
[49] Idem, 702.
[50] Ibidem.
[51] Idem, 707.

The examples of nudges founded in the reference work on this topic, must be carefully analized and classified according to the alleged danger that the individual must avoid.

Nudges destined to protect individual from lack of self-control:

An example of alimentary lack of self-control regards the design of the school cafeteria. Promoting the consumption of foods considered healthier and displaying them in places where they can be more easily observed, is made while placing foods considered less healthy in places that are more difficult to access and more difficult to observe.[52] At the same time, banning food with additives is presented not to be a nudge.[53] Another observation in this regard is that people buy more muffins than yogurt.[54] Therefore, people's otherwise well-known self-control issues related to what they are usually craving for, generates an impressive emotional response from the nudgers who aim to educate them towards a healthy lifestyle. For this purpose, another nudge is given by the municipality that encourages people to exercise.[55]

The cafeteria school example is not relevant with respect to the paternalistic nature analysis, because the nudgees are children and paternalistic ideology regards adults treated as incapable.

Nevertheless, it is undisputable that the planner can organise the food presentation as he sees fit, but, in such matters, as eating and selecting food, it is nor wise or mature to waste money and, under any circumstances, public money. A very useful nudge would be the mere advice not to exaggerate with food, but this nudge is avoided, and is never not to consume. The very idea, that it is too hard for a person not to be greedy or to choose food with care, is childish, and nudgers should show maturity.

Another category of lack of self control nudges is about people inclination to spend too much on useless things. For example, an unintentional employer nudge by half month salary payment instead of monthly payment, which helps with better savings.[56] It is, indeed an example of genuine nudge, that can be either intentional or unintentional, as a consequence and a compensation for small wages policy.

A bitter example is the bank account deposited all year round which one cannot withdraw, so to have money for holiday gifts.[57] This sad example shows how poor consumers are manipulated to refrain from consuming even essential goods as to meet their purpose in the high holiday sales, under the pretext of mandatory compliance with a deliberately fabricated habit of offering holiday gifts, as the only way to feel honorable and satisfied. Such a bank account is more an expression of the sellers and suppliers needs to stimulate trade, than to protect consumers from themselves.

Nudges meant to stimulate common sense:

The urinal engraved with the image of a fly[58], is, in fact, just an innovation based on the conjecture that this object is supposed to better serve the man. Innovation is not necessarily paternalism. It is not about a choice of begriming a public place, but an approach to the lack of common sense, which should not be an option. It can also be interpreted as an offensive allusion, being more than disrespectful to an animal species.

The campaign discouraging road littering[59] using commercials with personalities, can only serve trade purposes and can be a "good" occasion to waste money. Apart from not being a genuine libertarian paternalistic nudge, because a person is never allowed to litter, never has this choice, so there is no point to be convinced not to do it, such a campaign is not meant to protect the individual from himself. By littering, he hurts the environment and the others, and the only thing it could nudge him, would be civic education and an appropriate penalty. A real nudge could never recommend wasting money for the mere hope to convince no common sense individuals to turn elegant and clean.

The example of the teenagers having a child who receive a dollar for each day they are not pregnant[60] cannot be a paternalistic nudge because teenagers are minors, not adults to be subjected to paternalism in the real sense of the term. Moreover, teenagers get pregnant, usually not because they choose so, but because a lack in education, or morality, or the inherited way of life. They can be, also, confused by authority's double speech suggesting that something forbidden at sixteen becomes absolutely commendable and even rewardable at twenty. It is not very inspired, moral or equitable to pay someone to do act normal, just because in the past she acted otherwise.

In this category, informing that the degree of compliance in filling out tax returns forms is high, that is suppose to make individuals less inclined to cheat[61] is a good thing, only that individuals were never entitled to cheat, they were all the time constrained to abide by the law, so there was no place for a nudge.

A nudge for not wasting energy is intended by smiling or frowning emoticons attached to power

[52] Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 13-17.
[53] Idem, 20.
[54] Idem, 85.
[55] Idem, 101.
[56] Idem, 27.
[57] Idem, 83.
[58] Idem, 17.
[59] Idem, 101-102.
[60] Idem, 337.
[61] Idem, 112.

consumption information.[62] This is a bit infantile but welcome and perhaps amusing method to convince. The little globe that flashes when the person consumes too much electric energy[63] is an example of how, in many cases, such awareness campaigns end up to be just another incentives to consume more, instead of consuming less, especially if we consider the energy and resources wasted on such totally useless objects.

In the case of stimulations to less polluting[64], the consumer who is allowed to harm the environment would be asked to refrain as much as possible from doing it and is rewarded for not doing the harm he is allowed to do. It is a case of genuine paternalistic nudge.

The reminder nudges form another category applicable, for example, to those who have forgotten to renew their private health insurance. In these cases the employee's presumed choice is not to cancel the employer-subsidized insurance, so it must be kept as it was.[65]

Also, when setting up a "flexible expense account" with a salary retention, it will be assumed that the default option is to no longer withhold money.[66] These are situations in which it is considered that the employee does not have to end up spending money simply because he neglected some details.

The alarm clock that hides to force the owner to wake up[67] could be considered to be more like an amusing innovation.

Light admonitory nudges to giving up vices:

An example is the advertising message that most students do not exceed four alcoholic drinks a week, supposed to discourage alcohol abuse in educational institutions.[68] In other words, the authors of the message grant that four alcoholic drinks a week is perfectly alright, so you shouldn't miss four drinks a week.

Including a screen with pressure sensor in the urinal to connect with driving under the influence[69] is another urinal example, displaying an innovation. This is not a paternalistic nudge, because nobody can choose to drive while intoxicated, this being rightly forbidden by the law.

Many examples indicates too much indulgence towards vices. In this regard, some organizations helping people quit smoking advise smokers to put unspent cash on an account and to withdraw it when scheduled.[70] The same goes with refraining from gambling[71].

Bitter nail polish to stop people biting their nails[72] is another case of innovation with naive innocent purposes that could hardly be put as a paternalistic nudge.

Persuasion nudges:

Some relevant examples are automatic submissions to pension plans[73], or simplifying of the enrollment process[74]. Also, informing that the vote participating is high, encouraged people to come to vote.[75]

It was also considered as a nudge the technique of asking questions about people's intention to buy an object, to floss or to eat something, stimulating them to do so more often.[76]

Those who were also given the place of vaccination and were asked to make a plan for the date of vaccination were more determined to go with it.[77]

Other examples are asking people if they would like to donate to charities, and then commit to increasing their donations each year[78]; debit card for donations and tax deductions, or to keep track of donations[79] could be a nudge, but then again is more like a mere innovation.

The simple innovations destined to ensure smooth operation of an object are not nudges. Relevant examples of such innovations presented as nudges are: the lock button of dangerous machine tools[80], the warning sounds for seat belt, petrol, oil change etc.[81], the obligation to remove the card from the ATM first, so as not to forget it[82], signs of looking to the right or left in the U.K.[83], feedback from digital cameras that reproduce the image or the sound of classic cameras, mobile phones that sound like landlines or the battery

[62] Idem, 116.
[63] Idem, 300.
[64] Idem, 286.
[65] Idem, 30.
[66] Idem, 30-31.
[67] Idem, 78.
[68] Idem, 115.
[69] Idem, 140.
[70] Idem, 334.
[71] Idem, 335.
[72] Idem, 338.
[73] Idem, 177.
[74] Idem, 178.
[75] Idem, 112.
[76] Idem, 118.
[77] Idem, 119.
[78] Idem, 329.
[79] Idem, 330.
[80] Idem, 141.
[81] Idem, 145-146.
[82] Idem, 146-147.
[83] Idem, 149.

discharge warning[84], the paint that changes colour after it has dried so that those who use it do not leave uncovered parts[85], the red light reminding to change the air conditioning filter[86], the display of food that the user of a fitness device deserves, as an incentive to exercise more[87].

The instructions for use and prevention of mistakes when using a product is not paternalism, as it doesn't involve choice.

Privatization of marriage[88] cannot be a nudge, because marriage should not be seen as a mercantile institution, and should be based solely on love and respect.

Apart from the basic, coercive paternalism, that always compels, and does not recommend, the libertarian paternalism is suggesting the answer in the sense that the consumer seems to want to choose exactly what the one who suggests it wants, creating the impression that the consumer wants exactly that thing, but does not know how to express it.

3. Considerations on consumer law

3.1. Pillars of consumer law

Critics of consumer law view this branch of law as a form of paternalism[89]. That is why it's of a great importance to show a clear distinction between the protection provided by paternalism and the protection conferred by consumer law.

The main function of law is to protect the individual from the harmful conduct of others. The aim of paternalism is to protect the individual from himself.

Consumer protection legislation covers four main themes: "prompt, fair and complete information to consumers", "the right balance of obligations [...] and the protection of consumers' economic interests against the abuse of economic power of sellers and suppliers, the prevention and rejection of unfair commercial practices and the liability of sellers and suppliers for damages caused to consumers by the products or services sold"[90].

The consumer protection against the abuse of sellers and suppliers' economic power could never be considered as a form of paternalism, because it shields the consumer against the disproportionately high power of the seller and supplier, who may impose abusive clauses on the consumer. Therefore, the protection is not meant to protect the consumer from something he might be tempted to do, but only from an external harm.

The unfair commercial practices are also forms of external harm, and it is perfectly normal for the law to protect any part in a contract from an incorrect practice of the other. The protection against the unfair commercial practices is not a form of paternalism.

The liability of sellers and suppliers for damages caused to consumers by their products or services is perfectly justified as it is, designed to compensate the harm caused by improper products, and it has nothing to do with paternalistic protection.

As for the consumer's right to information, it must be pointed out that a paternalistic measure could consist in providing information, but always independently by the seller or supplier's obligation to inform the consumer. The paternalistic information acts as a nudge meant to channel the individual's decision, at the same time protecting him against possible mistakes he might make due to lack of knowledge of some details, relevant for a good choice. The paternalistic information is a totally different thing from the professional's duty to inform the consumer.

Therefore, the fundamental pillars of consumer law are based on different reasons and principles than paternalistic ideology. The law is meant to protect from any external harm that could affect one party in a contract as a result of the other part's conduct. The protection granted by the law is not a result of the gullible or weak nature of the consumer, but is the consequence of the principles of fairness and equity.

3.2. About consumers

Consumers are not a class. They could never be a class, because everyone is a consumer.

We hear very often that the consumer is considered the weak part in a contract with a professional. In fact, whether a certain consumer is weak or not is totally unimportant, because a person, acting as a consumer, can be sometimes weak and, in other occasions, quite strong, this aspect being irrelevant from the point of view of consumer law. Consumer law is destined to protect the status of being a consumer in a relation with a seller or supplier, not a person or a class. It is the condition of consumer that is protected by consumer law, not classes or persons. When we say "consumer" in this context, we mean the person in the position of consumer, not a weak, ignorant or gullible person or class. What is always vulnerable is only everyone's status of consumer, the ever changing position exposing everyone in one way or another in relation to a professional. To be a consumer is to be in a vulnerable status.

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[84] Idem, 150.
[85] Idem, 151.
[86] Idem, 337.
[87] Idem, 163.
[88] Idem, 307.
[89] Norbert Reich, *Principii generale ale dreptului civil al Uniunii Europene*, [General Principles of EU Civil Law], translated by Constantin Mihai Banu, (București: Ed. Universitară, 2014), 76.
[90] Gheorghe Piperea, *Protecția consumatorilor în contractele comerciale. Easy money. Despre irațional și oligo-rațional în contractele comerciale*, [Consumer Protection in Commercial Contracts. Easy money. About Irrational and Oligo-Rational in Commercial Contracts], (București: C.H. Beck, 2018), (my English translation), 5.

It would be utterly wrong to regard consumers as the always incapable or helpless class, always crying for help and always favored. Such insinuations belong to those who tend to discredit the protection conferred by consumer law and who would prefer sellers and suppliers to be exempt from any liability for the activity they carry out. So, all individuals, as producers, „are responsible to the consumer", as a feature of the free market.[91]

4. The crossing area between consumer law and paternalism

4.1. The importance of a clear distinction between the protection specific to consumer law and the protection specific to paternalism

Consumer law is, in some cases, penetrated by paternalism, but in reality these cases are much smaller in number and scope than one might think.

Unfortunately, both those who support consumer rights and those who denigrate consumer protection tend to exaggerate, by suggesting that clarification, improvement, innovation etc., would be paternalistic. Even the normal protection against deception and abuse is presented as paternalistic by the opponents of consumer law, and of equity, in general. At the same time, ardent supporters of paternalism tend to say that no matter how much, and to what extent, paternalism is welcome, so that the individual can be better protected, even from himself.

Paternalism is basically a good theory, if used correctly and balanced, exactly where is needed.

The danger of over-extending the use of paternalistic policies is the infantilization of those protected, by preventing them to develop the capacity to think freely and take decisions for themselves.

The danger of misperception of some measures as paternalistic, when in fact they are something else, is the trivialization, the demonetization of the idea of paternalism, facilitating the activity of denigrating the very idea of protection, even protection of a completely different nature, such as that conferred by consumer law.

Consumer protection stands out as special from other branches of law, but this seemingly special character is justified by its concern with the universal status of consumer, which is the ever weaker side of every one of us.

The Romanian Supreme Court of Justice and Cassation had also rightly remarked in previous decisions that it was wrong to consider as "clear and intelligible a contractual clause for the understanding of which no specialized knowledge is required, in the field of consumer protection things being different."[92]

The interplay area between consumer law and paternalism must be very well known and understood, on the one hand, so as not to infringe on consumer protection, and, on the other hand, for the cases of paternalism to be genuine and useful to the consumer.

Both consumer law and paternalism have protection in common, but they should not be confused. They must be differentiated so that the normal protection the law must offer does not appear as a favor, an exaggeration springing from the generosity of an authority, and, on the other hand, so that the reason for the paternalistic act should not be diluted.

The protection conferred by law is continuous and applicable to all, while paternalism is an exception to the rule of freedom of choice and applicable to specific situations.

It has been said that advertising would be useful to consumers for making "better and smarter choices".[93] It is not paternalism the legal obligation incumbent on the seller and supplier to state within an advertising material regarding the provision of loans that a loan involves the obligation to repay and that, before contracting for a loan, the consumer must check his ability to repay.

We should also not mistake banning consumer deception for paternalism.

It has been remarked that people are often unable to assess the consequences of their own decisions.[94]

In fact, transparency in lending[95] is not paternalism at all, but a mere elementary measure to ensure contractual balance and equity.

The idea that there should be fewer types of credit for consumers to make better choices[96] is inconsistent with the freedom of banks to offer any type of loan as long as they meet the appropriate requirements. The consumer does not choose better or worse depending on the number of types of loans offered, but on how correctly these offers are presented to him, how fairly the bank acts in his regard.

The fact that credit card companies are required to disclose to their customers the total of commissions and fees[97] is nothing but a fair and common sense requirement, to ensure a good evidence and permanent control of these costs.

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[91] Ludwig von Mises, *op. cit.*, (my English translation), 28.

[92] Înalta Curte de Casaţie şi Justiţie, Secţia a II-a civilă, [High Court of Casation and Justice, Second Civil Section], decision no. 3864/4 December 2014, https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=125389; (my translation).

[93] Richard H. Thaler, Cass R. Sunstein, *op. cit*, (my English translation), 236.

[94] Yuval Noah Harari, *Sapiens: Scurtă istorie a omenirii*, [Sapiens: A Brief History of Humankind], translated by Adrian Şerban, (Iaşi: Polirom, 2017), 82.

[95] Richard H. Thaler, Cass R. Sunstein, *op. cit.*, 208.

[96] Idem, 215.

[97] Idem, 220.

4.2. Paternalism concerning the consumer: genuine or false, good or bad. The criteria for good consumer paternalism

The mechanism for assessing the opportunity and justification of a paternalistic measure applied to consumers must allow for the specific circumstances involved by the specifics of consumer law relationships. Thus, the status of consumer in itself places the consumer in a vulnerable position, as he is compelled to consume, and consequently he is always dependent upon the seller's honesty. No matter how informed a particular consumer may be in a particular regard, he will not be able to have equal knowledge of all aspects of his consumption, and even if, absurdly, he was, he would never have the time and energy to analyze each product he buys with the greatest accuracy.

It must be kept in mind that, if the state of vulnerability of the consumer is created by the very act of the seller or supplier himself, a protective measure of the former cannot be considered paternalistic and it will only be a legal protection against an external harm.

Paternalism protects only against the natural vulnerability which can make the consumer to act against his own interests, because of his own fallibility, and not because he was deceived by someone else.

Paternalism should not be confused with equity, the latter being the ultimate reason for any legal system. Equity replaces the arbitrariness of force, protecting the weak from the abuses of the strong, and the idea of justice.

Genuine paternalism either withdraws freedom of choice or guides the choice, with or without indicating the specific path for the consumer.

One may qualify a paternalistic measure as good, when it meets two cumulative criteria: to be designed to serve the interests of the consumer and to be really useful to the consumer.

The first criterion points out that this measure should only have been aimed to ensuring greater consumer protection and not other reasons, such as favoring certain sellers or suppliers or certain products.

The argument of the need to protect consumers was used for states to block access to certain foreign products. Thus, in the cause C-178/84 Commision v. Germany (German beer)[98], the German government motivated the refusal of access to the German market of beers containing ingredients not permitted by German law, with the intention to protect German consumers from being deceived. It was considered that the measure was disproportionate, as consumers could be protected by the information on the product label.[99]

The second criterion in assessing the legitimacy of the paternalistic act is the consumer's benefit.

The consumer must have more to gain than if he had enjoyed full freedom of choice or, respectively, if he had ignored the planner's suggestions.

As a limitation of freedom for both the consumer and the seller or supplier, paternalistic measures must be proportionate to the legitimate purpose, to the interest pursued. Also, the paternalistic measure should last only as long as it is necessary.

An example of justified paternalism in consumer law is capping credit to avoid over-indebtedness. The control of the degree of indebtedness for the individual[100] it was also appreciated as an example of justified paternalism.

5. Conclusions

Notwithstanding the importance of comprehend the idea of protection as clearly as possible, confusion, which could sometimes be interpreted as intentional, continues to exist.

Paternalism, applied in cases where it is really necessary, is definitely a good thing.

Like any restriction of liberty, it must be justified, proportionate and limited to cases where it is necessary.

There are clear situations in which only through paternalism can adequate protection be provided to the consumer, so that it does not need to be extended to situations in which protection can be achieved otherwise, nor to claim that it exists when the protection comes from elsewhere. That is why we must always keep in mind the basic feature of paternalism, which is the protection of the individual from himself.

Regardless of the form of paternalism, coercive or exclusively "influencing", the authority is the one that always knows better and is entitled either to impose a certain decision, or to exercise influence on individuals, with or without indicating a precise choice to follow.

Paternalism starts from the presumed lack of discernment in decision-making, in the case of people with full legal capacity. It is important to be retained that the individual's inability to choose should not derive from the very misinformation of the authority, and can only be a result of the natural human limits.

A policy or an act can be qualified as genuinely paternalistic only if the protection is channeled primarily to the individual's best interest, and secondly to the others' interests.

Even the libertarian ideology admits the importance of appropriate counseling of individuals, to ensure achieving the goal of their freedom. Libertarian paternalism ideology starts from the ideas that the influence of people's choices cannot be avoided and that paternalism does not always involve coercion. Libertarian paternalism does not constrain individuals

[98] Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law. Cases and Materials*, second edition, (Cambridge: Cambridge University Press, 2010), 767. In this regard, art. 114 TFEU provides that consumer protection must benefit from a high level of protection.

[99] Idem, 768.

[100] Russell Blackford, *op. cit.*, 25.

to act in a certain way, dictated by planners, but only guides them to take the best decisions.

The libertarian paternalism is the ideal way to understand how paternalism penetrates consumer law and how probably it becomes to confound genuine and false paternalism.

Libertarian paternalistic nudges, which are instruments meant to protect the individual from himself, by guiding his choice, with or without indicating what exactly to choose, can be grouped into several categories, such as: nudges destined to protect the individual from lack of self-control, nudges meant to stimulate common sense, reminder nudges, nudges to giving up vices, persuasion nudges.

It is of a great importance to offer a clear distinction between the protection provided by paternalism in itself and the protection conferred by the consumer law. Without this clear distinction, it would be a great mistake and extremely dangerous to conclude that the protection afforded by law is a form of paternalism.

The main function of law, the enforcement of equity, protects the individual from the injustices he might suffer from others.

Paternalism, protecting the individual from himself, even if it penetrates the law, has a completely different nature and a different function.

Consumers are not a class, because every one of us is a consumer. It is the status of consumer that is protected by consumer law, not classes or persons. "Consumer", in this context, is the person in the position of consumer, not a weak, ignorant or gullible person or class.

Consumer law is, in some cases, penetrated by paternalism, but these cases are much fewer than usually presented.

In order to preserve both the beneficial effect that properly applied paternalism must have and the basic rationale of the law, namely the protection of the individual from the injustice caused by others, the interplay area between consumer law and paternalism must be rightly understood.

A paternalistic measure is good when it serves the interests of the consumer and is really useful to him.

Any misqualification as paternalistic of a consumer measure can lead to the dilution of the beneficial effect that this ideology must have, but also to the erosion in understanding the purpose of consumer law. Consequently, in order to prevent this misqualification, an objective and balanced analysis of each consumer protection measure is needed, so that the consumer status may enjoy due respect.

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A ROMANIAN PERSPECTIVE ON DETERMINING THE COMPETENT COURT FOR THE SHARING-OUT OF THE ESTATE IN THE LIGHT OF REGULATION (EU) NO. 650/2012

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Abstract

The Treaty on the Functioning of the European Union provides that the Union shall develop judicial cooperation in civil matters having cross-border implications and, for this purpose, the European Parliament and the Council shall adopt measures for the proper functioning of the internal market, aimed at ensuring the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction. To this end, the European Parliament and the Council of the European Union have adopted Regulation (EU) no. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, which applies to successions of natural persons who died on or after 17 August 2015.

There are more than a few cases in which the increasing mobility of private individuals, in particular within the European Union, gives rise to matters of succession with cross-border implications, such as when the deceased was the national of a state other than the state of their habitual residence at the time of death or when the assets forming part of the estate are located in the territory of several states. Thus, the inheritance, including the sharing-out of the estate, may fall under the scope of several legal systems. Under such circumstances, in the case of a judicial sharing-out of the estate, we are dealing with a private law matter having cross-border implications, which could result in a conflict of law, within the meaning that the dispute could be settled by courts from several states.

In light of the above, this short overview aims to analyse, on the one hand, the rules applicable in order to determine the court or courts of law competent to settle the sharing out of the estate, or the international jurisdiction of Romanian courts over foreign ones, without overlooking the correlation between the jurisdiction and the law applicable to the succession as a whole. After determining the state the courts of law of which hold jurisdiction, we will refer to internal jurisdiction, both in territorial and substantive terms, in line with the rules of the domestic civil procedural law.

One of the conclusions of our overview is that, although the regulation aims to ensure that the court of law ruling in connection with the sharing-out of the estate will enforce, in most of the cases, its own law, in practice, there will also be instances where the rules of procedural law will pertain to the legal system of one Member State which was party to the adoption of the Regulation, while the rules of substantive law will pertain to a third country. Thus, it is not impossible for the Romanian courts of law to enforce rules of substantive law pertaining to another legal system, all the more as, in accordance with Article 23 paragraph (2) letter j) of Regulation (EU) no. 650/2012, the scope of the applicable law also encompasses the sharing-out of the estate.

Keywords: *Regulation (EU) 650/2012, Romanian Code of Civil Procedure, succession, sharing-out of the estate, inheritance distribution (division), competent national court.*

1. Preliminary considerations

There are more than a few cases in which the increasing mobility of private individuals, in particular within the European Union, gives rise to matters of succession with cross-border implications, such as when the deceased was the national of a state other than the state of their habitual residence at the time of death or when the assets forming part of the estate are located in the territory of several states. Thus, the inheritance, including the sharing-out of the estate, may fall under the scope of several legal systems.

Under such circumstances, in the case of a judicial sharing-out of the estate, we are dealing with a private law matter having cross-border implications, which could result in a conflict of law, within the meaning that the dispute could be settled by courts from several states[1].

Therefore, first of all, we ought to detect the rules applicable in order to determine the competent court or courts of law in matters of sharing out of the estate, more specifically, the *international* jurisdiction of Romanian courts over foreign courts. After determining the state the courts of law of which hold jurisdiction, we will determine the *internal* jurisdiction, both in territorial, and substantive terms, in line with the rules of the domestic civil procedural law[2].

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[1] See Ion. P. Filipescu, Andrei I. Filipescu, *Tratat de drept internațional privat* (Treatise on private international law) (București: Universul Juridic, 2007), 33; Ioan Macovei, *Tratat de drept internațional privat* (Treatise of Private International Law) (București: Universul Juridic, 2017), 14.

[2] See Flavius George Păncescu in *Noul Cod de procedură civilă: comentariu pe articole* (Code of Civil Procedure: commentary on articles), vol. II: art. 527-1133, coordinated by Gabriel Boroi, second edition (București: Hamangiu, 2016), 998; Șerban-Alexandru Stănescu in Noul Cod de procedură civilă comentat și adnotat (The new Code of Civil Procedure commented and annotated), coordinated by Viorel Mihai Ciobanu and Marian Nicolae, vol. II (București: Universul Juridic, 2016), 1650.

Within the European Union, as far as successions with cross-border implications are concerned, it is Regulation (EU) no. 650/2012[3] which determines, as a matter of rule, the state the courts of law of which are competent to review the succession on the merits[4], and consequently, including the sharing-out of the estate.

In terms of territory, the regulation applies in all Member States, with the exception of Denmark (according to Articles 1 and 2 of Protocol no. 22 on the position of Denmark[5], annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union) and Ireland (according to Articles 1 and 2 of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice[6], annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union)[7].

Although there is no express stipulation in the Regulation within the meaning that the Member States which did not take part in its adoption are construed as third countries, Denmark and Ireland should be considered as *third countries* for the purposes of this Regulation[8] given that the Regulation cannot be enforced in a state which was not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

As regards the *application in time*, in accordance with Article 83 paragraph (1), the Regulation shall apply to the succession of persons who died on or after 17 August 2015, in particular, to the legal sharing-out of the estate concerning successions opened from and including 17 August 2015.

In connection with successions opened before the above-mentioned date, the internal rules of conflict of each Member State will apply, rules which, in the case of Romania, are contained in the Code of Civil Procedure[9], Book VII "International Civil Proceedings" (Articles 1064-1109).

In respect of the relationship with international conventions in effect at the time of its adoption, Article 75 paragraph (1) of Regulation (EU) no. 650/2012 provides that it shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of this Regulation and which concern matters covered by this Regulation, nevertheless, in accordance with paragraph (2), this Regulation shall take precedence over conventions concluded exclusively between two or more Member States which are party to its adoption, in so far as such conventions concern matters governed by this Regulation.

Thus, with a view to fulfilling the international commitments undertaken to third states by the Member States before the enforcement of this Regulation, in so far as a Member State has concluded with a third state a convention on matters governed by the Regulation, the said convention will continue to apply in relationships between the contracting states. The Regulation shall only take precedence over the international convention where the latter was concluded exclusively between states which were part in the adoption of the Regulation.

Although Article 75 paragraph (1) of Regulation (EU) no. 650/2012 only refers to international conventions concluded before the adoption of the Regulation on 4 July 2012, the doctrine emphasized the fact that the European Union hold, from this point forward, exclusive jurisdiction over the negotiation and conclusion of international treaties comprising rules of international private law in matters of succession, which means that the Member States which were part in the adoption of the Regulation can no longer conclude such conventions among them, because this would impair the enforcement of the Regulation[10].

Hence, further to the transfer of jurisdiction from the Member States to the European Union in respect of the conclusion of international conventions on the matters covered by Regulation (EU) no. 650/2012, Romania could only enter into such conventions comprising rules of international private law in matters of succession subject to the Commission's consent[11].

Please find below, first of all, an overview of the main rules for determining the *international* jurisdiction of Member States in the matter of legal sharing-out of the estate, in observance of Regulation (EU) no. 650/2012, also having regard to the correlation between *the jurisdiction and the applicable law to the succession as a whole*. Then, we will focus on *internal* jurisdiction, both in territorial and

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[3] *Regulation (EU) no. 650/2012* of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, published in the Official Journal of the European Union L 201 of 27 July 2012.

[4] See Ioan-Luca Vlad, *Succesiuni internaţionale. Regulamentul nr. 650/2012. Tratate internaţionale în domeniu* (International successions. Regulation no. 650/2012. International treaties in the field), second edition (Bucureşti: Editura Universul Juridic, 2020), 171.

[5] Published in the Official Journal of the European Union, C 326 of 26 October 2012.

[6] *Idem*. However, Ireland has the possibility to notify its intention to accept the Regulation, in accordance with Article 4 of the said Protocol.

[7] The United Kingdom withdrew from the European Union and, starting from 1 February 2020, it holds the status of third country, more specifically, non-EU country.

[8] See Andrea Bonomi în A. Bonomi, P. Wautelet, I. Pretelli, A. Oztürk, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, 2e édition (Bruxelles: Éditions Bruylant, 2016), 32-38; Paul Lagarde in Ulf Bergquist, Domenico Damascelli, Richard Frimston, Paul Lagarde, Felix Odersky, Barbara Reinhartz, *Commentaire du règlement européen sur les successions* (Paris: Éditions Dalloz, 2015), 14. See also Richard Frimston in *Idem*, 51-53.

[9] *Law no. 134/2010* on the Code of Civil Procedure, republished in the Official Gazette of Romania no. 247 from 10 April 2015.

[10] Andrea Bonomi în A. Bonomi, P. Wautelet, I. Pretelli, A. Oztürk, *Le droit européen des successions. Commentaire du Règlement (UE) n° 650/2012 du 4 juillet 2012*, 2e édition, 942.

[11] *Idem*, 942-943.

substantive terms, in line with the rules of Romanian civil procedural law.

2. Regulation (EU) no. 650/2012

A. *The habitual residence of the deceased at the time of death was located in a Member State* (general jurisdiction)

According to recital (23) "In view of the increasing mobility of citizens and in order to ensure the proper administration of justice within the Union and to ensure that a genuine connecting factor exists between the succession and the Member State in which jurisdiction is exercised, this Regulation should provide that the general connecting factor for the purposes of determining both jurisdiction and the applicable law should be the habitual residence of the deceased at the time of death".

In that respect, *the general jurisdiction rule* is laid down in Article 4 of the Regulation, reading as follows "(t)he courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole". In enforcing this article, the nationality of the deceased is irrelevant[12].

In accordance with abstract (23), in order to determine the *habitual residence*, the court of law should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of Regulation (EU) no. 650/2012.

Moreover, abstract (24) specifies that, in certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located.

Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances.

The provisions of the Regulation were devised in such a manner as to ensure that the court of law ruling on the sharing-out of the estate will enforce, in most cases, its own law. Therefore, with a view to ensuring the *unity of the succession*, in accordance with Article 21 paragraph (1), "(u)nless otherwise provided for in this Regulation, the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death".

However, as also specified in abstract (43), the rules of jurisdiction laid down by the Regulation may, in certain cases, lead to a situation where the court having jurisdiction to rule on the succession will not be applying its own law.

In order to narrow such a possibility, the regulation lays down several mechanisms which may be triggered when the deceased opted, in accordance with Article 22 paragraph (1), for his succession to be governed by the law of *another state* (than the state of his last habitual residence) the nationality of which he possessed[13]. In this case, the competent courts would be the courts of the Member State in which the deceased had his habitual residence at the time of death, and which should enforce the rules of substantive law of another state, irrespective of whether it is the law of a Member State or not.

Hence, Article 5 paragraph (1) reads as follows "(w)here the law chosen by the deceased to govern his succession pursuant to Article 22 is the law of a Member State, the parties concerned may agree that a court or the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter".

Consequently, in this case, the heirs may enter into a *choice-of-court agreement*, so that jurisdiction will be assigned to the courts of law of the Member State the law of which was chosen by the deceased to govern his succession as a whole, thus ensuring the unity between the rules of substantive law and procedural law, meaning the unity between the applicable law and jurisdiction.

B. *The habitual residence of the deceased at the time of death was located in a third-country* (subsidiary jurisdiction)

In accordance with Article 10 paragraph (1) of the Regulation, there are two instances where the courts of a Member State, such as Romania, nevertheless have jurisdiction to rule on the succession as a whole,

[12] See Dan Andrei Popescu, „Domeniul de aplicare al Regulamentului (UE) 650/2012. Regulile de competență internațională" (Scope of Regulation (EU) 650/2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession. International Competency Rules), *Revista română de drept privat* no. 5 (2014): 167.

[13] Article 22 paragraph (1): A person may choose as the law to govern his succession as a whole the law of the State whose nationality he possesses at the time of making the choice or at the time of death. A person possessing multiple nationalities may choose the law of any of the States whose nationality he possesses at the time of making the choice or at the time of death.

although the habitual residence of the deceased at the time of death was not located in a Member State.

The former concerns the case where the *deceased had the nationality of that Member State at the time of death* (jurisdiction based on nationality). The latter refers to the case where the *deceased had his previous habitual residence in that Member State*, provided that, at the time the court is seized, a period of not more than five years has elapsed since that habitual residence changed (jurisdiction based on previous habitual residence).

In all cases falling under the scope of Article 10 of Regulation (EU) no. 650/2012, recognition of subsidiary jurisdiction of the courts of a Member State is conditional upon the existence of assets forming part of the estate in the territory of that Member State, which was party to the adoption of the Regulation.

If the factual background does not fall under the scope of any of the cases described above, meaning that no court of law of a Member State has jurisdiction pursuant to Article 10 paragraph (1), the courts of the Member State in which assets forming part of the estate are located nevertheless have jurisdiction to rule not on the succession as a whole, but *only on those assets* (*forum necessitatis*).

Although the regulation aims to ensure that the court of law ruling in connection with the sharing-out of the estate will enforce, in most of the cases, its own law, in practice, there will also be instances where the rules of procedural law will pertain to the legal system of one Member State which was party to the adoption of the Regulation, while the rules of substantive law will pertain to a third country.

Thus, it is not impossible for the Romanian courts of law to enforce rules of substantive law pertaining to another legal system, all the more as, in accordance with Article 23 paragraph (2) letter j) of Regulation (EU) no. 650/2012, the scope of the applicable law also encompasses the sharing-out of the estate.

3. Territorial jurisdiction of the Romanian courts

As already specified above, upon determining the state the courts of which hold jurisdiction in accordance with Regulation (EU) no. 650/2012, we will determine the *internal* jurisdiction, both in territorial, and substantive terms, in line with the rules of the domestic civil procedural law.

In the case of Romania, in respect of the territorial jurisdiction, the Civil Procedure Code stipulates, in Article 118 paragraph (1) that, in inheritance matters, pending the severance of joint ownership, the following shall fall under the exclusive jurisdiction of the court assigned to the last residence of the deceased: motions on the validity or enforceability of testamentary dispositions; motions on the estate and its encumbrances, as well as motions on any claims which one heir might raise against another; motions of the deceased's legatees or creditors against any of the heirs or against the executor of the will.

Furthermore, Article 118 paragraph (2) clarify that the motions concerning estates relating to several successively opened successions fall under the exclusive jurisdiction of the court assigned to the last residence of any of the deceased.

A. *Exclusive jurisdiction of the court assigned to the last residence of the deceased*

In accordance with Article 118 paragraph (1) of the Civil Procedure Code, the court of law assigned to the last residence of the deceased, pending the severance of joint ownership[14], holds exclusive jurisdiction to rule on:

a) motions on the validity or enforceability of testamentary dispositions, such as motions to invalidate or ascertain the validity of a will or motions for the enforcement of a will, when the validity of the latter is not challenged [e.g., the universal legatee requests forced heirs to take actual possession of the estate, in accordance with Article 1128 paragraph (1) of the Civil Code][15];

b) motions on the estate and its encumbrances, as well as motions on any claims which one heir might raise against another, such as the motion for cancellation of the heir certificate, motion for reduction of gifts in excess of the freely disposable portion of the estate, motions on the conservation or administration of assets during the status of shared ownership, motion for the cancellation or termination of a sale of inheritance rights, *the request for the sharing-out of the estate* (including when the estate consists of real estate assets), inheritance claim, as well as the motion or any other motions whereby the heirs raise claims against one another, however, only in so far as such claims relate to the estate[16] (for instance, the motion of warranty against eviction and hidden flaws, submitted by one of the heir against the other heirs, in accordance with Article 683 of the Civil Code, or the motion to set aside the sharing out, by mutual consent, in accordance with Article 684 of the Civil Code)];

c) motions of the legatees or creditors of the deceased (estate) against any of the heirs or against the executor of the will, such as the motion for delivery of a particular devisee, motions whereby the personal creditors of the deceased exercise rights deriving from agreements concluded with the latter, motions whereby the creditors of the estate raise claims in reliance upon a title subsequent to the opening of the succession (e.g.,

[14] Nevertheless, "the jurisdiction is vested to the court holding powers over the last residence of the deceased, even where the succession was settled and the assets specified in the heir certificate were distributed, however, the distribution of other inherited real estate is sought, for which an ownership deed was issued after the sharing out" – Romanian High Court of Cassation and Justice, Civil Section I, *Decision no. 212/2016*, available on http://www.scj.ro.

[15] Gabriel Boroi, Mirela Stancu, *Drept procesual civil* (Civil procedural law), fifth edition (Bucureşti: Hamangiu, 2020), 290.

[16] Ibidem.

requests for expenses relating to the deceased's burial or expenses required for the conservation and administration of assets forming part of the estate[17]);

d) motions concerning the cancellation of the heir certificate and for determining the rights of persons claiming infringement of their rights as a result of issuance of the heir certificate.

Mention is to be made that, in the following cases, the jurisdiction of the court is determined not in reliance upon Article 118 paragraph (1) of the Civil Procedure Code, but in accordance with the general rule[18]:

a) motions whereby heirs exercise rights collected from the succession against third parties, debtors of the deceased;

b) motions whereby heirs bring suit against a creditor of the estate (e.g., in order for the court to ascertain the statute of limitations in respect of the creditor's right to claim and be granted foreclosure for a debt, for the termination or rescission of an agreement concluded by it *de cuius*);

c) motion whereby the third-party plaintiff does not intend to exercise a right of receivable over the estate, such as filing a real estate motion against the heirs or the heirs claiming a real estate to be returned by a third party, who does not challenge their capacity as his heirs *de cuius*, fall under the jurisdiction of the court assigned to the location of the real estate;

d) motions submitted by creditors of the estate, when there is only one heir, because there is no joint ownership, shall be settled by the court having jurisdiction over the heir's domicile[19].

B. *Jurisdiction in the case of successive successions*

In accordance with Article 118 paragraph (2) of the Civil Procedure Code, where several successions are opened successively, the court having jurisdiction over the last residence of any of the deceased shall have exclusive jurisdiction to rule on motions concerning the estate. This provision only applies when the persons who died successively are heirs of one another[20].

The considerations above reveal that the request for the sharing-out of the estate, including when the estate consists of real estate, falls under the exclusive jurisdiction of the court assigned to the last residence of the deceased.

Where the last residence of the deceased is not located in the territory of Romania, which means that the court having jurisdiction to rule in the case cannot be identified, the request for the sharing-out of the estate shall be forwarded, in accordance with Article 1072 of the Civil Procedure Code, in observance of the rules governing the substantive jurisdiction, to the Local Court of 1st District of Bucharest, or to the Tribunal of Bucharest.

That is why it is still necessary to determine the *internal* jurisdiction, in substantive terms, in accordance with the rules of Romanian civil procedural law, both when the last residence of the deceased is located in the Romanian territory, and when *de cuius* could have his residence abroad.

4. Substantive jurisdiction of the Romanian Courts

Before the Civil Procedure Code was amended by means of Law no. 310/2018[21], in accordance with Article 94 section 1 letter j), local courts used to rule, as courts of first instance, on *motions for legal distribution, irrespective of the value* and irrespective of the nature of the sharing-out, therefore, including on the sharing-out of the estate. On the other side, Article 105 of the Civil Procedure Code (currently repealed) stipulated that, *in matters of succession, jurisdiction depending on value was determined without subtracting the encumbrances or debts relating to the estate*.

When the motion for sharing-out of the estate was accompanied by motions such as for ascertaining the opening of the succession, the capacity and shares to which the heirs were entitled or the composition of the estate, it was deemed that this was a *main single motion for sharing-out*, because such motions are inherent to any sharing-out of estates, and the competent court was the local court, in accordance with Article 123 paragraph (1)[22] and Article 94 section 1 letter j) of the Civil Procedure Code[23].

In respect of other motions concerning matters of succession, such as the inheritance claim, cancellation of heir certificates or reduction of gifts in excess of the freely disposable portion of the estate, the court having jurisdiction to settle the sharing-out motion was disputed.

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[17] Mihaela Tăbârcă, *Drept procesual civil* (Civil procedural law), vol. I (Bucureşti: Universul Juridic, 2013), 674.

[18] See G. Boroi, M. Stancu, *Drept procesual civil* (Civil procedural law), fifth edition, 290 et seq.

[19] Exception: motions concerning the enforcement of testamentary dispositions falling under the scope of the court having jurisdiction over the location where the succession was opened, when the sole heir is the universal legatee, and the testator appointed a third party as his executor. See G. Boroi, M. Stancu, *Drept procesual civil* (Civil procedural law), fifth edition, 291.

[20] M. Tăbârcă, *Drept procesual civil* (Civil procedural law), vol. I, 676. See also Romanian High Court of Cassation and Justice, Civil Section I, *Decision no. 212/2016*, aforesaid.

[21] *Law no. 310/2018* for amending and supplementing the Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing other normative acts, published in the Official Gazette of Romania no. 1074 from 18 December 2018.

[22] Article 123 paragraph (1) of the Civil Procedure Code: Additional motions, ancillary motions, as well as incidental motions shall be settled by the court having jurisdiction over the underlying motion, even if substantive or territorial jurisdiction would lie with another court of law, save for the motions listed in Article 120.

[23] See G. Boroi, M. Stancu, *Drept procesual civil* (Civil procedural law), third edition, 205; Gheorghe Liviu Zidaru, *Competenţa instanţelor judecătoreşti în dreptul procesual civil român şi german* (The jurisdiction of the courts in Romanian and German civil procedural law) (Bucureşti: Universul Juridic, 2015), 342.

On the one hand, it was argued that, in cases of sharing-out of the estate, jurisdiction did not have to be split between the local court and the tribunal, "given that all motions […] concern, in the end, the sharing-out of the estate, will form a common part of it and will be tried before the local court, as first instance"[24].

On the other hand, save for the case where other motions in matters of succession were submitted on a subsidiary basis, during the proceedings for sharing out of the estate[25], it was deemed necessary, in each and every case, to determine the underlying claim, and, depending on it, to determine the rule of jurisdiction depending on which the substantive jurisdiction was to be decided[26].

Article I section 9 of Law no. 310/2018 added, in the Civil Procedure Code, in Article 94 section 1, after letter j), a new letter, j^1, reading as follows: "motions relating to matters of succession, irrespective of their value". In addition, Article I section 12 of Law no. 310/2018 repealed Article 105 of the Civil Procedure Code and, therefore, jurisdiction in matters of succession is no longer determined depending on the value, which means that the value of the object of such motions is no longer relevant in determining the substantive jurisdiction, and the motions relating to matters of succession fall under the jurisdiction of local courts, as first instance.

Consequently, as emphasized in the doctrine, at present, "motions for sharing-out of the estate fall under the substantive jurisdiction of local courts, irrespective of the value of the divisible property to be shared out and of whether it is submitted as underlying, ancillary or incidental motion, within another motion relating to matters of succession"[27]. If, in accordance with the law, other motions were also submitted in connection with the sharing-out of the estate and on the settlement of which depends the performance thereof, such as motions for the reduction of gifts in excess of the freely disposable portion of the estate, motions for the summary of donations to be included in the estate and others similar, in accordance with Article 985 paragraph (2) of the Civil Procedure Code, the local court shall further rule, in first instance, on such motions forming common part with the sharing-out of the estate[28].

Pursuant to an opinion expressed before the amendment of the Civil Procedure Code, "the thesis of predominant finality of the sharing-out of the estate cannot be adopted, irrespective of the particulars of each and every case, or of the nature of motions brought before the court"[29]. Thus, in light of the Civil Procedure Code, in the wording preceding the amendments enforced by Law no. 310/2018, in the case of motions not strictly connected with the legal relationships between presumptive heirs, but legal relationships also having as subjects parties not connected with the estate, as it happens in the case of motions concerning the ascertainment of absolute nullity of donation agreements concluded with third parties, such motion may not be construed as ancillary to the sharing-out of the estate, but a main claim in its own right, and therefore the criteria of value will be applied[30] in determining the court having substantive jurisdiction.

Since the ascertainment of the nullity of donations is aimed at replenishing the estate, and the motion for sharing-out of the estate falls under the substantive jurisdiction of the local court, whether it is submitted as an underlying claim or as an ancillary or incidental one, we believe that, at present, ascertainment of the absolute nullity of donation agreements concluded by *de cuius* with third parties will also fall under the jurisdiction of the local court, as first instance. Such motions will form common part with the sharing-out of the estate, as it also happens in the case of reduction of the gifts in excess of the freely disposable portion of the estate, or the quashing of donations, in so far as necessary for replenishing the forced heirship, all the more as reduction applies not only to donations benefiting heirs, but also to donations benefiting third parties to the estate.

5. Instead of a Conclusions

The interaction between elements such as the habitual residence of *de cuius* at the time of death, the choice-of-court agreement concluded by the heirs, the choice of law to be applied to the succession and the location of the assets forming part of the estate, leads to different results in terms of determining the Member State the courts of which have the power to rule on the succession as a whole, therefore, including in respect of the sharing-out of the estate. Thus, the fact that the deceased was a Romanian national or that he had chosen the Romanian law as the governing law or Romania as the venue where the assets forming part of the estate are located is not a guarantee of the fact that the Romanian courts will have jurisdiction, in accordance with Regulation (EU) no. 650/2012 to rule on the request for the sharing-out of the estate.

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[24] M. Tăbârcă, *Drept procesual civil* (Civil procedural law), vol. I, 528. In the same sense, see also G. L. Zidaru, *Competenţa instanţelor judecătoreşti în dreptul procesual civil român şi german* (The jurisdiction of the courts in Romanian and German civil procedural law), 344.

[25] See G. Boroi, M. Stancu, *Drept procesual civil* (Civil procedural law), third edition, 818-819.

[26] *Idem*, 205.

[27] G. Boroi, M. Stancu, *Drept procesual civil* (Civil procedural law), fifth edition, 235-236.

[28] Mihaela Tăbârcă, *Drept procesual civil. Supliment al vol. I, II, III: Comentarii ale Legii nr. 310/2018* (Civil procedural law. Supplement to vol. I, II, III: Comments of Law no. 310/2018), third edition (Bucureşti: Solomon, 2019), 17.

[29] See Gheorghe Liviu Zidaru, „Curtea de Apel Bucureşti, Secţia a IV-a civilă, Sentinţa nr. 58F din 5 aprilie 2016 (Jurisprudenţă comentată)" (Bucharest Court of Appeal, Civil Section IV, Sentence no. 58F of 5 April 2016 – Commented case-law), *Curierul judiciar* no. 2 (2017): 85.

[30] In accordance with Article 94 section 1 letter k) of the Civil Procedure Code: Local courts rule […] on any other motions which may be measurable in money, amounting up to and including RON 200,000, irrespective of the parties' capacities, whether they are professionals or not.

Furthermore, although the regulation aims to ensure that the court of law ruling in connection with the sharing-out of the estate will enforce, in most of the cases, its own law, in practice, there will also be instances where the rules of procedural law will pertain to the legal system of one Member State which was party to the adoption of the Regulation, while the rules of substantive law will pertain to a third country.

As such, we may be faced with the situation where the Romanian courts, competent to rule on the sharing-out of the estate, will enforce rules of substantive law pertaining to another legal system, all the more as, in accordance with Article 23 paragraph (2) letter j) of Regulation (EU) no. 650/2012, the scope of the applicable law also encompasses the sharing-out of the estate.

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HUMAN RIGHTS AND INHERITANCE LAW: A MIRRORED PERSPECTIVE

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Abstract

The enforcement of fundamental human rights in the spectrum of inheritance law has a lengthy history. From a modern perspective, we confront with a divergent dynamism: the inheritance law has a static dimension, being considered the traditional area of private law. On the other hand, the human rights are more dynamic, and urge to find themselves respected in all the areas of law.

The article unfolds from two perspectives: a syncretic, at a national level point of view and a diachronic, evolutionary one, at a supernational level, of the way the jurisprudence on human rights led towards the legislative changes. As part of the national civil law system, as an anchor in private law, inheritance law is ruled according to internal provisions, making harmonizing the law a challenging endeavor. Despite mutual socio-historical heritage and Roman law origins, there are plenty differences within the substantive succession laws of Member States. Due to the intra-community right to free movement, the patterns of life changed, both from the perspective of the European Union and from the Member States' point of view. As a corollary, transforming life also means shifting the mortis causa legal approach, mainly by considering the succession law.

The aim of this article is to examine the influence of human rights in the area of inheritance law, mainly in family law and property law, across different jurisdictions. Its structure will follow the paradigm of outlining the influence of fundamental human rights in contrast with the general principles of inheritance national laws. The article concludes by exploring the legislative impact and the limits that human rights have from the inheritance law perspective.

Keywords: *inheritance law, human rights, succession law, harmonization*.

1. Introduction

This article seeks to address an analytical overview of critical issues concerning the interpretation and application of fundamental rights, observing that the major impact of fundamental rights, from the private law perspective, is not on the legislation, but on the case-law. This happens as a consequence of interpreting fundamental rights in an appropriate manner in order to apply them to private law rules. In fact, by ricochet, the impact transfers towards the legislation in time, that has to encompass the updated case-law. Therefore, the legal literature points towards an indirect horizontal effect, noting that basic human rights have only a limited influence on inheritance law. As a consequence, it is brought forward the concept of '*subsidiarity in reasoning'*, by interpreting private law using fundamental rights principles and patterns, even though national private law has priority[1].

Inheritance rights are traditionally considered constitutional rights, as most states' constitutions guarantee a specific right of inheritance. Accordingly, there are some principles that encompass these rights. Throughout this paper, we will only discuss the most important ones. For example, the principle of equality, which entails that each natural person is equal in case of succession, with the same rules and conditions applying to all civil rapports. Also, it implies that men or women, legitimate and illegitimate children, as participants to civil relationships, must all be treated the same.

Initially, the rationale of asserting human rights involved vertical relationships. These rapports had the specific attributes that made the object of public law, thus regulating the relationship between the states and individuals by striving for the protection of individuals versus state interference in the area of fundamental rights. The objective is accomplished primarily by enforcing both negative and positive obligations for the states.

Subsequently, that rationale of asserting human rights is continuously expanded, merging in the process the area of private law. Due to the influence on horizontal relationships, this impacts the way that legislators establish and regulate these bonds between individuals.

2. Legal Sources of Human Rights

For a better approach, we will highlight the sources or instruments of human rights, on their different levels. At an international level, the human rights are defined and theoretically protected[2] by treaties, such as the *United Nations' Universal Declaration of Human Rights*, proclaimed by the *United Nations General Assembly* in Paris, in 1948[3].

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[1] Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law,* Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016, p. 9.

[2] It is only a theoretical protection due to the fact that the treaty is a non-binding legal instrument. As a consequence, there is no particular court, either at national or international level, that is bound to protect the human rights, as stated in the Treaty.

[3] Available at, https://www.un.org/en/about-us/universal-declaration-of-human-rights, accessed at 24.03.2021.

At a regional level, the instruments become more effective: the *European Convention on Human Rights*, formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*[4] is recognized by the signing parties: member states and the Union itself. As a consequence, the *European Court of Human Rights* protects the human rights stated in the Convention. Another regional instrument is the *European Charter of Human Rights*[5], enacted in 2000. In addition to these instruments, general principles regarding human rights might be found in the *Treaty on the European Union*[6], *Treaty on the Functioning of the European Union*[7] and in the jurisprudence of the *Court of Justice of the European Union.*

Besides the instruments listed above, we also distinguish national-level instruments or sources, such as national constitutions and the rulings of constitutional courts or other national courts that impact by their jurisprudence not only the ruling of other courts, but also the legislative perspective. However, there is a constant dynamism regarding the interpretation of the concept of human rights, due both to social and economic progress. In this respect, the development of private law protection of human rights enables reducing discrimination by protecting weaker parties[8].

Enabling human rights provisions is in close connection with the harmonization or adaptation of Member States' legislations. The purpose of unifying inheritance law in the European Union led towards the enactment of *Regulation (EU) No 650/2012*[9] *and* the implementation of the *European Certificate of Succession*. The regulation was met with great confidence, as being a proof of institutional harmonization of succession law among the Member states of European Union, concurrently establishing a better integration within the European Union and its principles.

The ideal scenario for best implementing human rights, as they are provided for by the sources indicated, implies reducing the divergences of Member states' national regulation concerning inheritance law. This is best achieved by unifying the rules of conflicts of law, mainly involving technical aspects, such as the procedure of determining the variables of inheritance, like heirs, estate portions, reserved estate portions et alii.

In case of cross-border inheritance procedures, because of the different inheritance laws that might apply, the context increases the difficulty, generating concerns not only regarding the lack of legal uniformity, but also in relation with the legal incompatibility. Therefore, the exercise of harmonizing succession laws is welcomed at European level. Moreover, the tendency leans towards creating a common European succession law framework. In this regard, *Regulation No. 650/2012* represents a first step towards harmonization, addressing cross-border juridical matters in a dual manner, by observing both legal and jurisprudential features. Also, the *Regulation No. 650/2012* founds the *European Certificate of Succession* that scrutinizes succession related rights from the Member States.

The *Regulation*'s prime purpose from the European Union's standpoint was the removal of internal Member states' legal inheritance-related obstacles, as they were encountered while exerting the right to free movement of persons[10]. In other words, the *Regulation*'s aim involved the '*collision uniformity of the succession*', as a first step towards harmonization. This concept entails that the applicable inheritance law involves a single connector, and as a consequence, the estate can be entirely inherited under a single substantive national law. By contrast, in case of inheritance disputes that involve more connectors, such as nationality or category of assets, the determination of applicable law can lead towards *'collision divisibility of the succession'*, enabling the divergent jurisdiction of national substantive laws over distinct inheritance assets.

This purpose would be accomplished in a dual manner. Firstly, the *Regulation* was intended to support the procedures of recognition and enforcement at intranational level. Therefore, the judgments delivered by a Member State could be easily recognized by a different Member State, thus reducing the incidence of inheritance-related incoherent case-law and jurisdictional disagreements involving a cross-border element. Secondly, the *Regulation* provided for the *European Certificate of Succession*, thus enabling a prompt assessment of inheritance cases involving a cross-border element, without altering the Member states internal substantive succession legislation.

[4] Available at https://www.echr.coe.int/documents/convention_eng.pdf, accessed at 24.03.2021.
[5] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, accessed at 24.03.2021.
[6] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, accessed at 24.03.2021.
[7] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, accessed at 24.03.2021.
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[9] *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0650, accessed at 24.03.2021.
[10] recital 9 of the *Regulation* provides that it applies to '*all civil law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession*.", available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62016CJ0558, accessed at 24.03.2021.

One of the main features of the *Regulation* is the establishing as a general principle[11] the jurisdiction of the Member State where *de cuius* had the last *habitual residence*[12]. Therefore, the *habitual residence* at the time of death is a main connector that is provided by the *Regulation.* Nevertheless, the *Regulation* does not impose this connector unto its recipients. For example, *de cuius* can indicate the applicable law, and as a result, the choice of law is a connector itself.

Therefore, even though the *Regulation* could not be a silver bullet for the legal harmonization issue, delivered an efficient solution for the applicable legislation. In time, this process will eventually help reducing the legislative divergence by enabling the juridical communication among Member states and by decreasing the discrepancies and conflicts encountered in the process of applying the law, that led towards the above mentioned "*collision fragmentation of the estate"*[13].

3. The legislative impact of human rights in the inheritance law

The *European Court of Human Rights*, by its jurisprudence, recognized in an indirect manner the fundamental human rights, in this purpose presenting a synthesis of the constitutional laws and traditions established by the Member states. Likewise, The *Charter of Fundamental Rights* represents a significant landmark for the Union's legislation, because it represents a written bill of rights, whereas *European Convention on Human Rights* embodies an outward bill of rights, generating a possible blunder regarding the legislative origin or legal source of fundamental rights. However, most fundamental rights are not considered absolute rights, recognizing that they can be limited accordingly with the public interest and the principle of proportionality.[14]

Even though the *European Convention on Human Rights* has impacted just a few cases regarding inheritance issues, it remains an important instrument invoked by parties involved in an inheritance dispute. The main provisions that are raised in order to settle the disputes are articles 6, 8, 14 of the Convention and article 1 of Protocol No. 1. The principle of '*the right to enjoy a possession'* and its protection according to *European Convention of Human Rights*, has been an unsettled odyssey. Allegedly, this particular bill of rights is not very resourceful in the inheritance-related issues. This being said, we will examine inheritance-related rights recognized by the Convention. For example, the right to inheritance is considered, according to *European Convention of Human Rights*, a possession within the scope of Article 1 of Protocol No 1. The European Court established a judicial divergence between two type of rights: on one hand, a settled right, and on the other hand, an expectation of inheritance. In order to have a consistent perspective, we shall examine some of the relevant case-law[15] in the following pages.

As a parenthesis, the consequences of discrimination are plenty and deceptive. In some legislations around the globe, the discrimination is mirrored by the failure of enacting the principle of equality. In such countries, the right to own property is not guaranteed by law for women[16]. However, the right of every person to equality before the law and enjoy the right to own property or the right to inherit, is still an unattained purpose. For example, in a decision from Kenya,[17] regarding the inheritance of land, the Court observed the violation of article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women.* In the cited case, because of the gendered-biased customary law, the daughters-heirs were entitled to a smaller portion of land than the sons-heirs, based expressly on their gender, thus infringing on basic human rights.

3.1. Property and inheritance as human rights

As stated in the legal literature, inheritance law '*deals with the passing on of property and rights and obligations, upon the death of an individual'*[18]. The legal research indicates that more than half a million legal cases encompass every year cross-border inheritances. Moreover, the percentage of cross-border inheritances amongst all the inheritance legal cases in the member states reaches the value of 10%[19]. It is a general rule that, at a European Union's level, the differences among the national inheritance laws generate insecurity and uncertainty, rendering the difficulty both for de cuius and for the heirs to

[11] Entitled 'the backbone of the system of succession established by the Regulation'; see Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[12] The concept of habitual residence designates the place where de cuius was 'at home', where life was most significant and where animus semper manendi contrasting with the concept of "domicile", as it is recognized by national jurisdictions.

[13] see Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[14] Robert Schütze, An Introduction to European Law, Cambridge University Press, 2015, pp. 105.

[15] Jonathan Glasson QC and Toby Grahamy, Inheritance: a human right?, Trusts & Trustees, Vol. 24, No. 7, September 2018, pp. 659–666.

[16] Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations "In Cameroon there is no legal provision for women to own property. Following traditional laws, a woman does not inherit land since she will marry and then be provided for by her husband outside her community. When her husband dies, again she will not inherit as the land returns to the husband's family." Source: Report of the Special Rapporteur on violence against women (E/CN.4/2000/68/Add.5), para. 14.

[17] Court of Appeal Eldoret: Mary Rono v. Jane and William Rono, Civil Appeal No. 66 of 2002, as cited in Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations.

[18] Martin Schauer, Bea Verschraegen (eds), *General Reports of the XIXth Congress of the International Academy of Comparative law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2017, f. 91.

[19] See Eleanor Cashin Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 132 (2013).

acknowledge their rights to leave and to receive inheritance in different countries[20]. Undoubtedly, this divergence of Member states' national regulation is an important obstacle in achieving real harmony in the area of human rights. In the following lines we will analyze the circumstances of forced heirship and disinheritance from a human rights standpoint.

Some Member States' legislations provide that one portion of the deceased's estate must be granted, to a class of heirs titled forced heirs. This provision is effective no matter the deceased's will and is applied both to donations and testaments. But even if the provisions are well established in the national legislations, they are, nevertheless, constraining the right to property. As a consequence, the deceased cannot freely dispose of the property, thus disregarding the right to protection of property, as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1. From this perspective, the legal provisions on forced heirship interfere with the right to protection of property as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1, although the institution itself theoretically pursues a legitimate purpose.

Another aspect is to distinguish if this particular interference is needed and appropriate in a democratic society and if the margin of appreciation, the way it is recognized to each Member State, is not distorted from its purpose. According to the margin of appreciation principle, member states have a certain autonomy regarding legislative policies related to controversial human rights, although guaranteed by the *European Convention on Human Rights.*

As stated by the legal provisions, part of the deceased's estate is granted de iure to the designated class of forced heirs. In order to achieve that, the legislator envisioned two portions of the estate: the non-reserved portion, of which de cuius can dispose of without restrictions, and the reserved portion, that entitles the reducing of both donations and wills that surpass the non-reserved portion; nevertheless, the reduction only operates after the death of *de cuius*, but the effects can retroactivate in the case of the donations.

As a principle, *de cuius* has the right to dispose *animus donandi* of his property. In order to do so, one can make donations during his or her lifetime, or a will, that has effect in devising the estate *post mortem*. From this point of view, the limitations concerning the right to decide the outcome of one's property, are in fact limitations of the right to property[21]. The rules concerning forced heirship are somehow disregarding the right to property as a fundamental human right, as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1. In fact, Article 1 of Protocol no. 1 of the Convention, is applicable to more situations, that span from full enjoyment of possessions to control of the use of property and the guarantee of not being deprived of property.

Even though *de cuius* has the right to decide to do whatever he wants with the property during his or her lifetime, if the arrangements involve the reserved portion of the estate, they will be annulled. In other words, the right to inherit the reserved portion is shieled better than the right to protection of property, as stated in the *European Convention on Human Rights,* Article 1 of Protocol no. 1. As a consequence, it is obvious the interference with the aforementioned fundamental right.

From our point of view, the legal mechanism of forced heirship is not only obsolete, but also detrimental to the legal order. Moreover, it does not appear necessary for the society's wellbeing, enabling to believe that the legislator does not trust the law's recipients to make the right choices in protecting their family. Because of that, the legislator decides for the citizens, taking away a part of their freedom of choice by imposing limitations regarding the protection of property, but delivering a greater protection to heirs by imposing the forced heirship mechanism, thus carrying out a legitimate purpose.

Another important matter is the possibility or impossibility of disinheriting the successors by *de cuius.* The connection with the human rights issue resides in the blurry lines designating the recipient of this protection: the deceased's will or the designated heirs.

The deceased's choice of disinheriting an heir is stipulated distinctly across the member states legal systems. Besides the fact that some Member States lack entirely the provisions regarding disinheritance, the ones that provide a legal framework, also specify different legal treatments, both substantive and procedural. As a consequence, enabling a homogenous treatment as provided by the Regulation is not a realistic choice, considering that protecting the deceased's will over the protection of the designated heirs might not be applicable.

Nonetheless, due to the concept of margin of appreciation recognized to member states by the Convention, for the time being, a claim brought up to the *European Court of Human Rights* concerning the violation of Article 1 of Protocol no. 1 of the Convention, by the mechanism of forced heirship or disinheritance, will probably be dismissed by invoking the Member State's margin of appreciation doubled by the juridical consistency of the Member states' legislation[22].

For better understanding the essence of the protected right, we will cite the Court's caselaw,

[20] Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[21] As stated in the case *Marckx v. Belgium*, application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[22] Dimitris Liakopoulos, 'Interactions between European Court of Human Rights and Private International Law of European Union' (2018) 10(1) Cuadernos de Derecho Transnacional 248.

pointing out the provisions taken into consideration for the protection of fundamental human rights.

In the case *Slivenko v Latvia*[23], the court stated that the Article 1 of Protocol No. 1 can be applied when the protection of the right to peacefully enjoy a possession deals with already existing possessions, not future or potential possessions. Therefore, the Convention does not provide any assurances related to the right to attain possessions. However, the Convention does provide a certain protection when the circumstances indicate a legitimate expectation of enjoying a possession.

Following the same rationale, in *Saghindaze and others v Georgia*,[24], the Court stated that the notion of 'possession' envisioned by art.1 of Protocol No.1, is an autonomous concept, surpassing the limitations of physical goods, including rights, interests, and even claims, as long as they are under the '*legitimate expectation'* umbrella.

Likewise, in *Fabris v France*[25], the Court stated that even though Article 1 of Protocol No. 1 of the Convention does not provide assurances related to the right to attain possessions, they do offer a certain protection when the circumstances indicate a legitimate expectation, as well as claims based on a legitimate expectation[26] of enjoying a possession. Also, the court stated that the autonomous concept of 'p*ossession*' might also encompass an advantage as a consequence of discriminatory provisions or circumstances.

The case unfolds as it follows: Mr. Fabris, a French citizen, was considered an illegitimate child, given the fact that he was '*born of adultery'*. As a consequence, he was entitled to only a half of the share a legitimate child would receive. Later on, France passed amendments to the obsolete legislation from 1972, that was deemed discriminatory, and as a consequence, illegitimate children were granted the same inheritance rights like legitimate children. However, the amendments did not have retrospective effect, and Mr. Fabris was only entitled to half of his legitimate brothers' inheritance shares, being considered illegitimate.

The Court solved the cause by applying Article 1 of Protocol No. 1 of the Convention, that provided: '*Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*.' and article 14 of the Convention, that provided the '*enjoyment of the rights and freedoms set forth in Convention shall be secured without discrimination on any ground such as (…) birth'*. In this context, it was underlined the principle of equality, as a human right, and its impact on the right to inherit, and as a consequence, on the right to peacefully enjoy property.

Another interesting case is represented by *Re Land*[27], in which the claimant, the sole beneficiary under his mother's will, had been found guilty for her death by manslaughter, and as a consequence was applicable the forfeiture rule. The court interpreted the right to inherit as a right to enjoy a possession by itself, according to Article 1 of Protocol No 1 of the Convention. Therefore, it is expected of the national courts to give effect to primary legislation by considering the human rights enshrined in the Convention.

3.2. Family life: children rights and different types of union

Until recently, inheritance laws that violated the rights of the children considered illegitimate were not regarded as discriminatory. There is a certain concern at European level that substantive family law continues to remain in the exclusive competence of Member states, interim enabling European institutions to take measures concerning family law with cross-border implications.

It is an undeniable fact that the main interest of children is to have legal provision that would protect them. The lack of legislation to address the most important rapports regarding the rights and obligations that are particular to family life can be extremely harmful for children, regardless of the rationale that was counted for the lack of legislative protection, such as the parents gender identity, ethnicity or sexual orientation[28].

The *European Court of Human Rights* handed down an ample case-law that acknowledged the violation of article 14 of the *Convention* where children '*born of adultery'* and as a consequence considered illegitimate, were denied the right to inherit an equal share of their parent's estate, due to the national legislations.

In *Marckx v Belgium*[29], the Court stated that its provisions, namely Article 1, Protocol No. 1, expresses the protection of the right to peacefully enjoy one's possessions. As a result, it applies only to existing possessions without guaranteeing the right of mortis

[23] Slivenko v Latvia, Application No 48321/99, 2003, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[24] Saghindaze and others v Georgia, Application no 18768/ 05, 27 May 2010, (2014) 59 EHRR 24, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[25] Fabris v France, Application no. 16574/08, 2013, ECHR, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[26] As a rule, for the legitimate expectation to be recognized, it must be justified by a legislative provision that enables the law's recipients to undertake a certain conduct.

[27] Re Land , [2006] EWHC 2069 (Ch), available at hudoc.echr.coe.int, accessed at 24.03.2021.

[28] L. HODSON, Loveday: *Ties that bind. Towards a child-centered approach to lesbian, gay, bi-sexual and transgender families under the ECHR*, International Journal of Children s Rights, 2012, p 503, available at https://www.researchgate.net/publication/274466020_Ties_That_Bind_Towards_a_Child-Centred_Approach_to_Lesbian_Gay_Bi-Sexual_and_Transgender_Families_under_the_ECHR, accessed at 24.03.2021.

[29] *Marckx v Belgium*, Application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

causa acquiring possessions, that is only a potential right. Also, in the same case the Court stated not only that the concept of '*family life'* is an autonomous one, but that one cannot make any proper difference in the human rights area between the legal status of a family: legitimate or illegitimate. The legal reason points towards article 8 of the Convention, that uses the word '*Everyone*'[30], in relation with the law's beneficiaries. As a paradigm, the Court stated that the right of succession between children and parents, and in general between ascendants and descendants, is closely linked to *'family life'.*

In *Paradiso and Campanelli v Italy*[31], the concept of '*family life'* is recognized in relation with the presence of close personal ties, the latter being a sine qua non condition for the acknowledgment of '*family life'*. Moreover, the concept is considered lato sensu, encompassing not only immaterial and non-patrimonial relationships, such as social, cultural or emotional bonds, but also patrimonial and pecuniary relationships, for instance child and spousal support, joint use of property or even the right to inherit property among the individuals of a family, that may have the legal basis of the institution of the forced heirship or the right to a reserved portion of an estate. The same issues were taken into consideration by the Court in the cases *Munioz Diaz v. Spain*[32], *Kroon and Others v. the Netherlands*[33].

Analogously to the circumstances of illegitimate children, the Court noticed human rights violations in the case of adopted children. For instance, in the cases *Hand v George*[34] or *Pla and Puncernau v Andorra*[35], the Court restated its position towards the right of adopted children to be considered equal to natural children, concluding that discriminating against them would violate the provisions of articles 8 and 14 of the Convention. The Court admitted that even though it is not vested to settle disputes of private nature, it cannot remain passive in case of infringement on the prohibition of discrimination, provided by article 8, 14 and the principles underlying the *European Convention on Human rights*, such as the right to respect for private and family life.

The problem of unequal treatment of adopted children or born out of wedlock is amplified by the sexual orientation discrimination that impacts the right to succeed. This is mainly because an important number of Member states do not recognize same-sex marriages and do not provide extra-marital partners the same inheritance rights as provided to spouses.

An unequal development at European level of family law and inheritance law generates many family relationships disputes. These are mostly caused by the fact that these relationships are legally recognized only in some countries. For example, same-sex couples, married in gender-neutral marriage legislations, fear that they would be deprived of their inherent rights as a consequence of the contradictory legal framework. In this respect, the Court paved the way by its case-law, towards the endorsement and the acquiescence of this highly debated human rights.

The cases did not specifically address the issue of substantial marriage validity. However, interpreting the European Court's case-law, renders that the internal recognition of a same-sex marriage, requested for a precise purpose, does not pose the peril of violating the public national order, albeit one of the spouses is a citizen of that Member state. Also, the case-law projected an emerging European public order that provides its own conformity agenda.[36]

The case *Coman and others v Romania*[37] involved a same-sex married couple, with spouses of different nationalities. One spouse was a Romanian national, hence a European Union citizen. According to the European Union legislation, the European Union citizens have the right to move freely, together with their family members. In the Coman v Romania case, the spouse that was not an European Union citizen was not allowed to move freely, as a consequence of applying the principles of national identity and public order, Romania being one of the member states that do not recognize same-sex marriages. As a result, the legislation fails to offer the legal protection implied traditionally by family rights, both for the spouses, and for the eventual children, such as inheritance rights. Although the case was decided solely in relation to the requirement of recognizing the right to move freely as distinct, autonomous right of the national identity principle, the case could also entail the patrimonial aspects of the family rights, such as inheritance rights.

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[30] Article 8 of the Convention states: '1. *Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*'.

[31] *Paradiso and Campanelli v Italy*, Application No 25358/ 12, 24 January 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[32] *Munioz Diaz v. Spain*, Application no. 49151/07, 2009. In the decision, the Court stated that: 'children born out of wedlock may not be treated differently-in patrimonial as in other family-related matters-from children born to parents who are married to each other', available at hudoc.echr.coe.int, accessed at 24.03.2021.

[33] *Kroon and Others v. the Netherlands*, Application number 00018535/91, October 27, 1994, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[34] *Hand v George*, [2017] EWHC 533 (Ch), available at https://uk.practicallaw.thomsonreuters.com/D-101-2266?transitionType=Default&contextData=%28sc.Default%29, accessed at 24.03.2021.

[35] *Pla and Puncernau v Andorra*, Application no. 69498/01, 2004, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[36] Laima Vaige, *"Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland,"* Oslo Law Review 7, no. 1 (2020): 46-59.

[37] Case C-673/16, *Coman and Others v Romania*, 2018 (Grand Chamber), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN, accessed at 24.03.2021.

Likewise, the case *Orlandi and others v Italy*[38] involved more same-sex married couples that were denied family rights by the Italian authorities, on the basis that such unions cannot be recognized by registering into the civil records office, despite the fact that they are legally concluded in a different state, because the national law only provided rules for the traditional families. The Court stated that Italy disregarded fundamental human rights as they are enshrined in article 8 of the *European Convention on Human Rights*.

Despite the fact the Court stated that Member States have the freedom of constraining access to marriage for same-sex couples, having a wide margin of appreciation in this respect, most domestic cases are decided by invoking the principle of public order, that blocks the application of legal provisions and instruments that seem discordant with the national legislation.

For some member states, the concept of marriage is enshrined in the Constitution, as a traditional, different-sex union. As a consequence, an eventual registration or transcription of same-sex parenthood or marriage, might be considered as disregarding the public order. Such Member States do not provide legal protection of same-sex couples family rights, or state same-sex marriages exclusion, defining the legal union only from a heterosexual perspective[39].

The difficulty lays within the outcome of the substantial legitimacy of the legal status of same-sex couples whether they need the legal recognition of their *status quo* in a country that does not give legal effect to such unions, nor recognize as legitimate the children of such spouses. For example, in an internal decision of one Member state[40], the court had to decide the outcome of the legal status of a child whose parents were of the same sex. The object of the case was the transcription of the child's birth certificate in conformity with a legal birth certificate from Great Britain. The court considered the child's best interest and the principle of equality and non-discrimination in order to issue a decision. Also, the court acknowledged the fact that the child' s rights could only be protected by recognizing the legal status in relation with his family.

However, besides the direct application of some European Union' Regulations, the optimum manner of providing certain effects of same-sex marriages in the Member States that would not legally recognize these types of unions, implies the acknowledgment, and as a consequence, the recognition, of the case-law provided by the *European Court of Human Rights.*

4. Conclusions

Analyzing the jurisprudence of the *European Court of Human Rights* is one way of understanding the impact of fundamental rights in this specific area of private international law, namely the succession law. In this respect, it is a critical role the was taken up by the *European Court of Human Rights* from the perspective of protecting fundamental rights as a top priority.

Moreover, the development of implementing uniform rules by the European Union, aims towards the methodical elimination of the legal boundaries between the Member States, hence providing superior protection to fundamental rights in comparison to the one provided by the national legislation. Among the effects of implementing human rights in national legislations, one can identify the decreased impact of national public order, on one hand, and the augmented role of the European Union's public order, on the other hand, and, as a consequence, improved legal certainty and predictability for the legal issues that are bound to arise in the context of human rights protection.

Inheritance law harmonization finds itself at the stage of work in progress. A modern Europe cannot and should not withdraw from this project. Obviously, the policy of small steps applies best in this scenario. Therefore, doctrinal harmonization through comparative studies of legislation and case-law dynamics is a first necessary step, leading towards the so-called "*spontaneous harmonization"*[41]. Once achieved this stage, it enables the synchronization at the European institutional level.

Rendering human rights reasonable entails finding the accurate balance amongst different types of protection. Mutually conflicting human rights are frequently debated. For example, the forced heir's right to a portion of the estate might infringe the testator's right to dispose mortis causa of the property, according to the personal will; the debtor's right to a home might infringe the buyer's right to property, the child's right to protection might impact the public order of the Member state that would not provide legal effects for the same-sex marriage of the child's parents, and so on.

In the judgments referred to above, the European Court focused on basic principles like the right to inherit as a fundamental element of family life. Although there is a divergent application and lack of

[38] *Orlandi and others v. Italy*, 26431/12 , 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[39] See Mole, Richard CM; (2016) *Nationalism and homophobia in Central and Eastern Europe*. In: Slootmaeckers, K and Touquet, H and Vermeersch, P, (eds.) *The EU enlargement and gay politics: the impact of Eastern enlargement on rights, activism and prejudice*. (pp. 99-121). Palgrave Macmillan: London, UK.

[40] *Judgment of Supreme Administrative Court of Poland, 10 October 2018, ref no OSK 2552/16*, as it is mentioned in Laima Vaige, *"Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland*," Oslo Law Review 7, no. 1 (2020): 46-59. According to the author, the child's '*birth certificate was transcribed with only one mother, while the second parent in the registry remained anonymous. The second mother was mentioned only in the margins of the entry in the registry'*.

[41] the so called *'spontaneous harmonization'* indicates a synchronized legislative development at the national level, by means of replicating the changes observed in other countries. For more details about the issue, see Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342

harmonization between private international law and basic human rights, in time, due to the continuously expanding case-law of the European supranational courts, the Member States' legislation will surely find the proper balance, adjusting the legal provisions in order to comply with the supranational legislation concerning human rights

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CERTAIN ASPECTS REGARDING THE PARTIES' AGREEMENT IN CIVIL PROCEDURE

Nicolae-Horia ȚIȚ [*]

Abstract

The article examines how the agreement of the parties' may be relevant at various stages of the procedure, during the civil process. The provisions of the Romanian Code of Civil Procedure are analyzed in relation to the Model European Rules of Civil Procedure developed by the European Law Institute and UNIDROIT. Specifically, two situations in which the agreement of the parties takes effect in the procedural plan are herein being analyzed: (i) the establishment of the legal qualification concerning the acts and facts brought before in court and (ii) the agreement that may intervene in connection with certain aspects of evidence (their request after the deadline provided by the law, the conventions on evidence). The relationship between the principle of the judge's role in finding the truth and the principle of availability is being examined. The limits within which the parties may dispose by way of their agreement in the analyzed situations and the way in which the judge must relate to this manifestation of the principle of availability are also being further examined. The analysis intends to highlight the components of these principles and the development of a concept which targets the cooperation of the parties during the civil process is being proposed, highlighting the role of lawyers in identifying and applying appropriate procedural means for the court to resolve the matters that concern, in fact, the dispute between the parties.

Keywords*: civil procedure, agreement, parties, legal characterization, evidence, judicial remedies*.

1. Introduction

The unfolding of the civil process is marked by an intertwinement of the principle of availability with that of the role of the judge in finding the truth. Article 9 C. pr. civ., under its marginal name „the disposition right of the parties" regulates several facets concerning availability in civil proceedings, starting with bringing an action before the court, continuing with establishing the object and limits of the process and ending with the inventory of "classic" procedural acts: waiving the judgment of the summons, the waiver of the alleged claim, the recognition of the claims made by the opposing party, the court settlement, the adherence to the court decision (waiver of the right to appeal), the waiver of the court decision's execution[1]. In addition to these ways of disposing by the initiation, continuation, completion of the process, respectively the execution of the court decision, art. 9 para. (3) final thesis C. pr. civ. provides that the parties may dispose of their rights „in any other manner permitted by law"; this provision implies, on the one hand, that the will of the parties may yield various effects during the civil proceedings, throughout various stages of the procedure, and on the other hand, that they may occur only to the extent that there are legal provisions allowing the parties to dispose in respect to certain procedural institutions.

The rule established by art. 9 C. pr. must be interpreted in relation to the provisions of art. 22 C. pr. civ., which regulates the principle of the judge's role in the civil process. It should be noted that its marginal name no longer uses the established phrase „active role", this being preserved, in the current legislation, only regarding the bailiff (art. 627 of the C. pr. civ.)[2]. However, this option concerning the marginal designation must not lead to the conclusion of a reduction in the judge's prerogatives during a trial; by analyzing the provisions of art. 22, especially of par. (2), (3) and (4), it follows that the judge has numerous prerogatives enabling him to examine the case in all respects, including putting before the parties for debate factual and legal matters that are not covered by their summons or statements of defense, adducing the evidence necessary to fully clarify the factual situation and to establish or, as the case may be, to restore the legal qualification of the acts and facts brought before the court. The role of the judge in finding out the truth is combined, in principle, with the availability of the parties, because the court is bound by the procedural framework established by them, the judge being required to rule on everything that is therein requested, without exceeding the investment limits expressly provided by the law [art. 22 para. (6) and art. 397 para. (1) C. pr. civ.]. The procedural framework established before the first court will be kept, of course, before the appellate court, compared to the limits of its devolution effect established by art. 478 para. (1) and (3) C. pr. civ.

The role of the judge can also be manifested through the steps taken by him to settle the dispute amicably, the court being able, for this purpose, to order the personal appearance of the parties, under the conditions of art. 227 para. (1) C. pr. civ. This prerogative of the court is also mentioned in Rule 10

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[1] See G. Boroi, M. Stancu, *Drept procesual civil*, 5th Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2020, pp. 16-22.

[2] V. M. Ciobanu, *Comentariu sub art. 22 C. pr. civ.*, in V. M. Ciobanu, M. Nicolae, *Noul Cod de procedură civilă comentat și adnotat, Vol. I – art. 1-526*, Second Edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2016, p. 91.

(1) of the Model European Rules of Civil Procedure[3]. Although the Romanian legislator has established this prerogative of the judge, it is not seconded by a regulation of an obligation for the parties to try to resolve the dispute amicably[4] or aiming at the role of the parties in this matter. The provisions of art. 10 C. pr. civ., that regulate the procedural obligations of the parties, refer only to the general obligation to contribute „to the smooth conduct of the process, thus seeking its completion", which does not necessarily imply the obligation to try the amicable settlement of the dispute or accessing certain procedural means in this regard.

The Model European Rules of Civil Procedure[5] contains provisions that shape, on the one hand, the principle of cooperation between the parties in the amicable settlement of the dispute, and, on the other hand, the role that they and their lawyers play in this regard. Rule 9 provides, in this regard, in the first paragraph that „parties must co-operate, in seeking to resolve their disputes consensually, both before and after proceedings begin". The cooperation of the parties is therefore seen as a procedural obligation between them, which can be transposed both in setting up a way to settle the dispute amicably and in reaching an agreement on various aspects of the procedure. In this regard, Rule 9 (4) provides that „when a consensual settlement as a whole cannot be reached, parties must take all reasonable opportunities to reduce the number of contested issues prior to adjudication". The role of the will of the parties is therefore important throughout the entire proceedings, as the parties may, through their cooperation, set up small transactions as to remove certain issues relating to the resolution of the case from the jurisdiction of the judge; In this way, the judge's attention can be focused on the issues that remain in dispute and the length of the proceedings can be significantly reduced.

Rule 9 (2) mentions the obligation of the parties' lawyers to identify possible alternative methods of resolving the dispute and to inform and encourage the parties about them, as well as to use these methods, when they are binding[6]. Rule 10 (2) also requires the court to inform the parties „about the availability of different types of settlement methods" and to recommend them „the use of specific consensual dispute resolution methods".

Starting from the Rule 9 (4) of the European Model Rules of Civil Procedure, which stipulates the obligation of the parties to reduce the issues to be resolved by the judge by their agreement of will, using in this respect all available procedural means, we will further analyze two procedural institutions which were novel elements at the time of the adoption of the current Code of Civil Procedure and which configure the role of the parties' agreement, displayed prior or during the judicial procedure, in relation to certain aspects of the trial: (**i**) the possibility conferred by art. 22 para. (5) for the parties to establish, by express agreement of will, the legal qualification and the legal reasons that the court shall consider when resolving the case; (**ii**) the role of the parties' agreement in the matter of evidence, respectively the possibility for the parties to agree on waiving the fulfillment of the limitation period stipulated for the right to propose evidence for one of the parties [art. 254 para. (2) § 5 C. pr. civ.] and the possibility to conclude a convention on the admissibility, object, or burden of proof (conventions on evidence - art. 256 C. pr. civ.).

2. The parties' agreement on the legal qualification of the acts and facts brought before the court

The regulation dedicated to the role of the judge in finding the truth in the civil process includes an important rule according to which the manner this principle operates is configured; representing a consecration of the Latin adage "*da mihi factum, dabo tibi ius*", the rule established by art. 22 para. (4) C. pr. civ. provides that the judge has the obligation to give or to restore, as the case may be, the qualification of the acts and facts brought to the court. This prerogative of the judge must be exercised by reference to the guarantees provided by art. 14 C. pr. civ. regarding the finding of the truth and it is applicable regardless of whether or not the parties have given a legal qualification to the factual situation described in their requests[7].

[3] These provide that „The court must facilitate settlement at any stage of the proceedings. Particularly, it must ensure that the parties consider settlement in the preparatory stage of proceedings and at case management conferences. If necessary, for furthering the settlement process, it may order the parties to appear before it in person."

[4] The Romanian law provides for relatively few situations in which the parties must initiate, prior to bringing an action before the court, a preliminary procedure meant to facilitate a possible amicable settlement of the dispute. Such a situation is provided by art. 1015 C. pr. civ., in the matter of the payment order. Also, according to art. 60^1 of Law no. 192/2006 on mediation and the organization of the mediator profession, there are a number of matters in which proof of participation in an information hearing on the benefits of mediation must be provided, but the lack of such evidence cannot lead to the rejection of the action as inadmissible.

[5] Model European Rules of Civil Procedure were produced by the European Law Institute and Unidroit and may be consulted on https://www.unidroit.org/instruments/civil-procedure/eli-unidroit-rules (accessed on 20.03.2021).

[6] In Romanian legislation, according to art. 2 para. (1^3) of Law no. 192/2006 on mediation and the advantages of mediation, „the information procedure on the advantages of mediation may be performed by the judge, prosecutor, legal counsel, lawyer, notary, in which case it is attested in writing".

[7] Even if the plaintiff has the obligation to indicate within the writ of summons both the factual and the legal reasons, according to art. 194 lit. d) C. pr. civ., only the factual reasons constitute a mandatory element of the summons, provided by law under the sanction of nullity [art. 196 para. (1) C. pr. civ.], and in the procedure of regularization of the summons, it can be annulled solely for lacking the factual reasons, according to art. 200 para. (4) C. pr. civ., as amended by Law no. 310/2018. See, for details, N.-H. Țiț, R. Staciu, Legea 310/2018 pentru

The parties are required to state the factual grounds of their writ of summons, thereby setting out the cause of action brought before the court, and to prove the factual aspects to which they refer in support of their claims or defenses; also, the parties may propose a legal qualification of the acts and facts deduced to the court, of which, however, the court is not bound, the judge being the one who must establish the legal qualification, after putting it in the contradictory debate of the parties.

The provisions of art. 22 para. (5) C. pr. civ. establish an important derogation from this rule, allowing the parties, by express agreement of will, to impose on the judge a certain legal qualification, insofar as the dispute concerns rights that the parties may dispose of and if by this manner the rights or legitimate interests of third parties are not being infringed. These legal provisions represent a premiere in the Romanian legislative landscape, configuring a balance between the parties' right of disposition and the principle of the judge's role in finding the truth. The parties have the right to settle on the legal qualification of the acts and facts brought before the court, within the limits provided by law, the judge being compelled to resolve the dispute starting from such qualification, that he cannot amend.

The provision of the law uses the phrase „limitation of debates", which means that the express agreement of the parties in this regard has the effect of removing from the legal debates the legal issues on which they have expressly agreed upon, the purpose of such an agreement being to give within the jurisdiction of the judge exclusively those matters on which there is a conflict between the parties. For example, the parties may agree upon the legal nature of the act concluded between them but may disagree as to the execution of the obligations falling within the content of the legal relationship arising from such act; the parties may expressly agree on the legal nature of a condition, the dispute concerning whether or not such condition was fulfilled. Concluding an agreement by which the legal qualification of the acts and facts brought before the court is established has important implications regarding the development of the procedure. Compared to Rule (4) of the Model European Rules of Civil Procedure, the parties reduce the litigious issues that the judge has to resolve, which is likely to streamline the judicial activity and significantly reduce its duration. Specifically, Rule 26 (4) provides that „where parties are free to dispose of their rights, they may agree on the legal basis of the claim or on specific issues in the claim". Accordingly, the Romanian Code of Civil Procedure stipulates that the parties' agreement may concern the legal grounds of the request or the legal qualification of a certain factual aspect, matters which, once agreed by the parties, will no longer be the subject of judicial debates and, therefore, they will be found in the motivation of the decision as such.

This manifestation of procedural availability is allowed by law only if the parties' agreement of will concern rights that they may dispose of, aspect that is retained both by the provisions of art. 22 para. (5) C. pr. civ., as well as by Rule 26 (3). Romanian civil procedural law also knows, in addition to this limitation, the one related to the protection of the rights or legitimate interests of third parties, a limitation that neither the French procedural law nor the European Model Rules of Civil Procedure mention. The court to which such an agreement of will is presented must therefore examine, first of all, whether the subject-matter of the agreement concerns rights that the parties may dispose of, which implies that the judge is well acquainted with the elements of the legal relationship brought before the court, having as starting point the factual situation described by the parties in their requests; secondly, the judge must assess the potential effects that the settlement of the case made on the basis of the legal qualification given by the parties through their agreement of will could have on the rights or interests of third parties, related to the opposability of the court decision, under art. 435 para. (2) C. pr. civ. The role of the judge is, in this situation, oriented not to identify the correct legal qualification, but to verify the effects that the decision he would pronounce according to the legal qualification established by the agreement of the parties would have throughout the civil circuit. This position of the judge is a unique one in the Romanian civil procedural law, as the Romanian judge is being called not only to settle the actual dispute between the parties, but also to evaluate the consequences that the solution he would pronounce could generate in relation to the rights and the interests of others. The judge must therefore ask himself and assess whether the manner in which the parties agree to settle on the legal qualification of the acts and facts brought before the court is prone to have an indirect effect on a third party.

Article 22 para. (5) C. pr. civ. inflicts an express agreement of will in connection with the prerogative of the parties to establish the legal qualification of the acts and facts deduced in court; therefore, the mere non-challenge by the opposing party of a legal qualification cannot lead the court to the conclusion of the existence of such agreement and cannot exclude the judge's prerogative to put for debate a potential requalification. The manifestation of the parties' will must be clear and unequivocal, as expressing their agreement will not only give a certain legal qualification to a factual aspect present in the case, but also will impose that qualification on the judge. Being a regulation by way of exception [the rule is represented by the prerogative of the court in the sense of giving or restoring the legal qualification of the acts and facts brought to the court,

modificarea și completarea Legii nr. 134/2010 privind Codul de procedura, comentarii, explicații, jurisprudență relevantă, Hamangiu Publishing House, Bucharest, 2019, pp. 48-49.

according to art. 22 para. (4) C. pr. civ], it must be interpreted restrictively, and the judge must ensure that the express agreement of the parties exists and that their intention is to exclude a certain qualification from the debates. This is all the more so as the Romanian civil procedural law has not established a specific procedural vehicle, as is the joint application provided by Rule 57 of the European Model Rules of Civil Procedure[8].

The regulation of such a procedural means would have facilitated the application of the provisions consisting in art. 22 para. (5) C. pr. civ., all the more so as it is also present in the French legislation, at art. 57 of the Code of Civil Procedure (la requête conjointe). We consider that, *de lege ferenda*, an express regulation is required in this respect, as the submission of the joint request is likely to facilitate the establishment by the judge of the limits of the trial. Such request would clearly identify the issues upon which there is an agreement of the parties and the ones being disputed, the judge thus knowing, as of the time of his investiture, that the parties had concluded an agreement on the legal qualification.

3. The agreement of the parties in the matter of evidence

Another procedural institution in respect of which the agreement of the parties may have legal effects is that of evidence. In connection to this, we note that the parties may agree on two categories of issues: (**i**) waiving the fulfillment of the limitation period triggered as a result of exceeding the procedural moment until which evidence can be requested [art. 254 para. (2) § 5 C. pr. civ.] and (**ii**) the conventions on the admissibility, object, or burden of proof [art. 256 C. pr. civ.].

The first situation concerns a rule of an exclusively procedural nature, referring to the trial phase in which the means of proof can be proposed. The rule in this matter is that the evidence must be requested, under the sanction of extinguishment of such right, through the writ of summons or statement of defense [art. 254 para. (1) C. pr. civ.], thus in an early stage of the procedure, more precisely in the written phase. However, the extinguishment of the right does not operate if there is an express agreement of all parties regarding the proposal of the evidence during the judicial inquiry or even during the debates phase of the trial, according to art. 254 para. (2) § 5 C. pr. civ[9]. Such a manifestation of procedural availability concerns exclusively the moment when the evidence may be proposed, and not its admissibility; in other words, if an express agreement of will is conveyed pursuant to art. 254 para. (2) § 5 C. pr. civ., this will not automatically lead to the administration of the evidence, the court being still required to assess its admissibility, by reference to both the provisions of art. 255 para. (1) C. pr. civ. and the conditions of admissibility provided by law, as the case may be. The agreement of the parties removes, in this case, only the procedural sanction of extinguishment, without having consequences in the field of admissibility of evidence.

The second situation subject to analysis is that of concluding a convention on the admissibility, object, or burden of proof (art. 256 C. pr. civ.). In this situation, the agreement of the parties concerns issues with direct implications on the merits, as it implies a derogation from the rules prescribed by the legislator in this matter. Although the provisions of art. 256 C. pr. civ. Have no mention in this regard, we consider that the agreement of the parties must be an express one, as the mere silence of the opposing party cannot be deemed as enough to establish that such party agrees, for example, with the administration of a piece of evidence that the law does not permit[10]. For the situations in which the legislator intended for a tacit agreement to produce effects on the admissibility of the evidence, it expressly stated as such; this is the case, for example, in art. 309 para. (4) § 4 C. pr. civ., regarding the admissibility of the evidence with witnesses, if the reason for using such evidence is to prove the existence of a legal act for which the law requires the written form *ad probationem*, provided the agreement of the parties concerns rights they may dispose of.

The agreement of the parties may concern only the matters relating to the admissibility of the evidence, its subject-matter and the burden of proof; therefore, it is not allowed to derogate from the rules provided by law regarding evidence-taking, even if there is an agreement of the parties in this respect[11]. The potential cases in which the parties may derogate by their agreement of will from the rules concerning evidence-taking are expressly provided for by law and, therefore, are of strict interpretation; this is the case, for example, in art. 315 para. (2) C. pr. civ., regarding the express or tacit agreement of the parties to call as witnesses the persons indicated in art. 315 para. (1) § 1-3 C. pr. civ. An agreement of the parties expressed in other situations regarding evidence-taking may not produce legal effects; for example, a convention of the parties for the purpose of calling as a witness a person placed

[8] Rule 57 (1) provides that „a joint application is a statemen of claim in which parties jointly may submit to the court their agreement according to Rule 26, their respective claims and defenses, the issues on which they disagree, and which are to be determined by the court, and their respective arguments on those disputed issues".

[9] In respect to this regulation, it has been correctly stated in the doctrine that the limitation period for the right to propose evidence is a mixed one, its establishment being aimed to ensure swiftness of procedures and to impose procedural discipline on the parties, as well as to protect their private interest, which makes it possible to waive the effects of the extinguishment term by the parties express consent (see Gh.-L. Zidaru, P. Pop, *Drept procesual civil. Procedura în fața primei instanțe și în căile de atac*, Solomon Publishing House, Bucharest, 2020, pp. 161-162.

[10] V. Dănăilă, *Comentariu sub art. 256 C. pr. civ*., in G. Boroi (coord.), *Noul Cod de procedură civilă. Comentariu pe articole. Vol. I. Art. 1-455*, Hamangiu Publishing House, Bucharest, 2016, p. 681.

[11] See M. Fodor, *Comentariu sub art. 256 C. pr. civ*., in V. M. Ciobanu, M. Nicolae, *op. cit.*, pp. 869-870.

under court interdiction or who has previously been convicted of perjury, or an agreement concerning the taking of witnesses evidence before the appellate court. Also, an agreement regarding the probative force of the evidence is not admissible; for example, the parties could not agree that a commencement written proof should be given the probative force of a document under private signature.

Conventions regarding evidence should not be confused with the situation in which, in assessing the admissibility of evidence and its usefulness, the court considers that a fact is uncontested and no longer needs to be established. In case the parties conclude conventions on evidence, they shall enter into an express agreement by way of derogation from a certain aspect relating to the admissibility, object or burden of proof, following which the evidence will be taken and the court shall assess it, with a view to settle the merits of the cause. In the event of uncontested facts, the judge is the one who considers, in relation to the circumstances of the case, that a means of proof should no longer be taken, for the reason that the evidentiary fact claimed by one of the parties has not been challenged by the opposing party.

Article 256 C. pr. establishes three categories of limitations regarding the right of the parties to conclude a convention on evidence. The first one concerns the nature of the rights that fall within the content of the legal relationship brought to the court, respectively that the parties can dispose of such rights. This type of constraint, encountered also, in art. 22 para. (5) C. pr. civ., as showed above, takes into account the extension of the dispositive nature of the rules governing the legal relationship between the parties on certain procedural rules or which would have procedural implications, in case such legal relationship becomes litigious. The second type of limitation concerns the situations in which the conventions on evidence would restrict or even eliminate the possibility of proving legal acts and facts; the court may disregard such a convention and allow the evidence which, in the absence of an agreement of the parties, would have been admissible, if such agreement would have restricted or even eliminated the possibility of a party to prove an alleged fact. Finally, the third limitation concerns a general condition of any agreement, namely, to not contravene public order or morals; for example, a convention by which the parties establish that it is permitted to administer a material means of proof which had been obtained in breach of the law or of good morals could not produce legal effects in procedural terms [art. 341 para. (2) C. pr. civ.].

Therefore, the agreement of the parties may have effect in the realm of evidence in what concerns their proposal, by removing the extinguishment of rights that would occur if the evidence would not be requested through the writ of summons or the statement of defense, respectively on the admissibility, object or the burden of proof, by concluding a convention on these matters relating to evidence, before or during the trial. These manifestations of procedural availability may have important effects on the solution to be pronounced by the judge; however, the conclusion of such an agreement does not eliminate the active role of the court, the judge being able to order *ex officio* the taking of additional evidence, under the conditions of art. 254 para. (5) C. pr. civ., in order to establish the relevant factual elements in question, by way of an exact and thorough manner.

4. Conclusions

The provisions of the Code of Civil Procedure provide the possibility for the parties to conclude agreements on various aspects of the procedure, thus setting up a side of the principle of availability which allows the parties, even if they are in dispute on certain issues, to resort to conventions before or during the trial, allowing them to remove from the jurisdiction of the court matters on which there is no disagreement and to entrust the judge with the task of pronouncing a solution solely in relation to the disputed matters. The Model European Rules of Civil Procedure provide in Rule 9 (4) that in the event a transaction which does not resolve the dispute in full cannot be concluded, conventions on certain aspects of the procedure must be concluded whenever it is possible, given that such procedural manifestation of the parties may significantly lead to the settlement of the case within a reasonable period of time. According to the Romanian Code of Civil Procedure, the agreement of the parties is allowed in respect to the establishment of the legal qualification of the acts and facts brought to the court, as well as regarding certain aspects related to the evidence. In both cases, the agreement of the parties may generate procedural effects provided that it concerns rights which the parties may dispose of. The procedural effects of the legal nature regarding the rules governing the legal relationship of subjective rights are therefore being distinguished; if the parties may derogate from the rules laid down by law when entering into a contract, they may derogate as well from the rules laid down by law at the moment when they are in litigation, in respect to the qualification of acts and facts brought before the court, respectively as regards admissibility, the object or burden of proof.

It should be noted the importance of the involvement of lawyers in the identification and access by the parties they represent to these means by which certain aspects of the procedure can be agreed upon. Rule 9 (2) of the Model European Rules of Civil Procedure requires lawyers to inform their clients of these means, to encourage them to use them and to assist them in concluding the necessary conventions for this purpose. In addition, the court has an important role in facilitating a possible understanding of the parties and to inform them about the various procedural aspects in connection to which an agreement could intervene, as provided by art. 227 C. pr. civ. and Rule 10 of the European Model Rules of Civil Procedure.

However, the Romanian law does not provide for any specific procedural means by which the judicial cooperation of the parties can materialize. *De lege ferenda*, we appreciate that it would be useful to transpose into Romanian legislation a legislative solution such as the one provided by Rule 57 of the European Rules of Civil Procedure, namely that of a joint application.

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THEORETICHAL AND PRACTICAL ASPECTS REGARDING THE CONTENT OF THE DISMISSAL DECISION

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Abstract

Even if 18 years have passed since the adoption of the Romanian Labor Code, in the practice of legal labor relations there are many situations in which employers have major difficulties in establishing the correct content of dismissal decisions. Irregularities in the resolution of individual labor disputes often lead to the annulment of dismissal decisions by the courts. We have proposed that, in the content of this material, we identify and analyze the conditions under which a dismissal decision can be drawn up under legal conditions.

Keywords: *individual employment contract, legal employment relationship, termination of the individual employment contract, dismissal, dismissal decision, motivation of the dismissal decision, annulment of the dismissal decision, individual labor dispute*.

1. Introduction

The dismissal of employees is regulated by the Romanian Labor Code (Law no. 53/2003, republished[1], with subsequent amendments and completions[2]), from the perspective of manifesting the principle of legality, the legislator's option being to allow the employer to dispose unilaterally (as an exclusive expression of his will legal) termination of the individual employment contract only in the cases and under legally defined conditions[3].

In this context, the application of the rules of common law regarding the general regime of termination of the civil contract by unilateral termination (art. 1.321, art. 1.276-1.277, art. 1.552 of the Civil Code) is, in principle, excluded. This is because the specific requirement deduced from art. 278 para. (1) of the Labor Code, regarding the possibility of "completing" the provisions of the Labor Code (and, by extension, of labor law as a whole) with those of civil law only if there is a compatibility of the latter with the specifics of labor relations[4].

It is therefore necessary, both in the course of the procedural steps specific to each dismissal case and in the process of concretely establishing the content of the dismissal decision (by reference to the operating dismissal case)[5], that the employer complies exactly with the substantive and formal requirements provided by the Labor Code, the lack of fulfillment of any procedural condition or its non-compliant fulfillment may lead, as a rule, to the annulment of the dismissal decision.

There is thus a strong need in the practice of employment relationships to identify, in an analytical way, all the content elements of the dismissal decision, depending on the operating hypothesis, and to explain, in a complete way, the reasons whose manifestation determined the employer to finally order the termination of the individual employment contract by dismissal.

2. Legal characterization of the dismissal institution

A. We consider as useful the legal characterization of the dismissal institution from a theoretical perspective, starting from the overall observation of the regulatory solutions retained by the legislator[6]. As a starting point in this approach, art. 58 para. (1) of the Labor Code, defines dismissal as

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[1] In the "Official Gazette of Romania", part I, no. 345 of May 18, 2011.

[2] The last legislative intervention in this regard (by reporting at the time of finalizing the drafting of this material – 22nd of April 2021) was made by Law no. 298/2020 for the amendment and completion of Law no. 53/2003 - Labor Code, published in the "Official Gazette of Romania", part I, no. 1293 of December 24, 2020.

[3] See I.T. Ștefănescu, Theoretical and Practical Treaty on Labor Law, 4th edition, revised and added, „Universul Juridic" Publishing House, Bucharest, 2017, p. 464.

[4] From the strict perspective of the possibility of revoking the dismissal decision by the employer, the High Court of Cassation and Justice retained, by Decision no. 18/2016 (published in the "Official Gazette of Romania", part I, no. 767 of September 30, 2016), that in the interpretation and application of the provisions of art. 278 para. (1) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, the provisions of art. 1,324, 1,325 and 1,326 of the Civil Code, republished, can be applied in full of the provisions of the Labor Code, being compatible with the specifics of labor relations; in the interpretation of art. 55 lit. c) and art. 77 of the Labor Code, the dismissal decision may be revoked until the date of its communication to the employee, the act of revocation being subject to the communication requirements corresponding to the act it revokes (dismissal decision).

[5] A. Țiclea, Dismissal Decision, in "Romanian Journal of Labor Law" no. 3/2003, pp. 13-17.

[6] Normative solutions that, during the last 18 years since the entry into force of Law no. 53/2003 - Labor Code, remained almost unchanged, proving in this way, against the background of the strong manifestation in practice of some hesitations and doubts, the difficulty for the legislator to intervene to remedy a series of obvious inaccuracies.

representing the termination of the individual employment contract at the initiative of the employer.

The characteristic legal features of the dismissal institution are, in our opinion, the following:

a) dismissal is a unilateral legal act subject to communication (the provisions of art. 1326 of the Civil Code, which are applicable as a common law being incidental), its author being exclusively the employer;

b) dismissal is a causal legal act[7]; the measure ordered by the employer, having as specific result the termination of the individual employment contract on his own initiative, it implies the existence of the cause by necessary reporting to the reasons for dismissal;

c) the legislator's option is to regulate in the Labor Code imperative and restrictive (limiting) the hypotheses in which the employer can order the dismissal and the conditions in which the dismissal can be ordered; this way of regulating constitutes an embodiment, in the matter of the termination of the individual employment contract, of the stability in work and of the legal protection of the right to work;

d) no other situations of unilateral termination of the contract are applicable, among those resulting from the corroboration of art. 1321 C.civ. with art. 1552 para. (1) C.civ. (unilateral termination of the civil contracts); It should be emphasized that the parties to the individual employment contract may not agree - by contract, at its conclusion, or by an addendum concluded during the existence of the contract - that the employer be granted the legal possibility to order the unilateral termination of the individual employment contract in other situations than those expressly and exhaustively provided by the Labor Code;

e) regardless of the case of dismissal and the number of employees affected by the measure ordered by the employer, the dismissal decision is an individual act; how many employees are fired, as many dismissal decisions will have to be issued by the employer;

f) the dismissal must meet, cumulatively: the general substantive conditions regarding capacity, consent, object and cause; the special requirements provided by the Labor Code; the specific condition of form - the written form of the dismissal decision - is an *ad validitatem* requirement;

g) as a rule, for dismissal cases that do not imply the existence of the employee's guilt condition, legal measures are established to protect employees, such as: providing a vacancy corresponding to the employee's training or, as the case may be, with his work capacity; the request by the employer, prior to the issuance of the dismissal decision, of the support of the territorial employment agencies in order to redistribute the employee; active measures to combat unemployment; a notice period, which may not be less than 20 working days; money (or other material) compensations;

h) regardless of the dismissal hypothesis, the (former) employee is entitled to challenge in court the measure ordered by the employer; the employee may request, within this procedural step, the annulment of the dismissal decision, the restoration of the parties to the situation prior to the communication of the dismissal decision, the payment by the employer of some compensations (material, as a rule, but also possible to repair a non-pecuniary damage).

B. There is no perfect overlap between "dismissal" as *negotium iuris* and "dismissal decision", given that the issuance of the dismissal decision by the employer is only the final (and formal) stage of expressing the legal will of the author of the act. The dismissal thus corresponds, in all cases, to a time interval between the moment when the employer was notified about the circumstance (manifestation of a factual situation) that can be included in one of the dismissal hypotheses provided by art. 61 or, as the case may be, art. 65 of the Labor Code.

Concretely and concisely presented, these factual situations are the following:

- the possible commission by the employee of an act which may be qualified as a serious disciplinary offense or the commission by the employee of several acts which may be qualified as repeated disciplinary offenses;

- the employee is absent from work for more than 30 calendar days, due to the disposition of the measure of pre-trial detention or house arrest;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly determined by the manifestation of a physical and/or mental incapacity, such as to no longer allow him/her to fulfill his/her duties corresponding to the job occupied;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly due to the manifestation of a professional misconduct;

- the existence of one or more reasons, unrelated to the person of the employee, which would justify the termination of the job held by that employee.

We referred to these circumstances because the employer, in the motivation of the dismissal decision, will have to highlight in the content of the act (as a rule) detailed references in relation to the factual situation of which he became aware and, if applicable, which he analyzed it in a specific legally established procedural framework.

3. Motivation of the dismissal decision

A. The motivation of the dismissal decision is similar, from the perspective of the logical-legal operations necessary to be performed in order to establish the final form of the act, with the motivation of the court decision. Like the judge in drafting the jurisdictional act we referred to, the employer is legally obliged to comply with the requirements regarding the structuring of the content of the dismissal decision (as a formal step) and to indicate the factual and legal

[7] G. Boroi, C.A. Anghelescu, *Civil Law Course. General Part*, 2nd Edition revised and added, "Hamangiu" Publishing House, 2012, p. 125.

reasons that determined the dismissal "solution" (as a substantive element).

Among the content elements of the dismissal decision, common to any hypothesis of dismissal among the five regulated by the Labor Code, the factual motivation of the decision and, in many cases, the correlation of the factual reasons with their legal classification proved to be for employers some of the most problematic steps specific to the proper management of labor relations.

The errors which manifested themselves - and which, in a significant number, still manifest themselves - led, in the event that the decision was challenged in court, to the annulment of the act and, hence, to the most unpleasant consequences for employers, especially when the issue of restoring the parties to the previous situation was raised by reassigning the illegally or unfounded dismissed employee to the position held prior to the disposition of the measure of termination of the individual employment contract.

B. From a practical perspective, the factual motivation of the dismissal decision is necessary to include all the elements specific to the manifestation of that circumstance which may represent one of the causes of dismissal provided by art. 61 and art. 65 of the Labor Code.

a) In the case of disciplinary dismissal, based on the provisions of art. 61 and art. 248 para. (1) lit. e) of the Labor Code, it is necessary to point out that, according to art. 252 para. (2) lit. a) of the same Code, in the content of the decision there must be the very "description of the deed that constitutes a disciplinary violation".

This option of the legislator, different from the one found in the factual motivation of the other types of dismissal decision, presupposes that the employer does not save in presenting all the specific coordinates specific to the occurrence of the misconduct or, as the case may be, to disciplinary misconducts (if the employer has found that the employee has committed two or more acts which constitute culpable breaches of his obligations).

Both the doctrine[8] and the jurisprudence have consistently held that the "description of the deed" in a consistent manner presupposes:

- indication of the factual situation in its materiality, and not in the form of generalities or vague, unverifiable statements, which correspond to a detail of the imputed deed/deeds;

- the explicit presentation of those aspects that may lead to the conclusion that the act of the employee represents a violation of the norms of work discipline;

- individualization in time of the disciplinary violation, otherwise the court cannot verify the observance by the employer of the legal provisions regarding the terms provided by art. 252 para. (2) of the Labor Code;

- indication of the essential elements for individualizing the act imputed to the employee, the date or period of time in which it was committed, knowing that any act of a person takes place in a certain time and place, the spatial and temporal limits characterizing any action, or human inaction, in their absence the existence of a deed cannot be conceived[9].

Along with these useful landmarks, the description of the deed that constitutes a disciplinary violation may also involve:

- specifying that the act constituting a disciplinary violation was committed through a singular manifestation, which corresponds to the possibility of fixing in time and space its production, or, as the case may be, the disciplinary violation is presented as an act committed in a continuous form;

- the fact that the act was committed by the employee as the sole perpetrator or that the act was committed by the sanctioned employee together with one or more colleagues, or with one or more persons who do not have the status of employee of the employer ordering the measure;

- an indication of all the elements and circumstances which, in connection with the manifestation of the factual situation, justify the employer's choice to classify the disciplinary misconduct as a serious one (in which case it is legally possible to apply the most severe disciplinary sanction);

- correlation of the determination of the concrete content of this structural element of the disciplinary sanction decision - "description of the deed" - with the objective circumstantial landmarks (those provided by art. 250 of the Labor Code and, possibly, others established by the applicable collective labor agreement or, in its absence, by the internal regulation); we refer to the "circumstances in which the act was committed" and the "consequences of the disciplinary violation";

- highlighting those factual circumstances that justify the retention by the employer of a certain form of guilt with which the employee committed the disciplinary offense (intent or fault).

The following options do not comply with the requirements of making a proper description of the act that constitutes a disciplinary offense:

- the presentation in the decision exclusively of the statement that the act imputed to the employee consists in breach of one or more provisions of labor law, of the applicable internal regulations or collective bargaining agreement, or non-compliance with one or more obligations arising from the individual employment contract, orders and the legal provisions of the hierarchical managers (in the form of expressions

[8] I.T. Ștefănescu, *op. cit.*, p. 523 and p. 857; A. Țiclea, *Labor Law Treaty. Legislation. Doctrine. Jurisprudence*, 8th Edition, revised and added, "Universul Juridic" Publishing House, Bucharest, 2014, pp. 777-779.

[9] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1180/2020, in the "Romanian Journal of Labor Law" no. 3/2020, pp. 220.

such as: “Disciplinary violation consists in non-compliance by the employee with art. 112 of the Labor Code”, given that the employer had found that the employee did not comply with the work schedule);

- the use of generic and in no way circumstantial wording, such as the employee's manifestation of a "non-compliant attitude towards the direct hierarchical boss" or of an "irreverent attitude towards another person" or "repeated non-performance of duties";

- a description - even in detail - of an act which cannot constitute a disciplinary offense (for example, the employer has retained as a disciplinary offense an act of the employee who, outside the actual course of work, gave an interview in which, the right to an opinion, referred to some negative aspects that manifest themselves in the field of activity to which the employer belongs[10]).

From a documentary point of view, we share the opinion according to which the requirement established by art. 252 para. (2) lit. a) of the Labor Code is complied with by the employer in the situation where the dismissed person has become concretely and certainly aware of the facts invoked for dismissal (such as a report or report)[11]. We specify that, at present, it is necessary to attach that document to the dismissal decision and that this mode of operation is mentioned in the decision itself (using, for example, a formula such as: "The description of the act which constitutes a disciplinary presented in the report annexed hereto, by which the undersigned was notified in connection with the deeds committed by the employee”).

The requirement to describe the act constituting a disciplinary offense as a mandatory content element of the disciplinary dismissal decision must be correlated with the content of the final report of the disciplinary investigation (the act of "disinvestment" of the person who has been appointed to carry out the disciplinary investigation or of the disciplinary investigation commission). We refer to the need for the deed described in the content of the decision to be identical to the one that was investigated disciplinary. One or more facts that have not been the subject of disciplinary investigation cannot substantiate the application of the sanction consisting in the disciplinary termination of the individual employment contract, given the violation of art. 251 para. (1) of the Labor Code, even if regarding this or these (uninvestigated) facts the employer would comply with all the requirements corresponding to a compliant description.

b) If the employee is fired as a result of pre-trial detention or house arrest for a period longer than 30 days, under the Code of Criminal Procedure [hypothesis regulated by art. 61 lit. b) of the Labor Code], the content of the dismissal decision is established according to art. 62 para. (3) of the Labor Code. As such, the decision "must be motivated in fact".

The motivation in fact in this situation is limited to the indication by the employer of the interval in which the employee was absent (thus justifying compliance with the requirement that the employee's absence be longer than 30 calendar days) and the manner in which the employer became aware, concretely, of the preventive measure ordered in connection with the employee in question.

The fact of arrest of the employee or his house arrest may be brought to the notice of the employer by using any means of proof to this effect, including by indicating by the employer the information available to any interested person on the court portal (portal. just.ro).

c) The motivation in fact within the dismissal decision ordered pursuant to art. 61 lit. c) of the Labor Code (when, by decision of the competent bodies of medical expertise, the physical and/or mental incapacity of the employee is found, which does not allow him to fulfill his duties corresponding to the job) is a well-founded requirement on the provisions of art. 62 para. (3) of the Labor Code.

Considering also the resolutions given by the High Court of Cassation and Justice by Decision no. 7/2016[12], according to which in interpreting the provisions of art. 61 lit. c) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, by decision of the medical expertise bodies (which establishes the physical and/or mental incapacity of the employee) is understood the result of the evaluation of the occupational medicine specialist on fitness for work, consisting in the aptitude sheet, uncontested or become final after the appeal, by issuing the decision by the entity with legal attributions in this respect, the factual motivation of the dismissal decision implies in this situation:

- the indication (without the need for detailing) by the employer of the medical condition from which the employee suffers, according to the findings made following the occupational medicine specialist's assessment of occupational fitness, highlighted in the aptitude sheet or in the aptitude sheet and in the issued decision by the county or Bucharest public health directorate, following the contestation of the aptitude file by the employee, pursuant to art. 30 of Government Decision no. 355/2007 on the surveillance of workers' health[13], with subsequent amendments and completions;

- a specific indication of the duties established by the employee's job description, which can no longer be performed properly, and the causal link between the employee's state of health and the fact that his existence no longer allows him to perform those duties.

[10] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1203/2019 (unpublished).

[11] I.T. Ștefănescu, *op. cit.*, p. 523.

[12] Published in the "Official Gazette of Romania", part I, no. 399 of May 26, 2016.

[13] Published in the "Official Gazette of Romania", part I, no. 332 of May 17, 2007.

It is also possible, in this case, for the employer to comply with the requirement to include in the content of the dismissal decision the factual motivation of the measure by attaching to the decision the aptitude sheet or, as the case may be, the aptitude sheet and the decision issued by the management. of public health of the county or of the municipality of Bucharest pursuant to art. 33 of Government Decision no. 355/2007, specifying in the dismissal decision that the document or documents in question constitute its annex.

d) In the case of the dismissal decision based on the provisions of art. 61 lit. d) of the Labor Code (professional misconduct), being applicable accordingly art. 62 para. (3), it is necessary that the employer actually motivates his measure.

The motivation in fact in this situation will include:

- the manner in which the employer became aware of the fact that, as regards the dismissed employee, indications were received that he no longer professionally corresponded to the job in which he was employed, which led to the prior professional assessment procedure [the one in which refers to art. 63 para. (2) of the Labor Code and which is normatively developed by the applicable collective labor contract or, in its absence, by the internal regulation, or - in the absence of both regulatory landmarks - is established by the employer in an *ad hoc* manner];

- how the professional mismatch manifested itself in a concrete way (as the case may be: possible: non-fulfillment of the work norm, defective development of the activity, accomplishment of some works of poor quality[14]); what were the attributions, established by the job description, that the employee did not fulfill in a compliant way and how the result of these non-conformities was manifested;

- what was the time interval in which this non-conformity manifested itself;

- presentation of the way in which the prior professional evaluation procedure was organized and the concrete way in which it was carried out; in this respect, the decision must include references to the person appointed to carry out the professional evaluation or, as the case may be, to the composition of the evaluation committee, the evaluation criteria used, the evaluation method or methods used, the result of the evaluation. and the explanations given by the employee on the occasion of the evaluation and/or on the communication of the result of this approach;

- justification of the impossibility of maintaining the employment relationship, given the serious or significant nature of the professional misconduct in relation to the volume and/or importance of specific tasks that the employee, due to professional misconduct found after the assessment, can no longer perform properly.

e) The content of the decision to dismiss the employee for reasons not related to his person is regulated by art. 76 and art. 63 para. (2) of the Labor Code. According to lit. a) in art. 76, the dismissal decision must contain "the reasons for the dismissal". Correlating this formal requirement with the provisions of art. 65 of the Code, it follows that the reasoning in fact in this case of dismissal implies that the employer has to:

- indicate in detail the reason or reasons unrelated to the employee's person that led to the termination of his / her employment (usually circumstances in the general sphere of economic difficulties, technological changes or reorganization of activity), as well as the causal and temporal landmarks related to the manifestation of the reason or motives in question (why did the respective situations appear, when their manifestation started, the interval in which they manifested, the fact that a moment of the cessation of the manifestation cannot be anticipated their circumstance that they have an irreversible effect);

- specify the manner in which he was informed of the circumstances which manifested itself on the basis of the disposition of the post occupied by the employee (note or report of the functional compartment in which the post was abolished; note or report of the financial department or the human resources department, etc.);

- concretely justify the necessary relationship between the manifestation of the reason or reasons unrelated to the employee and the termination of employment, from the perspective of fulfilling the requirement of the existence of a real and serious cause;

- indicate the internal act (decision or decision of the person or body which has the power to institute measures concerning the organizational and functional structure of the employer's entity) by which the employment has been abolished and by which the establishment plan has been amended accordingly and the employment status of that employer.

4. Conclusions

From the point of view of compliance with the rules on the content of the dismissal decision, an employer must act with the utmost diligence in motivating the dismissal decision and, in general, in drawing up this document on which the existence of the legal employment relationship depends. A possible reserve of economy or detail is not justified in any situation.

[14] I.T. Ștefănescu, *op. cit.*, p. 741.

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NEUROMARKETING IN INTERNATIONAL COMMERCIAL LAW

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Abstract

Commercial advertising is absolutely necessary for traders who promote their products and services in order to attract consumers and to succeed on the market at the expense of their competitors. As consumers have developed resistance to traditional marketing practices, traders may make use of neuromarketing techniques while searching for other efficient tools.

Neuromarketing is a field that combines neurology, behavioral psychology and notions of economy and traditional marketing for the purpose of analyzing and understanding the processes that take place in the human brain when it is exposed to marketing stimuli.

Neuromarketing raises certain ethical and legal issues. On the one hand, there are concerns related to the protection of the persons involved in neuromarketing research. On the other hand, applying in commercial advertising the solutions offered by neuromarketing poses a series of problems, since these solutions have been qualified as techniques that distort the rational consumer's choice of products and services.

Given that on the background of the technological revolution the consumer (of advertising) has become an international one, the paper will be structured in three parts. First, we will tackle the meaning of neuromarketing and how its techniques are used in commercial advertising, particularly in online advertising. In the second part, we will reveal the mechanism of online and offline neuromarketing, highlighting the legal issues stemmed from the neuromarketing research, especially from the participants data protection. In the last part, we will analyze the effects of neuromarketing on the single European market. Within this framework, we will establish the effects of neuromarketing on competition and consumers' rights, determining the competent authority and the applicable law for dispute resolution.

Keywords: *neuromarketing, advertising, international trade law, unfair commercial practices, competition*.

1. Introduction

We live in a fast-growing economy that requires constant innovation from all of its participants in order to survive on the market. The fierce competition, together with the 'sophistication' of the consumer, has led to the necessity of using more advanced techniques. These techniques are meant to surpass the shortcomings of traditional marketing studies, being entirely focused on the consumer, from both physical and mental point of view.

In this framework, we aim at discussing the concept of neuromarketing and its role in the international commercial advertising. Neuromarketing is a field that combines neurology, behavioural psychology and notions of economy and traditional marketing for the purpose of analysing and understanding the processes that take place in the human brain when it is exposed to marketing stimuli. We are going to touch upon a few aspects related to these disciplines, from a legal standpoint. Our intention is to raise awareness about these sensible issues with pluridisciplinary connections, as, eventually, affect us all.

After clarifying the concept of neuromarketing, we will analyse its impact on participants to both neuromarketing studies and international trade. The issues raised by the violation of privacy and the concerns related to data protection will be examined. Based on the quite technical portrayal of neuromarketing, in the second part of the paper we will focus on the dimension of advertising generated by neuromarketing. In the last part we are going to determine the path for counteracting the negative effects of neuromarketing, both on consumers and traders, having in mind the space of the European Single Market.

We consider that neuromarketing is a domain less analysed in legal studies. Based on our knowledge at this moment no domestic legal study on neuromarketing exists. In the attempt to draw attention to this subject, especially in the field of Romanian legal studies, a few tools at the disposal of legal practitioners are brought into light. As legal provisions do not keep pace with the rhythm of neuromarketing's development, legal analyses are needed for providing efficient legal ideas to neutralize the neuromarketing undesirable outcomes and our study is one of them.

2. Today's market and neuromarketing[1]

The today's economy is rooted in a driven by profit society in which all its participants are searching for new and effective ways of increasing their earnings and putting competitors out of business. Meanwhile, technology passes through an unprecedented development as it starts to make use of human-applied

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research that provide precious knowledge for improving services and products for consumers. In addition, the nowadays competitive market requires more efficient advertising. Along these lines, had emerged, within marketing strategies, the use of consumer neuroscience which combines consumer research with modern neuroscience. Neuroscience is considered to bring an improvement in the field of consumer behaviour and marketing[2] and it comes as a refining tool for traditional marketing, leading to the development of a new field called neuromarketing.

The base for neuromarketing is consumer neuroscience[3] which tries to recognize the primordial neural processes which determine the judgement of a consumer and the brain mechanisms that determine decision making. Neuromarketing focuses on identifying and extracting into data brain response to marketing stimuli. Neuromarketing went beyond the primordial scientific purpose and had become a model of business, as well as a tool for businesses. Within companies have been created special departments that deal with neuromarketing studies, while other companies have specialized[4] themselves in running neuromarketing research[5] and then selling and/or giving access to the findings. The specialized companies have reunited into the Neuromarketing, science & business association[6] (hereinafter, 'NMSBA').

2.1. Neuromarketing: concept and scope

Neuromarketing has appeared as a field of research within neuroeconomics[7] and it is founded on neurotechniques[8]. It has to be underlined that neuromarketing differs from consumer neuroscience, even if they are often presented as equivalents[9]. Neuromarketing is a separate field that uses consumer neuroscience for developing marketing strategies, while consumer neuroscience is a much broader concept within neuroeconomics that encompasses marketing decisions and leverages given by neurological data[10].

Various companies started to use neuromarketing within their marketing activity. It is noticeable that most of them are multinationals[11], which can be put forward reasonable presumptions regarding the considerable costs of using neuromarketing.

Neuromarketing is founded on neurobehavioral studies[12] and consequently it outperforms conventional marketing research[13], as the latter is based on self-reports, while neuromarketing uses data collected through high state of art technology means. Neuromarketing compensates most of the downsides of traditional marketing research[14] and it is also an important tool for validating, refining or extending the traditional marketing theories[15] and techniques as it can be successfully used on persons already exposed to traditional marketing. Neuromarketing is suitable for identifying strengths and weaknesses of traditional marketing and providing methods to correct its errors[16]. It is considered that neuromarketing does not represent a substitute for the traditional research methods already used in marketing, but it would rather provide supplementary tools[17] with the scope of improving and getting better results. One of the uses for neuromarketing in the area of traditional marketing that support its complementary nature is the assessment of the interpersonal mentalizing skills of salespeople[18],

[2] Hilke Plassmann et. al, "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", *Journal of Marketing Research*, 52 (4) (January 2015): 3, https://www.researchgate.net/publication/272640846_Consumer_Neuroscience_Applications_Challenges_and_Possible_Solutions.

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[5] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 3.

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[10] Blum, "Consumer Neuroscience: A Multi-disciplinary Approach to Marketing Leveraging Advances in Neuroscience, Psychology and Economics", 11, 12.

[11] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology", 3.

[12] Ibid, 2.

[13] Antonio Mileti, Gianluigi Guido, and M. Irene Prete, "Nanomarketing: A New Frontier for Neuromarketing", *Psychology&Marketing* Vol. 33, Issue 8 (July 2016): 664, https://doi.org/10.1002/mar.20907.

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[15] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 5.

[16] Ibid.

[17] Ibid, 4.

[18] Ibid, 8.

skills that refer to their ability to project mental states[19] to consumers.

Amongst neuromarketing pledges is revealing the content of the human mind's 'black box'[20] and finding the legendary 'buy button'[21]. Even if there is no certain proof concerning the existence of a *buy button*, it is considered that knowledge provided by neuromarketing research can be used for inducing a certain consumer behaviour or for seeding memories and ideas in the brain that can later affect the decisional process and turn into an unconscious decision of buying a product that has been advertised[22]. Some argue that the scope of neuromarketing is influencing people`s[23] brains at an unconscious level. Nevertheless, the current state of neuromarketing cannot provide means for completely manipulating consumers` behaviour[24].

Neuromarketing goes beyond advertising as marketing also implies market research, product creations and testing, price establishing, strategies of promoting[25] and so on. Neuromarketing is used in product design and packaging, pricing, store design, professional services and advertising[26], as it studies consumer attention, consumer arousal, product/brand appraisal, product/brand preference, purchase behaviour, memory and brand extension[27].

As to neuromarketing techniques, they are meant to identify physical changes and or psychological arousal[28] that are caused by the exposure of a consumer to particular advertisements[29], products or commercial contexts. They are also meant to recognize the moments of attention[30] of a consumer and to detect and record changes in brain activity. The main techniques of neuromarketing research are functional magnetic resonance imaging (fMRI), qualified electroencephalography (EEG), eye tracking and galvanic skin response. Researchers are trying to expand neuromarketing's horizons by bringing new methods and techniques. A quite relevant example are the studies based on measuring the level of glucose in blood for analysing the brain processes implied in self-control and willpower[31]. Another innovative field is nanomarketing which interferes with neuromarketing.

2.2. Advertising as a scope of neuromarketing

The general aim of marketing is to create commercials that are appealing to consumers. Neuromarketing offers methods for increasing the attractiveness of commercials based on human instincts and emotions[32] and it subsequently increases the probability of making purchases[33].

Neuromarketing is used mainly for determining and measuring consumers' response to different types of advertising[34] and products design. Neuromarketing has also the role of quantifying the impact of specific marketing strategies on the consumers[35] that are test subjects in the research studies. In doing so, it reveals human perceptions and emotions related to certain advertised products or advertisements and it identifies the mental mechanisms that shape the emotional and unconscious elements of decision making.

What can be firmly stated is that neuromarketing represents an extraordinary tool for optimizing advertising[36] both in online and offline environments. It can be used for predicting consumer`s behaviour[37] and even manipulate it as the consumer is not aware of his decision because of unconscious processes[38] or cannot consciously explain the reasoning behind his

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[27] Terry Daugherty and Ernest Hoffman, "Neuromarketing: Understanding the Application of Neuroscientific Methods Within Marketing Research", in *Ethics and Neuromarketing. Implications for Market Research and Business Practice*, eds. Thomas et al., 12 – 22.

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[29] Krausová, "Neuromarketing from a Legal Perspective", 40.

[30] Ibid, 12, 13.

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[34] Pozharliev, Verbeke, and Bagozzi, "Social consumer neuroscience: neurophysiological measures of advertising effectiveness in a social context", 352.

[35] Krausová, "Neuromarketing from a Legal Perspective", 40.

[36] Ibid, 41.

[37] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 9.

[38] Pozharliev, Verbeke, and Bagozzi, "Social consumer neuroscience: neurophysiological measures of advertising effectiveness in a social context", 351.

decisions[39]. In addition, neuromarketing identifies consumer preferences and impressions on both products and advertisements[40], giving an insight into people`s views and intentions[41] and offering understanding of the effects of online and offline ads on consumers[42]. Neuromarketing companies that activate in the field of advertising promise that their services help the client understand what catches the attention when viewing an ad. Among the services they provide are tests of the ads in online contexts, second-by-second analysis of an ad, determination of brand perception, tests of the emotional reaction to an ad, and reports with recommendations for improving the ads[43]. Briefly, they promise to their client that they improve the effectiveness of the ads and reveal the real consumer's insights[44]. The promise may actually be one to keep as it is considered that preferences are automatically retrieved, without a conscious control from the consumer[45] as the brain continuously encodes them even when the consumer is not aware. This is where neuromarketing steps in for mapping, predicting[46] and then building preferences with the help of ads.

2.3. Neuromarketing among pros and cons

Neuromarketing is constantly perceived different, through a dual pros-and-cons perspective.

With respect to the pros that plead in favour of neuromarketing, the accuracy and objectivity of the research results concerning consumer behaviour is higher than in the case of traditional marketing research, because data is collected in a controlled and technological environment, by a specialist, and is not offered by the consumer itself. Through neuromarketing, marketing researchers can access the unconscious reactions and decisions in the human brain, which cannot be recognized and verbalized consciously by consumers. On the grounds of this, neuromarketing is considered to be a method for better understanding the client and thus delivering him products and services in order to perfectly meet his needs[47]. In this way, neuromarketing may also serve consumers' interests. Moreover, by accessing the neuroscientific knowledge laid down in literature, consumers may get to understand their own decisional mechanisms[48] and recognize eventual persuasion tactic slipped unnoticed in advertisements.

Unfortunately, the balance is tipped against neuromarketing. More than a few cons have been highlighted in literature. The foundation of most of them is laid by ethical considerations.

To begin with, economist and behavioural researchers claim that neuromarketing, as it uses neuroscience, provides an insight into the consumer brain, but not necessarily into the consumer behaviour[49]. Consequently, it may not serve the purpose of marketing. As brain function may be irrelevant in depicting behaviour, it is stated that neuroscientific techniques may not have the expected results in terms of improving marketing strategies because they identify only the brain functions which may not be that helpful in the matter of behavioural influence.

In addition, another similar drawback is represented by the limited possibility of inferring psychological processes from neural data[50]. It implies the difficulty to apply a reverse inference approach in order to determine if a certain brain response is inferred from an activity that involves a particular psychological process[51]. Due to not having previous information regarding the brain regions studied when exposed to a certain stimulus, reverse inference tends to pose problems to researchers[52].

Furthermore, neuromarketing may affect personal autonomy[53], particularly the autonomy of will, potentially causing an interference with the right to respect for private life[54] and in certain circumstances, even with the right to respect for physical and mental integrity[55]. There are several concerns regarding not necessarily the unlawful processing of data, but related to the unethical processing of data.

Finally, neuroimaging studies, thus neuromarketing through fMRI (a technique which is to be described below), are considered less reliable and generalizable compared to traditional marketing

[39] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 6.
[40] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology", 4.
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[43] "Understanding reactions to advertising", Neurons Inc, accessed 29 February, 2021, https://neuronsinc.com/products/adtest/.
[44] "Advertising", Brain Signs, accessed 20 February, 2021, https://brainsigns.com/en/services/neuromarketing/advertising.
[45] Uma R. Karmarkar and Hilke Plassmann, "Consumer Neuroscience: Past, Present, and Future", *Organizational Research Methods* Vol. 22(1) (2019): 179, https://doi.org/10.1177/1094428117730598.
[46] Karmarkar and Plassmann, "Consumer Neuroscience: Past, Present, and Future", 182.
[47] Krausová, "Neuromarketing from a Legal Perspective", 41.
[48] Ibid.
[49] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 10.
[50] Ibid, 13.
[51] Ibid.
[52] Ibid, 14.
[53] Krausová, "Neuromarketing from a Legal Perspective", 41.
[54] Ibid.
[55] Article 3 of *Charter of Fundamental Rights of the European Union*, OJ C 326, (October 20212): 391–407, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT.

studies[56] as it uses small samples of consumers that are not necessarily representative. The greatest issue put forward is the opportunistic findings, also known as false positives[57] because of small samples of test subjects.

3. Neuromarketing's mechanism. Scientific and commercial marketing[58]

Neuromarketing mechanism has slight variations depending on its type: scientific or commercial, online or offline. In general, it implies high costs[59] which are not public-funded[60], notwithstanding it is done for economic or scientific purposes.

Each company or research laboratory adopts an internal general research policy, also called 'protocol'[61]. This protocol provides primarily guidelines regarding the enrolment practices for test subjects. Most of the companies adopt, as well, methodologies that encompass the conditions and activities undertaken by the company, which basically depicts the established mechanism.

3.1. Types of neuromarketing

Scientific or commercial neuromarketing can be both online or offline. The difference between scientific and commercial neuromarketing is first given by their dissimilar aim. While scientific researchers use neuromarketing techniques for research and findings to be transformed in literature for academic attainment, company researchers are oriented toward monetizing the findings. These differences further generate distinct structures of the mechanisms.

Offline neuromarketing is the one conducted within the companies and special labs, in real life. They imply all the techniques detailed in paragraph 1.2. and more. Online neuromarketing has recently emerged. In advertising, it focuses on testing ads '*with online panels for customer attention, emotions, and memory*'[62]. In the context of the social media's boom, neuromarketing companies have also explored this new source of earning and have created special service. Therefore, they provide solutions for testing and boosting ads on social media, particularly Facebook, Twitter, Instagram, YouTube and Pinterest[63].

There have also emerged neuromarketing online tests[64], mainly as a result of the pandemic times that require social isolation. These online tests can measure emotional reactions and continue to do eye tracking on users[65].

3.2. Human test subjects for the research neuromarketing studies

Neuromarketing research implies individuals[66] that are subjected to the investigative techniques. Depending on the type of neuromarketing (scientific or commercial), studies are conducted with a small number of people, an average of 25-30[67] persons, or with a larger number of people, ~~with~~ a minimum of 30 participants and a maximum of hundreds[68]. In general, regardless of the type of neuromarketing, it is preferable a diverse group of people to be chosen, but it must be kept in mind that as diversity increases, the number of people would also increase[69]. Test subjects are carefully selected and treated[70] during the studies. As a rule, minors cannot be included in such studies[71]; nevertheless, if the company conducting the research is interested in minors' behaviour, the studies cannot begin without the parental consent.

Participants are recruited long before starting the research study, because a certain degree of training is crucial[72], mainly due to the biases (misconceptions) related to neuromarketing[73]. Test subjects are requested to provide explicit consent under the personal data protection legislation[74]. The participants are requested to go through procedures for informed consent[75] and are given disclosure of benefits and rights they are able to exercise during the studies, including the right to

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[56] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 16.
[57] Ibid, 19.
[58] Aura-Elena Amironesei.
[59] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 17.
[60] Cristian Ducu, "Topoi in Neuromarketing Ethics", 39.
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[68] "NeuroMethod: How to run a neuromarketing study", Neuro Inc, accessed February 29, 2021, https://neuronsinc.com/insights/neuromethod-how-to-run-a-neuromarketing-study/.
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[72] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.
[73] For more details about the biases ("misconceptions"), see Arianna Trettel et al., "Transparency and Reliability in Neuromarketing Research", in *Ethics and Neuromarketing. Implications for Market Research and Business Practice,* eds. Thomas et al., 104 – 105.
[74] Krausová, "Neuromarketing from a Legal Perspective", 47.
[75] David Hensel, Lisa-Charlotte Wolter, and Judith Znanewitz, "A Guideline for Ethical Aspects in Conducting Neuromarketing Studies", in *Ethics and Neuromarketing. Implications for Market Research and Business Practice,* eds. Thomas et al., 69.

withdraw at any time without any repercussion[76]. The participants are also given explicit and detail information regarding the scope of the research, the possible outcomes and the publication of the results, the incidental findings policy, privacy and confidentiality of their data[77], the techniques that are going to be used, the concrete steps taken during the studies, and any eventual risk[78], regardless of its chances to occur. Test subjects receive enough information in order to be able to make a conscious and valid choice[79].

Test subjects do not sign up without the promise of a reward. Even if they participate on a voluntarily basis, they receive sums of money in exchange for they data. There is no standard established concerning the incentives awarded to participants or rules for determining them. Therefore, each company regulates its own rules on test subjects' remuneration.

3.3. Running the research studies

Every neuromarketing study starts with an idea that leads to a research question which incorporates a hypothesis, preferably a directional one[80]. Subsequently, the question is fragmented according to the used techniques[81]. For example, if the question is whether a second ad is better than the first one, the researcher also puts the question whether during watching the second ad the test subject produces higher frequency brainwaves or has a more intense electrical brain activity. Based on the research question, it is decided the type of respondent that is needed[82].

The next step is to take a decision on the structure and content of the test[83]. Neuromarketing studies are likely to present a high level of complexity[84]. It has be decided, accordingly, the proper approach together with the neuroscience methods to be used[85]. Before conducting the real study, a few pilot sessions may be taken into account[86].

For a research study, the company needs to have a neuromarketing team[87] carefully chosen. Some of the roles given to the members of the team are: account owner, project manager, researcher, marking teams, coder, and analyst[88]. It is of utmost importance to have science staff[89].

In contrast to traditional marketing studies in which test subjects are required to voluntarily self-complete questionnaires, in neuromarketing data is collected without being consciously given. Furthermore, the test subject is not even aware of the data he or she is delivering to the researchers, whereas in traditional marketing the subject has control over the information he or she provides[90]. Data is collected by technologies that electronically read, collect and process biometric data provided during the studies by the test subjects. These technologies are generally named biometric systems[91].

A proposed improvement for neuromarketing studies is to conduct them in two different environments, a social and an isolated one, and then to identify the differences[92]. This means that test subjects shall see the advertisements in two opposite contexts: surrounded by people and in social isolation. Such a proposal is of extreme importance particularly in these pandemic times.

Finally, during the running of the studies, the research team should avoid or at least minimize the harm done to participants[93] as neuromarketing tools may physically and psychologically affect them. Subsequently, companies shall take the appropriate measures for their protection.

3.4. Neuromarketing results and findings

Neuromarketing studies deliver knowledge derived from brain functioning analyses that may be used by marketers[94]. The purpose of neuromarketing is to obtain general principles regarding brain functioning that can be applied when designing advertisements[95] in order to make them extremely attractive and effective.

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[76] Yesim Isil Ulman, Tuna Cakar, and Gokcen Yildiz, "Ethical Issues in Neuromarketing: ''I Consume, therefore I am!"", *Science and Engineering Ethics* 21 (Springer, 2015): 1276, https://www.researchgate.net/publication/282008481_Ethical_Issues_in_Neuromarketing_%27%27I_Consume_therefore_I_am.

[77] Ulman, Cakar, and Yildiz, "Ethical Issues in Neuromarketing: ''I Consume, therefore I am!"", 1277.

[78] Eugenia Laureckis and Àlex Martínez Miralpeix, "Ethical and Legal Considerations in Research Subject and Data Protection" in *Ethics and Neuromarketing. Implications for Market Research and Business Practice*, eds. Thomas et al., 93.

[79] Ibid, 96.

[80] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[81] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[82] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[83] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[84] Plassmann et al., "Consumer Neuroscience: Applications, Challenges, and Possible Solutions", 17.

[85] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[86] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[87] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[88] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[89] "NeuroMethod: How to run a neuromarketing study", Neuro Inc.

[90] Krausová, "Neuromarketing from a Legal Perspective", 41.

[91] Article 29 Data Protection Working Party, *Opinion 3/2012 on developments in biometric technologies*, 00720/12/EN WP193, (April 27 2021):5, accessed January 29, 2021, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2012/wp193_en.pdf.

[92] Pozharliev, Verbeke, and Bagozzi, "Social consumer neuroscience: neurophysiological measures of advertising effectiveness in a social context", 359.

[93] Hensel, Wolter, and Znanewitz, "A Guideline for Ethical Aspects in Conducting Neuromarketing Studies", 71.

[94] Krausová, "Neuromarketing from a Legal Perspective", 40.

[95] Ibid, 47.

Neuromarketing has at its core the processing of data collected during the research studies performed on the test subjects. The data collected is unique to individuals and consists mainly in information about their neurological processes[96], information which is designated as biometric data[97].

Raw data collected needs to be interpreted for reaching the actual findings that serve commercial or scientific purposes. During interpretation, errors may occur in the final findings due to misinterpreted data[98]. There is the possibility for the results to be interpreted by artificial intelligence, especially when it comes to fMRI scans of test subjects[99] watching advertising. Regarding the accuracy of the raw results, considering the use of biometric systems which cannot generate 100% error-free results[100], there is a possibility that some of the results may not be fully-relied on. 'Breaches' in the accuracy of the raw results may afterwards reflect in research findings.

Internal validity tests should be performed on neuromarketing results to ensure their validity and effectiveness[101] for the clients (interested companies) as there is a certain responsibility towards the clients that have entered into contracts for being delivered findings of neuromarketing research.

3.5. Neuromarketing: mining Big Data?

Primarily, it can be affirmed without a shadow of doubt that neuromarketing implies 'mining the mind'[102]. But does it also involve mining Big Data[103]?

Big Data refers to gigantic sets of data that cannot be processed simultaneously by traditional technology because of their volume[104]. Big Data is made of every single digital print and information about a consumer and it is mined for isolating his or her preferences and commercial behaviour. Neuromarketing and Big Data share the same purpose: to contribute in designing strategies as a means to attract and influence consumers. They can also form a team by completing each other and giving rise to state-of-the-art business and marketing ideas. Both are meant to analyse consumer's behaviour[105], especially customer purchase process and reaction to ads, opening the way for predicting purchase behaviour[106]. The nowadays trend is to either pass from big data analysis to neuromarketing studies in business activity [107] or to use neuromarketing in order to add a persuasion layer to the big data results[108].

Neuromarketing does not imply mining Big Data, there is no inclusion relation between these two, but rather a possible complementary relationship. While knowledge derived from Big Data mining targets identifiable consumers, neuromarketing generates general-applicable findings meant to be used on a larger segment of population.

With or without completing Big Data, neuromarketing knowledge is considered to lead to manipulative advertising which, in terms of European legislation, may represent misleading or aggressive commercial practices[109]. The subject will be further developed in the part 3 of this article.

3.6. Personal data

Personal data is undoubtedly involved in neuromarketing, as the test subjects have to be identified first, to be asked for full and informed consent, and eventually ~~to~~ for providing supplementary information necessary for the study, including contact information and medicines or previous health issues or conditions. Moreover, the data collected during running the studies is biometric data, as detailed *supra*.

By means of neuromarketing is done a form of brain-reading and storage of data 'bleed' by the human body[110]. The data collected represents biometric data and within the territory of EU falls under the protection of GDPR[111]. Through neuromarketing techniques are

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[96] Ibid, 46.

[97] Article 29 Data Protection Working Party, *Opinion 3/2012 on developments in biometric technologies,* 3, 4.

[98] Daugherty and Hoffman, "Neuromarketing: Understanding the Application of Neuroscientific Methods Within Marketing Research", 8.

[99] Andrea Lavazza, "Freedom of Thought and Mental Integrity: The Moral Requirements for Any Neural Prosthesis", *Frontiers in Neuroscience* (February 19, 2018): 19, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5825892/.

[100] Article 29 Data Protection Working Party, *Opinion 3/2012 on developments in biometric technologies,* 6.

[101] Hensel, Wolter, and Znanewitz, "A Guideline for Ethical Aspects in Conducting Neuromarketing Studies", 79.

[102] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology", 4.

[103] Wei Fan and Albert Bife, "Mining Big Data: Current Status, and Forecast to the Future", *SIGKDD Explorations,* Vol. 14, Issue 2 (January 2014): 1, 2, https://www.researchgate.net/publication/303165833_Mining_big_data_Current_status_and_forecast_to_the_future/link/5ab6ac34aca2722b97cdfd76/download.

[104] Zilong Fang, Pengju Li, "The Mechanism of "Big Data" Impact on Consumer Behavior", *American Journal of Industrial and Business Management* 4 (2014): 45, https://www.researchgate.net/publication/276494999_The_Mechanism_of_Big_Data_Impact_on_Consumer_Behavior/link/5ac0276e0f7e9bfc045bfa04/download.

[105] Carla Nagel, "Big Data vs. Neuromarketing", NMSBA, accessed January 10, 2021, https://nmsba.com/neuromarketing/news-blog/630-big-data-vs.-neuromarketing.

[106] Mweathe, "So, WHY did the chicken cross the road? – From Big Data to Neuromarketing", April 4, 2016, accessed January 12, 2021, https://mpk732t12016clustera.wordpress.com/2016/04/04/so-why-did-the-chicken-cross-the-road-from-big-data-to-neuromarketing/.

[107] Mweathe, "So, WHY did the chicken cross the road? – From Big Data to Neuromarketing".

[108] Carla Nagel, "Big Data vs. Neuromarketing".

[109] Krausová, "Neuromarketing from a Legal Perspective", 43.

[110] Pozharliev, Verbeke, and Bagozzi, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century", 2.

[111] European Union, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation*),* OJ L 119, (May 4, 2016): 1–88, https://eur-lex.europa.eu/eli/reg/2016/679/oj.

identified and measured the physiological characteristics of the test subject, as well as his or her behaviour.

Particular attention should be paid to storing the raw data in cloud for the neuromarketing companies that have concluded cloud computing contracts. Data protection policy and protocols should be adopted. In such documents should be included the identities of the persons who have access to the data, the persons who process and work with the data on the basis of authentication and authorization, a contingency plan for cases of confidentiality breaches[112].

3.6.1. Complying with data protection regulations. Anonymization

As data collected during the studies represents biometric data and some of the results of neuromarketing may take the form of biometric templates, which contain key features extracted from the collected raw biometric data, stored for later use[113], its processing falls under the protection of GDPR.

Companies and scientists could comply with data protection regulations by using techniques of anonymization[114]. Neuromarketing has no interest in future identification of the test subjects, especially as the aim is to obtain generalizable findings following the processing of data. The identity of test subjects is of no interest for either the neuromarketing company or the buying company.

Neuromarketing companies could opt for anonymous interpretation of the data or apply other procedures that impede test subjects' identification after their data having been collected[115]. In certain cases, if needed, companies or scientists could use pseudonymization[116].

3.7. 'Disseminating the results' among interested companies for commercial purposes

After processing the collected data, in commercial neuromarketing, the findings of the researchers have economic value and represent the 'product' that is further 'disseminated' to interested companies. In general, the initial data collected is of no value to such companies, because for drawing conclusions there are needed specialists in neuroscience that can interpret the data. Exceptions may exist when the companies have their own specialists and prefer to receive 'raw' data.

An important aspect that governs the B2B (business-to-business) relation between the neuromarketing company and the company interested in its research findings is transparency[117], in particular when it comes to the dissemination. There is a fear of possibly sharing the knowledge with their competitors[118]. If the study has been performed at a client's particular behest, as an *ad hoc task force*[119], then the results would probably be available and disclosed only to that client. Neuromarketing companies should be more transparent to their business clients with regard to what is not possible to be obtained as a result of the research findings. Furthermore, they should inform their contractors about the used techniques and methodologies, because most of the companies tend to present the procedure as a mystery fulfilled with the best and miraculous methods that are extremely efficient[120]. This 'mystery' also impedes any third-party evaluation as the used tools are unknown.

Besides disseminating the findings, there are companies offering marketing advice based on their own findings[121]. Most of the companies provide both findings and consultancy[122]. In the field of scientific neuromarketing, scholars argue that the results should be shared or sold anonymously[123].

3.8. Neuromarketing and privacy. Neurolaw. Nanomarketing

The results of neuromarketing are said to be a key[124] for entering into the human brain in order to control mental mechanisms and determine commercial decisions. As the right to privacy (or the right 'to be let alone'[125]) includes aspects related to the interior privacy of an individual, using the results in marketing

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[112] Laureckis and Miralpeix, "Ethical and Legal Considerations in Research Subject and Data Protection", 95.

[113] Article 29 Data Protection Working Party, *Opinion 3/2012 on developments in biometric technologies*, 4.

[114] Data Protection Commission, *Guidance Note: Guidance on Anonymisation and Pseudonymisation* (June 2019): 2, 3, https://www.dataprotection.ie/sites/default/files/uploads/2019-06/190614%20Anonymisation%20and%20Pseudonymisation.pdf.

[115] Pop, Dabija, and Iorga, "Ethical responsibility of neuromarketing companies in harnessing the market research – a global exploratory approach", 35.

[116] European Union Agency for Cybersecurity, *Pseudonymisation techniques and best practices. Recommendations on shaping technology according to data protection and privacy provisions* (November 2019): 7, https://www.enisa.europa.eu/publications/pseudonymisation-techniques-and-best-practices/at_download/fullReport.

[117] Hensel, Wolter, and Znanewitz, "A Guideline for Ethical Aspects in Conducting Neuromarketing Studies", 78.

[118] Ibid.

[119] "Ad hoc task force. Neuroscience to solve your deep research challenges", Neurons Inc, accessed January 12, 2021, https://neuronsinc.com/products/neurotaskforce/.

[120] Trettel et al., "Transparency and Reliability in Neuromarketing Research", 106.

[121] For more details about the existing neuromarketing companies and their specialities https://www.nmsba.com/buying-neuromarketing/neuromarketing-companies

[122] See, for example, "Committed to solve your marketing and management pains", Icense, accessed January 10, 2021, https://www.icense.org/consultancy.html; "Our product portfolio for your research needs", Neurons Inc, accessed January 10, 2021, ,https://neuronsinc.com/products/.

[123] Ulman, Cakar, and Yildiz, "Ethical Issues in Neuromarketing: ''I Consume, therefore I am!"", 1277.

[124] Krausová, "Neuromarketing from a Legal Perspective", 47.

[125] For further details, see Sabah S. Al-Fedaghi, "The "Right to be let alone" and private Information", in *Enterprise Information Systems VII* (Springer, 2007), https://doi.org/10.1007/978-1-4020-5347-4_18.

may represent a breach of mental privacy. Once again, we mention that consumers have no proper control over the data they offer during studies. Thus, they may give unintended information which may infringe the privacy of their mind and thoughts. The right to freedom of thought[126] with his internal dimension[127] (the *forum internum*[128]) is guaranteed by ECHR. Thought is also found in the UN Declaration [129] in Article 18 which protects 'free thinking'[130].

Mining the mind can also lead to gaining enough information in order to be able to prime or trigger consumer's preferences[131], which would weaken his or her will autonomy, affecting the physical and mental integrity.

It is debatable if the present rights in the sphere of individual privacy have the strength to cope with the emerging neurotechnologies, as brain data has a direct link to someone`s inner life and personhood[132]. Some argue that there should be regulated a new and individual rights, namely right to mental privacy[133] and cognitive liberty[134], known as neurorights[135]. This right shall protect every single individual from intrusions into his brain processes and decisional mechanisms, and his ultimate aim would be the protection of freedom of thought (FoT) which includes the right not to have the thoughts manipulated[136].

Considering the danger posed by neuroscientific techniques, there have been made a few attempts to introduce neurorights as human rights, including *inter alia* the right to cognitive freedom, the right to psychological continuity, and the right to mental integrity[137]. The umbrella term used to for naming the new field of law that encompasses all of the provisions related to neurorights is 'neurolaw'[138] and the case-law based on it would represent 'jurisprudence of the mind'[139]. Until legally binding set of norms will be enacted, moral rules provided in the field of ethics governs for the moment the theoretical neurorights[140] and tend to protect even the right to human dignity. There has also been proposed to be founded a 'monitoring gatekeeper'[141] in order to supervise the process and use of neuromarketing studies. Future legally binding regulations in the field of neuromarketing and marketing in general, applicable to companies, shall ensure and secure mental autonomy of the consumers.

4. Legal considerations on neuromarketing and advertising based on it. Liability for use of neuromarketing techniques[142]

Commercial advertising, particularly online advertising, has transnational effects. Both consumers and traders are exposed to and affected by neuromarketing. In order to determine the path for counteracting the negative effects of neuromarketing, the legal characterization of this new type of advertising is first to be done and, afterwards, it is argued whether and in which manner it is to be sanctioned, having in mind the space of the European Single Market.

4.1. Legal classification of commercial advertising based on neuromarketing techniques

In the European Union (hereinafter, EU), the main regulations that cover commercial advertising, including advertising based on neuromarketing techniques, are:

- Directive 2006/114/EC concerning misleading and comparative advertising[143] (hereinafter, Directive 2006/114), transposed into Romanian legislation by the Law no. 158/2008 concerning misleading and

[126] Article 9 of European Convention of Human Rights (1950), https://www.echr.coe.int/documents/convention_eng.pdf.

[127] Sjors Ligthart et al., "Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges", *European Human Rights Law: Foundations and Challenges. Neuroethics* (June 2020): 3, https://doi.org/10.1007/s12152-020-09438-4.

[128] Jim Murdoch, *Freedom of thought, conscience and religion. A guide to the implementation of Article 9 of the European Convention on Human Rights*, Human rights handbooks, No. 9, Directorate General of Human Rights and Legal Affair Council of Europe, F-67075 Strasbourg Cedex (June 2007): 13, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4f.

[129] United Nations, Universal Declaration of Human Rights (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[130] Ligthart et al., "Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges", 4.

[131] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology", 4.

[132] Ligthart et al., "Forensic Brain-Reading and Mental Privacy in European Human Rights Law: Foundations and Challenges", 10.

[133] Pozharliev, Verbeke, and Bagozzi, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century", 6.

[134] Marcela Ienca, "Do We Have a Right to Mental Privacy and Cognitive Liberty?", Scientific American, (May 3, 2017), accessed 15 January 2021, https://blogs.scientificamerican.com/observations/do-we-have-a-right-to-mental-privacy-and-cognitive-liberty/#:~:text=A%20right%20to%20mental%20privacy%20would%20protect%20individuals,as%20against%20the%20unauthorized%20collection%20of%20those%20data.

[135] Roberto Garbero, "A new category of human rights: neurorights", *Springer Open Blog*, (April 26, 2017), accessed 15 January 2021, http://blogs.springeropen.com/springeropen/2017/04/26/new-category-human-rights-neurorights/#:~:text=The%20right%20to%20cognitive%20liberty%20protects%20the%20right,the%20coercive%20and%20unconsented%20use%20of%20such%20technologies.

[136] Pozharliev, Verbeke, and Bagozzi, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century", 1.

[137] Lavazza, "Freedom of Thought and Mental Integrity: The Moral Requirements for Any Neural Prosthesis", 26.

[138] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology", 5.

[139] Ibid, 7.

[140] *NMSBA Code of Ethics.*

[141] Hensel, Wolter, and Znanewitz, "A Guideline for Ethical Aspects in Conducting Neuromarketing Studies", 79.

[142] Carmen Tamara Ungureanu.

[143] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, OJ, L 376/21, (December 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0114.

comparative advertising[144];

- Directive 2010/13/EU concerning the provision of audiovisual media services[145] (hereinafter, Audiovisual Directive), transposed into Romanian legislation by the Audiovisual law no. 504/2002, as amended and supplemented[146]; Audiovisual Directive has been recently amended by Directive (EU) 2018/1808 (which is to be transposed into Romanian legislation[147]);
- Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market[148] (hereinafter, Directive 2005/29), transposed into Romanian legislation by the Law no. 363/2007 on unfair traders' practices towards consumers and harmonization with European consumer protection legislation[149].

Commercial advertising based on neuromarketing/neuroscience research findings has been characterized in the legal literature as *subliminal advertising*, which makes use of techniques that distorts consumer rational choice of products and services[150]. Subliminal advertising leads to changes in preferences, opinions and consumers wishes by using stimuli that influence and even manipulates consumers' decisions, having direct effects on market competition, as well.

If the advertising founded on neuromarketing techniques equates with subliminal advertising, it should be banned. Subliminal advertising is already prohibited according to EU regulations and Member States national laws. The things, though, are not as simple as they seem. Subliminal advertising is sneaky and putting this label on advertising based on neuromarketing techniques is not an easy task.

The meaning of subliminal advertising is not explained in the Audiovisual Directive, the Member States undertaking the burden of providing a definition in their national legislation that transposes the directive. The Audiovisual Directive (as revised) bans subliminal advertising for any products or services, the provider of audiovisual services being prohibited from using surreptitious audiovisual commercial communication [art. 9(1)(b)]. According to art. 4 (d) of the Romanian Advertising Law[151], subliminal advertising is considered „any type of advertising that uses stimuli too weak for being consciously perceived, but which can influence the economic behavior of an individual". A similar definition is provided in art. 1.18 of the Audiovisual Law.

The provisions of the Audiovisual Directive are supplemented by the ones from Directive 2005/29, which aims at protecting consumers against traders' unfair commercial practices. The Directive is applicable to both B2B and B2C (business-to-consumer) relations. It explicitly prohibits unfair advertising as it is being considered an unfair commercial practice.

'Commercial practice' means any act, omission, course of conduct, proceeding or commercial communication, including marketing and advertising, done by a trader directly linked with the promotion, sale or supply of a product to consumers [art. 2 (d)]. According to art. 5(2), a commercial practice is unfair if it is contrary to the requirements of professional diligence and if it distorts or may significantly distort the economic behavior regarding a product of the average consumer whom it reaches or to whom it is addressed. To significantly distort the economic behavior means to make use of an unfair commercial practice in order to appreciably affect consumer's ability to make an informed decision, causing the consumer to take a commercial decision that he or she would not have taken otherwise [art. 2 (e)]. The notion of average consumer is not explained; it is left to national courts and authorities the mission of interpreting the typical response of an average consumer in a certain given situation, according to CJEU case-law[152].

Unfair advertising may take different forms. Pursuant to art. 5(4), misleading and aggressive commercial practices are particularly labelled as unfair. Could neuromarketing techniques be considered unfair advertising? The consumer exposed to neuromarketing techniques is not aware of their use and neither of their influence, thus the consumer may mistakenly believe that he or she has control over his/hers own decisions. The consumer is not, in essence, deceived, but seduced, persuaded through subconscious methods. Neuromarketing does not represent mind-control, but change-thoughts, as it bypasses consumer's rational

[144] Republished in Official Journal of Romania no. 454, 24.07.2013.

[145] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95/1, (April 15, 2010), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010L001.

[146] Published in Official Journal of Romania no. 534, 22.07. 2002.

[147] An infringement procedure was taken on 23 November 2020 against 23 EU Member States, which have not transposed the directive within the stipulated time limit, including Romania; information available online: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2165, accessed February 2, 2021.

[148] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149/22 (June 11, 2005), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029.

[149] Published in Official Journal of Romania no. 899 (December 28, 2007).

[150] Krausová, "Neuromarketing from a Legal Perspective", 41.

[151] Law no. 148/2000 on advertising, as amended and supplemented, published in the Official Journal of Romania no. 359, (August 2, 2000).

[152] Recital 18 from the Directive 2005/29/EC. For a portrait of an average consumer, see Lucian Bercea, "Standardul "consumatorului mediu" și consimțământul pentru prelucrarea datelor cu caracter personal", *Revista Română de Drept Privat*, no. 1/2018.

control[153]. Consequently, consumer's consent is altered[154], but it is questionable whether the lack of consent or the vitiated consent falls under the meaning of any defects of consent (error, fraud, or violence/fear) regulated in Romanian Civil Code[155]. Even supposing a consumer would admit the idea of being manipulated and, as a result, he would invoke an error induced by fraud, it would be incredibly difficult for him to prove it[156].

Could advertising based on neuromarketing represent another unfair commercial practice, different from a misleading or aggressive one? On the grounds of considering as unfair *in particular* the misleading and aggressive commercial practices, the Directive 2005/29 leaves room for other types of unfair commercial practices, as well.

In the Directive 2006/114, which aims at protecting, mainly, the traders against misleading advertising (with beneficial consequences on consumers), misleading advertising is forbidden. As pointed out before, to invoke the misleading nature of the advertising which is based on neuromarketing may not represent a viable solution. Nevertheless, if a competitor is affected by other competitors' practices, which fall under the categories listed in art. 101 or 102 from the Treaty on the Functioning of the European Union[157], then the first competitor may seek compensation for damages according to Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union[158].

In the light of the above, when the criterion of manner of delivery to the recipient is used, the commercial advertising based on neuromarketing techniques may be characterized as *subliminal advertising*; when the criterion of the result achieved comes into play, it can be qualified as *unfair commercial practice*, which could result in violating EU competition rules.

4.2. How could be the traders held responsible for promoting their products and services by means of neuromarketing?

There are no provisions in EU regulations referring to the persons to be held responsible for unlawful advertising. Pursuant to art. 18 of Romanian Advertising Law, *the author, the advertising director and the legal representative of the means through which the ads are disseminated* are jointly held responsible with the trader who advertises his/hers products or services.

According to art. 19 of Romanian Advertising Law, if the person that advertises is not based in Romania or cannot be identified, the liability should be borne by, where appropriate, her legal representative in Romania, the author, the advertising director or the legal representative of the means of disseminating advertising.

Moreover, in accordance with art. 1(a) and (aa) of the Audiovisual Directive (as revised), which represents a special law in relation to the Romanian Advertising Law, the provider of a video materials sharing media has no editorial responsibility.

4.2.1. Types of liabilities for unlawful advertising through neuromarketing techniques

There are two types of liability for unlawful advertising: administrative liability and civil liability.

Unlawful commercial advertising, whether subliminal or an unfair commercial practice, generally triggers administrative liability. The competent bodies of each EU Member State can impose fines and other additional administrative penalties[159]. Imposing sanctions that are characteristic to this particular field is based on the principle of territoriality. Even if the practices of commercial advertising that attract liability incorporate cross-border elements, the law applicable to the administrative liability stays the law of the Member State in which the competent bodies operate.

The facts which constitute contraventions according to the administrative law could be considered delicts/torts in civil and commercial law, attracting thus civil liability, if its conditions are fulfilled[160]. Civil liability may occur especially in the field of unfair competition following unlawful commercial advertising. It can also occur when consumer rights are violated having as a result individual or collective damages.

If the civil delicts/torts contain cross-border elements, it is necessary to determine the competent court for dispute resolution, and the applicable law. In

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[153] Jan Christoph Bublitz, "Freedom of Thought in the Age of Neuroscience", *Archives for Philosophy of Law and Social Philosophy*, Vol. 100, No. 1 (2014):13, https://www.jstor.org/stable/24756752.

[154] See also, Krausová, "Neuromarketing from a Legal Perspective", 44-45.

[155] Art. 1204-1220 Romanian Civil Code.

[156] For a detailed analysis, see Carmen Tamara Ungureanu, *Drept civil. Partea generală. Persoanele* [Civil Law. General Part. Persons] (Hamangiu Publishing House, Bucharest, 2016), 137 and the following.

[157] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012, 0001 – 0390 (October 26, 2012), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

[158] OJ L 349 (December 5, 2014); the directive was transposed in the national legislation by Government Emergency Ordinance no. 39/2017 on actions for damages in cases of violation of the provisions of competition law, as well as for amending and supplementing the Competition Law no. 21/1996, published in Official Journal of Romania no. 422 (June 8, 2017).

[159] For a detailed analysis, see Carmen Tamara Ungureanu, *Drept internațional privat european în raporturi de comerț internațional* [European Private International Law in International Commercial Relations] (Hamangiu Publishing House, Bucharest, 202), 386-388.

[160] See also, Christine Riefa, "Séverine Saintier, Unfair Commercial Practices Directive: remedying economic torts?", in *Research Handbook on EU Tort Law*, ed. Paula Giliker (ed.), (Edward Elgar Publishing, UK, 2017), 293- 297.

the EU, the provisions of Brussels I bis Regulation[161] and Rome II Regulation[162] are mainly applicable, to which may be added conflict rules from a few European directives[163].

According to art. 1 (1) of the Brussels I bis Regulation, its provisions do not apply to administrative matters. In tort liability matters, the plaintiff can choose between the court at the defendant's domicile (art. 4) and the court at the place where the harmful event occurred or may occur (art. 7.2).

The place where the harmful event occurred is, according to the case-law of the CJEU, either the place of the causal event or the place of the direct and immediate damage suffered by the direct, immediate victim. In the case of a plurality of damages, the place where the harmful event occurred is either the place of the causal event for the full reparation of the damage, or the place of the damage occurring in each Member State for the reparation of the damage in that State, or the place where the centre of the victim's interests is located. The plaintiff may choose any of the competent courts according to these criteria.

As to the applicable law, the Rome II Regulation does not apply to administrative matters [art. 1(1)]. In civil liability for torts/delicts, the general rule is included in art. 4(1) according to which the law applicable to non-contractual obligations arising out of an unlawful act is the law of the country in which the damage occurred (*lex loci damni*), irrespective of the country in which the event giving rise to the damage occurred or in which the indirect consequences of that event occur. This rule does not apply if the situation falls within the exceptions to the general rule or into categories for which special rules of conflict have been established.

When an information society service provider is held liable for unlawful commercial advertising, the *law of the country of origin* is the applicable law, meaning the law of the country where the provider is based/has its seat[164]. The rules of conflict from the Rome II Regulation are not applicable at the matters that fall within the regulatory field of the Directive on Electronic Commerce, as it results from art. 27 Rome II Regulation. The same rule (the law of the country of origin) applies to situations, which fall within the scope of the European directives concerning commercial advertising.

As to the unfair competition, the market effects principle is used. According to art. 6(1) of the Rome II Regulation, the law applicable to non-contractual obligations arising out of an act of unfair competition is the law of the country in which the competitive relations or collective interests of consumers are or may be affected. For non-contractual obligations arising out of restrictions of competition the applicable law is the law of the country in which the market is or may be affected [art. 6(3) of the Rome II Regulation]. Yet, when an unlawful commercial advertising produces effects in several countries, the market effects principle leads to the application of different laws, one for each affected market. In order to avoid such a situation and taking into account the provisions of art. 27 of the Rome II Regulation, the country of origin principle is used instead.

4.3. Class actions

In view of the fact that subliminal advertising cannot be easily recognized and invoked, it seems that class actions, named representative actions, could be an efficient remedy made available to consumers by the Directive 2020/1828 on representative actions for the protection of the collective interests of consumers[165] (hereinafter, Directive 2020/1828), which is to be transposed into national legislations[166].

According to art. 2(1) of Directive 2020/1828, its provisions apply to representative actions lodged against violations of the EU law committed by traders, including with respect to commercial advertising[167]. Such violations harm or have the potential to harm the collective interests of consumers.

For the purpose of bringing representative actions, there are designated qualified entities, such as

[161] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1, (December 12, 2012), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215.

[162] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40, (July 31, 2007), https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864.

[163] For example, from the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178/1 (July 17, 2000), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031. For details, see Ungureanu, *Drept internațional privat european în raporturi de comerț internațional,* 390-392.

[164] For a detailed analysis, see Ungureanu, Drept international privat european în raporturi de comerț internațional, 390-392.

[165] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, OJ L 409/1 (December 4, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2020.409.01.0001.01.ENG.

[166] The directive is to be transposed in national legislations by 25 December 2022. The provisions adopted are to be applied from 25 June 2023 (art. 24).

[167] As provided in the annex of the directive, points 14 and 33, referring to the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, (June 11, 2005): 22, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029, and the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, (April 15, 2010) : Articles 9-11, 19-26 and 28b.

NGOs for consumers' protection. Qualified entities can bring both domestic and cross-border representative actions (art. 3.5) and they may lodge, on behalf of consumers, actions for injunction or for redress before a court or an administrative or civil/commercial authority.

Pursuant to art. 8(3) of Directive 2020/1828, a qualified entity may seek an injunctive measure, *e.g.* to cease the display of an advertisement based on neuromarketing techniques, without the consent of the consumers represented, without the existence of an actual loss or damage and in the absence of a proven intent or negligence on the part of the liable trader. The injunction measures are meant to protect the collective interests of consumers, regardless of the existence of an actual loss or damage at an individual level.

For being granted redress measures, such as compensations, contract termination, reimbursement of the price paid and so on, it follows from art. 9 that there is needed the existence of an injury/harm.

As to the traders damaged through neuromarketing techniques, they should rely on the unfair competition laws[168].

4.4. Liability for breach of fundamental human rights, the right to freedom of thought

Until the transposition of Directive 2020/1828 into domestic legislations, a solution that could be taken into consideration is the use of human rights mechanism. Hence, in legal literature[169], there has been put forward the idea of invoking art. 9 of the European Convention on Human Rights[170] (on the right to freedom of thought). Even if courts and doctrine[171] do not deal with the freedom of thought, taking for granted the idea that thoughts are intangible and beyond the possibility of control, neuromarketing threatens it by using stimuli that exceed the sphere of commercial information and enter into the sphere of manipulation.

In order to make use of this mechanism, first there should be exhausted all national channels of appeal that the person whose freedom of thought has been violated is entitled to. In Romania, this sort of action could be founded on the provisions of art. 29 (1) of Romanian Constitution ('Freedom of thought, opinion, and religious beliefs may not be restricted in any form whatsoever. No one may be forced to adopt an opinion or to adhere to a religious belief contrary to his or her beliefs'). Nonetheless, it would be hard to prove such a violation. In the legal literature[172], it is affirmed that for proving the negative effects of neuromarketing there might be used means of proof provided by neuroscience.

Some authors argue, furthermore, that there should also be recognized other human rights in the context of neuroscience's development, namely the right to cognitive liberty, the right to mental privacy, the right to mental integrity, and the right to psychological continuity[173] for the reasons already discussed in paragraph 2.8.

5. Conclusions

Neuromarketing is still in its infancy[174], being labelled as an emerging field[175]. Despite its relative incipient stage, it plays a major role in international trade as its main aim is to contribute to the improvement of marketing, particularly to the persuasive effect of advertising upon worldwide consumers. It is a great and innovative tool for traders, but it may result in competitive advantages that are likely to cause disruptions on the market, affecting traders with more reduced financial resources as neuromarketing is highly-costing.

From the consumers' perspective, neuromarketing is sketched mainly as a harmful instrument meant to alter their will autonomy and consequently to influence economic decisions in favour of traders. The literature seems to be constantly working on the subject for discussing means of protecting the individuals, but the proposals that have been put forward appear to be utopic for the moment, especially the regulation of neurorights. In these circumstances, both consumers and the organisms that act on their behalf, along with the traders less powerful and disadvantaged on the market have to rely on the existing European instruments that have been considered in the third part of the article.

The reader of this article should be aware of the fact that '*Neuromarketing is here to stay; it's not a summer fashion'*[176]. It will continue to develop itself and pose new legal issues for all the participants to international trade, as well as for consumers.

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[168] We do not examine here this issue. For an analysis, see Ungureanu, *Drept international privat european în raporturi de comerț internațional,* 392-394.

[169] Pozharliev, Verbeke, and Bagozzi, "The Autonomous Mind: The Right to Freedom of Thought in the Twenty-First Century", 5.

[170] https://www.echr.coe.int/documents/convention_eng.pdf.

[171] Bublitz, "Freedom of Thought in the Age of Neuroscience", 3.

[172] Anne Lise Sibony, "Is EU Law Neuro-Friendly?", *Neuroscience in European and North American Case Law* (Italie Pavia and Milan, du 16/09/2010 au 17/09/2010): 4, http://hdl.handle.net/2078.1/163031.

[173] Ienca and Andorno, "Towards new human rights in the age of neuroscience and neurotechnology".

[174] Daugherty and Hoffman, "Neuromarketing: Understanding the Application of Neuroscientific Methods Within Marketing Research", 6.

[175] Ibid, 31.

[176] Laureckis and Miralpeix, "Ethical and Legal Considerations in Research Subject and Data Protection", 91.

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CONTRACTOR AGREEMENT UNDER THE NEW ROMANIAN CIVIL CODE

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Abstract

Traditionally, the contractor agreement was considered a variety of the leasing contract. If in the case of the lease contract the owner transferred the right to use a good for a certain period of time and the tenant undertook to pay a rent calculated according to the period of use of the property in the case of the contractor agreement, he undertakes to make his work available to the client for a period of time so that at a certain point the work requested by the client is completed. At first glance the two contracts seemed to have a similar structure and mechanisms. In both cases, the client pays a sum of money. While in the case of the lease the lessor cedes the use of a good in the second case the contractor cedes his work. Nowadays, such a vision is found in the regulation provided by the Napoleonic civil code which was strongly influenced by the principles of Roman civil law. Thus, the chapter entitled "Du louage d'ouvrage et d'industrie" is placed in the section entitled "Du contrat de louage" which mainly regulates the types of rent. The Napoleonic civil code does not regulate very clearly the figure of the entrepreneur either. Also, the same regulation confuses the contractor contract with the employment contract for which it establishes some specific rules although the latter is a contract with a clearly distinct profile. The Italian Civil Code of 1942 went beyond this anachronistic vision and regulated the contractor contract as any contract with its own autonomy. The new Romanian civil code has largely taken over the provisions of the Italian code, considering similarly the contract as distinct from the lease agreement. This study aims to study the regulation offered by the Romanian civil code entered into force in 2011 in order to observe similarity with the Italian civil code and the principles underlying the regulation.

Keywords: *commercial contract, contractor agreement, contractor obligations, client`s obligations, risks.*

1. Introduction

Economic relations are based on the production of goods and the provision of services. One of the legal forms of these social relations is the contractor agreement.

Traditionally, the contractor agreement was considered a variety of the leasing contract. According to the art. 1708 of the Napoleonic Civil Code, "il y a deux sortes de contrats de louage:

Celui des choses,

Et celui d'*ouvrage*".

In the case of the contractor agreement, the contractor undertakes to make his work available to the client for a period of time so that at a certain point the work requested by the client is completed.

While in the case of the lease the lessor cedes the use of a good in the second case the contractor cedes his work. Such a vision is found as we saw in the regulation provided by the Napoleonic Civil Code which was strongly influenced by the principles of Roman civil law[1].

This study aims to analyze the current regulation and to observe if the contract has acquired autonomy.

Unlike the old Civil Code of 1864, which briefly mentioned the lease of things, the new Romanian Code provides a much clearer definition of the contractor agreement.

Therefore, according to the provisions of Art. 1851 by concluding this Agreement, "the contractor undertakes, at his own risk, to perform a certain work, material or intellectual, or to provide a certain service to the beneficiary, in exchange for a price".

The legal text is inspired by the Italian Civil Code which provides in Art.1655 that "l'appalto è il contratto col quale una parte assume, con organizzazione dei mezzi necessari e con gestione a proprio rischio, il compimento di una opera o di un servizio verso un corrispettivo in danaro"[2].

Despite a similarity, the regulation in the Romanian Civil Code does not retain the phrase "by organizing the necessary means", which together with the assumption of risks and the performance of a work or the provision of a service for a price outline the substance of the agreement.

It is also noteworthy that the text of the Romanian Civil Code details the fact that the work can be material or intellectual, a specification that we do not find in the Italian Code.

As regulated, the contractor agreement is one of the agreements in which the involvement of the entrepreneur as a production organizer providing goods or services to customers stands out, so we can consider the agreement as a typical commercial agreement.

2. Its Delimitation from Other Agreements

As the contractor agreement generates an obligation to do a work or thing against a price that will be paid by the beneficiary of the work, it is necessary to differentiate it from other similar contractual

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[1] P. du Plessis, *Borkowski' Textbook on Roman Law*, (Oxford: Oxford University Press, 2010), 277-278.

[2] See A. Frondrieschi, "L'appalto d'opera" in Gregorio Gitti, *I contratti per l'impresa* (Bologna: Il Mulino, 2012), 141.

profiles. The purpose of the delimitation is to remove any doubt as to the nature of the agreement in view of the fact that it has a special regulation in terms of price, warranty against defects or risks.

Delimitation from the sales agreement. Undoubtedly, the contractor agreement can often be confused with the sales agreement, especially regarding the sale of future goods[3].

In Italian case-law, a contract whose parties have taken into account the intervention of the contractor, even when the raw material is supplied to him, is considered to be a contractor agreement: „si ha appalto quando la prestazione della materia costituisce un mezzo per la produzione dell'opera e il lavoro é il scopo esenziale del negozio, in modo che le modifiche da aportare alle cose, pur rientranti nella normale attivita produttiva dell'imprenditore che si obbliga a fornire ad altri, consistono non gia in accorgimenti marginali e secondari diretti ad adattarle ale specifiche esigenze del destinatario della prestazione, ma sono tali da dare luogo ad un *opus perfectum*, inteso come effectivo e voluto risultato della prestazione"[4] .

The Italian Civil Code does not regulate assessment criteria, therefore the authors of the Romanian Code innovated by drafting art. 1855. According to it, the agreement is a sale one and not a contractor one 'when, according to the intention of the parties, the execution of the work does not constitute the main purpose of the agreement, taking also into account the value of the goods supplied'[5].

Delimitation from the employment agreement. We must add on the other hand that the contractor agreement can be confused with the employment agreement. We remember that the old Civil Code confused the contracts and the employment agreement was considered a variety of the contractor agreement. Thus, according to art. 10 from the Working Code, the individual employment agreement is the contract under which a natural person, referred to as an employee, undertakes to perform work for and under the authority of an employer, natural or legal person, in exchange for a remuneration referred to as a salary. Therefore, the employment agreement presupposes a legal link of subordination between the party who pays the employee's remuneration and the employee, subordination that is not found in the Contractor Agreement.

Delimitation from the Lease Agreement. According to art. 1777 NCC lease is the contract by which one party, called the lessor, undertakes to insure the other party, called the lessee, the use of a good for a certain period, in exchange for a price called rent.

Thereby, although the lease agreement is a contract with successive services and the lessee pays a sum of money as rent, what the lessee actually conveys is the right to use a property, whether it be movable or immovable.

Delimitation from the Mandate Agreement. According to art. 2009, the mandate is the contract by which a party, called the trustee, undertakes to conclude one or more legal documents on behalf of the other party, called the principal. It seems that there are some similarities but in fact the object is different.

Delimitation from the Deposit Agreement. Since the contractor agreement may assume that the work or service performed by the contractor could be performed on goods handed over by the customer or the principal, the contractor agreement may be confused with the deposit one. According to art. 2103 paragraph 1, the deposit agreement is the contract by which the depositary receives from the depositor a movable property, with the obligation to keep it for a period of time and to return it in kind.

In other words, the deposit agreement involves the preservation of the good received and its return as received, or, within the contractor agreement, the contractor intervenes on the substance of the good by making changes.

As we observed in the case of mandate the object is different even the depositary assume an obligation to do.

3. Legal Characteristics

The contractor agreement can be characterized by being bilateral and synallagmatic, as it is concluded between two parties, each assuming obligations towards the co-contractor[6].

It is onerous and commutative because the main obligation of the beneficiary is to pay the agreed price. It provides successive execution and, from a contractual point of view, it is consensual because in the absence of a legal provision imposing the authentic form, the principle of consensualism shall be applied.

Unlike the provisions of the old Civil Code, the new Code imposes certain limitations called incapacities. Thus, Art. 1853 refers to the provisions of Art. 1655 paragraph 1 providing that they apply accordingly to the contractor agreement.

4. Validity Conditions

Thus, the trustees, for the goods they are entrusted to sell, the parents, the guardian, the curator, the

[3] M. Montanari, *Imprenditore. Contratti commercialli*, (Turin: Giuffre, 2001), 178.

[4] Cassazione, 30 martie 1995, nr. 3807 in Ruperto, Cesare, *La giurisprudenza sul codice civile* (Milano: Giuffre, 2005), p. 4795.

[5] See Gh. Gheorghiu, Contractul de antrepriză in Flavius-Antoniu Baias, *Noul Cod civil: comentariu pe articole: art. 1-2664*, (Bucharest: C.H. Beck, 2014), 2021 ; V. Nemeș and G. Fierbințeanu, *Dreptul contractelor civile si comerciale. Teorie, jurisprudență, modele*, (Bucharest: Hamangiu, 2020), 230.

[6] See V. Nemeș and G. Fierbințeanu, *Dreptul contractelor civile si comerciale. Teorie, jurisprudență, modele*, (Bucharest: Hamangiu, 2020), 227.

provisional administrator, for the goods of the persons they represent, the civil servants, the syndic judges, the insolvency practitioners, the executors, as well as other such persons, which could influence the conditions of the contractor agreement made through them or which has as its object the goods which they administer or whose administration they supervise, cannot also conclude a contractor agreement for their own goods for a price consisting of a sum of money derived from the sale or exploitation of the good or patrimony that they administer or whose administration they supervise, as appropriate[7].

All these incapacities are regulated by the law in order to impose a fair behaviour of the contractor and the beneficiary.

5. Object of Agreement

As we have noted above, the performance of a work or the provision of a service is the main obligation of the contractor.

With regard to the price, Art. 1854 NCC paragraph 1 provides that it "may consist of a sum of money or any other goods or services".

Similar to the regulation of the sales agreement, the price must be significant and determined, or at least determinable[8].

In this sense, when the agreement does not include price clauses, the beneficiary owes the price provided by law or calculated according to law or, in the absence of such legal provisions, the price set in relation to the work performed and the expenses necessary to perform the work or service, taking into account the existing protocols as well (Art. 1854 NCC paragraph 3).

The norm is different from the Italian regulation which provides the following in Art. 1657: „Se le parti non hanno determinato la misura del corrispettivo né hanno stabilito il modo di determinarla, essa è calcolata con riferimento alle tariffe esistenti o agli usi; in mancanza, è determinata dal giudice".

That rule is necessary; without it the agreement has no object.

The Civil Code permits three ways to determine the price in order that one of this be compatible with the context and the parties' will.

The beneficiary is only required to pay this increase to the extent that it results from works or services that could not have been provided by the contractor at the time of the conclusion of the agreement.

The parties agree that the contractor agreement will rely on estimate prices, namely a provisional price. In this case, the total price may change depending on the evolution of material prices, labour required and additional works added.

If upon the conclusion of the agreement, the price of works or services has been estimated, the contractor must justify any increase in price (Art. 1865 paragraph 1).

If the price is set according to the value of the works performed, the services provided or the goods supplied, the contractor is required, at the request of the beneficiary, to account for the status of works, services already provided and expenses already incurred (Art. 1866).

On the other hand, the parties may agree on a price for the whole work or service - called a flat rate - without taking into account the amounts that make up the price.

Despite the various innovations brought to the old regulation, in the Romanian Civil Code there are no important provisions regarding various incidents or amendments to the initial agreement.

Thus, the amendments of the Italian Civil Code are as follows:

- amendments made by convention of the Parties,
- necessary changes and amendments ordered by the Beneficiary.

The first case is regulated by the provisions of Art. 1659. According to these, "l'appaltatore non può apportare variazioni alle modalità convenute dell'opera se il committente non le ha autorizzate.

L'autorizzazione si deve provare per iscritto.

Anche quando le modificazioni sono state autorizzate, l'appaltatore, se il prezzo dell'intera opera è stato determinato globalmente, non ha diritto a compenso per le variazioni o per le aggiunte, salvo diversa pattuizione"[9].

The second case is regulated by the provisions of Art. 1660. Thus, „se per l'esecuzione dell'opera a regola d'arte è necessario apportare variazioni al progetto e le parti non si accordano, spetta al giudice di determinare le variazioni da introdurre e le correlative variazioni del prezzo.

Se l'importo delle variazioni supera il sesto del prezzo complessivo convenuto, l'appaltatore può recedere dal contratto e può ottenere, secondo le circostanze un'equa indennità.

Se le variazioni sono di notevole entità, il committente può recedere dal contratto ed è tenuto a corrispondere un equo indennizzo".

Finally, the third case is covered by Art. 1661: „Il committente può apportare variazioni al progetto, purché il loro ammontare non superi il sesto del prezzo complessivo convenuto. L'appaltatore ha diritto al compenso per i maggiori lavori eseguiti, anche se il prezzo dell'opera era stato determinato globalmente.

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[7] See V. Nemeș, and G. Fierbințeanu, *Dreptul contractelor civile si comerciale. Teorie, jurisprudență, modele*, (Bucharest: Hamangiu, 2020), 229.

[8] See Gh. Gheorghiu, Contractul de antrepriză in Flavius-Antoniu Baias, *Noul Cod civil: comentariu pe articole: art. 1-2664*, (Bucharest: C.H. Beck, 2014), 2020.

9 See D. Rubino and G. Iudica, Dell'appalto, (Bologna: Zanichelli, 1992), 405-406; O. Cagnasso, Il contratto di appalto, in G. Cottino, Contratti commerciali (Padova: CEDAM, 1991), 690-691.

La disposizione del comma precedente non si applica quando le variazioni, pur essendo contenute nei limiti suddetti, importano notevoli modificazioni della natura dell'opera o dei quantitativi nelle singole categorie di lavori previste nel contratto per l'esecuzione dell'opera medesima"[10].

In this case, when the agreement is concluded for a global price, the beneficiary must pay the agreed price and cannot request a reduction thereof, motivating that the work or service required less work or cost less than provided (Art. 1867 paragraph 1).

Likewise, the contractor cannot claim a price increase for reasons contrary to those mentioned.

The flat rate remains unchanged, although changes have been made to the execution conditions initially provided, unless the parties have agreed otherwise.

6. Obligations of Parties

6.1. Contractor's obligations

The contractor has the duty to do the work and surrender it when finished to the beneficiary.

In principle, in the execution of the work the contractor can work with his materials or with those procured by the beneficiary.

Unlike the previous Code, which only mentioned the two alternatives, the current Code imposes a presumption, namely that the contractor is obliged to execute the work with his materials in the absence of a contrary legal or conventional provision (Art. 1857 paragraph 1)[11].

When the beneficiary hands over the materials to the contractor, the latter is obliged:

a. to store and use them according to their destination, according to the applicable technical rules,

b. to justify how they have been used; and

c. to return what has not been used for the execution of the work (Art. 1857 paragraph 3 NCC).

A new obligation for the contractor comprised within the current Code is that of information[12]. That made the contractor careful regarding the materials.

In the Italian Code, the information obligation only takes into account the defects of the materials provided by the beneficiary: L'appaltatore è tenuto a dare pronto avviso al committente dei difetti della materia da questo fornita, se si scoprono nel corso dell'opera e possono comprometterne la regolare esecuzione (Art. 1663)[13].

Therefore, according to Art. 1858 the Contractor is obliged to inform without delay the Beneficiary if the normal execution of the work, its durability or its use according to its destination would be endangered due to:

a) the procured materials or other means that, according to the Agreement, the beneficiary made available;

b) inadequate instructions given by the beneficiary;

c) the existence or emergence of circumstances for which the contractor is not liable[14].

In the other case, the contractor working with his materials is responsible for their quality, according to the provisions of the sales agreement.

Since the contractor actually hands over the good in a similar way to the seller, he is obliged to guarantee against the defects of the work and for the qualities agreed pursuant to Art. 1863 which refers to the regulation of the warranty against latent defects in the thing sold[15].

The Italian code contains a special regulation regarding the guarantee against the defects.

The first paragraph of art.1667 is similar to the regulation from the sale contract: L'appaltatore è tenuto alla garanzia per le difformità e i vizi dell'opera. La garanzia non è dovuta se il committente ha accettato l'opera e le difformità o i vizi erano da lui conosciuti o erano riconoscibili, purché, in questo caso, non siano stati in mala fede taciuti dall'appaltatore.

The second paragraph impose to the beneficiary a special term to point out the defects: Il committente deve, a pena di decadenza, denunziare all'appaltatore le difformità o i vizi entro sessanta giorni dalla scoperta. La denunzia non è necessaria se l'appaltatore ha riconosciuto le difformità o i vizi o se li ha occultati.

Finally, the third paragraph impose a special term for the beneficary's action: L'azione contro l'appaltatore si prescrive in *due anni* dal giorno della consegna dell'opera. Il committente convenuto per il pagamento può sempre far valere la garanzia, purché le difformità o i vizi siano stati denunziati entro sessanta giorni dalla scoperta e prima che siano decorsi i due anni dalla consegna.

6.2. Beneficiary's Obligations

The beneficiary has two main obligations.

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[10] See D. Rubino and G. Iudica, Dell'appalto, (Bologna: Zanichelli, 1992), 432.

[11] See V. Nemeș, and G. Fierbințeanu, Gabriela, Dreptul contractelor civile si comerciale. Teorie, jurisprudenta, modele, (Bucharest: Hamangiu, 2020), 237; Gheorghiu, Gheorghe, Contractul de antrepriză in Baias, Flavius-Antoniu, Noul Cod civil: comentariu pe articole: art. 1-2664, (Bucharest: C.H. Beck, 2014), 2022.

[12] Gh. Gheorghiu, Contractul de antrepriză in Flavius-Antoniu Baias, Noul Cod civil: comentariu pe articole: art. 1-2664, (Bucharest: C.H. Beck, 2014), 2022.

[13] D. Rubino and G. Iudica, Dell'appalto, (Bologna: Zanichelli, 1992), 295.

[14] V. Nemeș, and G. Fierbințeanu, Dreptul contractelor civile si comerciale. Teorie, jurisprudenta, modele, (Bucharest: Hamangiu, 2020), 241; Gheorghiu, Gheorghe, Contractul de antrepriză in Baias, Flavius-Antoniu, Noul Cod civil: comentariu pe articole: art. 1-2664, (Bucharest: C.H. Beck, 2014), 2022.

[15] Gh. Gheorghiu, Contractul de antrepriză in Flavius-Antoniu Baias, *Noul Cod civil: comentariu pe articole: art. 1-2664*, (Bucharest: C.H. Beck, 2014), 1888 et seq.

Like the buyer, he has the obligation to participate in the acceptance of the work.

Thus, according to Art. 1862 paragraph 1 immediately after receiving the communication by which the contractor notifies him that the work is completed, the beneficiary has the obligation to verify it, within a reasonable time according to the nature of the work and protocols in the field, and, if it meets the conditions established by contract, to accept it, and, where appropriate, to retrieve it.

If, without good reasons, the beneficiary fails to appear or does not communicate without delay to the contractor the result of the verification, the work is considered accepted without reservations[16].

The beneficiary who has accepted the work without reservations no longer has the right to invoke the apparent defects of the work or the apparent lack of agreed qualities.

Art. 1862 is inspired by Art.1665 from the Italian Code. According to the latter ”il committente, prima di ricevere la consegna, *ha diritto di verificare l'opera compiuta*.

La verifica deve essere fatta dal committente appena l'appaltatore lo mette in condizione di poterla eseguire.

Se, nonostante l'invito fattogli dall'appaltatore, il committente tralascia di procedere alla verifica senza giusti motivi, ovvero non ne comunica il risultato entro un breve termine, l'opera si considera accettata.

Se il committente riceve senza riserve la consegna dell'opera, questa si considera accettata ancorche' non si sia proceduto alla verifica”.

Regarding the payment of the price, the new Code introduces a rule linking the payment to the acceptance of the good.

The Italian Code provided that rule: ”Salvo diversa pattuizione o uso contrario, l'appaltatore ha diritto al pagamento del corrispettivo quando l'opera e' accettata dal committente”.

Therefore, according to Art. 1864 paragraph 1 when the object of the agreement is a work, the Beneficiary is obliged to pay the Contractor the price on the date and place of acceptance of the entire work, unless otherwise provided by law or agreement.

7. Legal Mortgage

Sometimes, the beneficiary may not pay the price. This is a major risk for the contractor because he has to pay the pice of materials and surely the salaries of his employees.

In order to guarantee the payment of the price due for the work, the contractor benefits from a legal mortgage on the work, constituted and preserved in accordance with the law.

In comparison with the Italian Code the choice of the Romanian Code authors’ is innovative.

8. Incidents during the Performance of Agreement. Good Risks and Agreement Risks

Sometimes, the work may be in danger without one of the parties’ fault.

That’s why the law intervenes: If the beneficiary, although notified by the contractor under the conditions of Art. 1858, does not take the necessary measures within a period appropriate to the circumstances, the contractor may terminate the agreement or may continue its execution at the risk of the beneficiary, notifying him in this regard (Art. 1859 paragraph 1).

Art. 1859 paragraph 2 is innovative also. The contractor is obliged to request the termination of the agreement, under the sanction of taking over the risk and being liable for the damages caused, including to third parties, when the work would be likely to threaten a person’s health or bodily integrity.

An aspect related to the specifics of the contractor agreement regulation is related to the loss of the work before acceptance. The regulation is found in Article 1860.

According to this norm, if prior to the acceptance the work is lost or damaged due to causes not attributable to the beneficiary, the contractor who purchased the material is obliged to restore it at his own expense and in compliance with the initial conditions and terms, taking into account, if necessary, the rules on the fortuitous suspension of the execution of obligations.

Basically, the risk of losing the goods is the contractor’s responsibility. It is normally because the goods are in the contractor’s possession.

The law impose to the contractor to assume the agreement risk. According to Art.1864 paragraph 2 if the work perished or deteriorated before acceptance, without the fault of the beneficiary, the contractor is not entitled to the price if he gave the material or if the loss or damage had a cause other than defects of the material given by the beneficiary. In this case, the agreement remains in force, with the provisions of Art. 1860 applicable.

A particular situation is when the material belongs to the beneficiary and is handed over to the contractor for processing. A special rule establishes the person who assumes the agreement risk.

In this case according to Art. 1860 paragraph 2, when the material was purchased by the beneficiary, he is required to bear the costs of restoring the work only if the loss was due to a defect in the materials. In other cases, the beneficiary is obliged to provide the materials again, if the loss or damage is not attributable to the contractor.

The provisions of this Article do not apply when the loss or damage occurs after the acceptance of the work, in which case the contractor remains liable, if applicable, under the warranty against latent defects and for the agreed qualities.

[16] V. Nemeș and G. Fierbințeanu, *Dreptul contractelor civile si comerciale. Teorie, jurisprudenta, modele*, (Bucharest: Hamangiu, 2020), 244-45.

9. Work Control and Execution

The work must be done as the parties agreed.

In order to prevent some execution defects and to be able to exercise the rights specified above, Art. 1861 of the NCC recognizes the beneficiary's right, at his own expense, to control the work during its execution, without unduly embarrassing the contractor, and to communicate his observations to the latter.

So defects can be avoid and the work will be as the parties conceived it.

According to the Italian Code, namely Art. 1662. Verifica nel corso di esecuzione dell'opera "il committente ha diritto di controllare lo svolgimento dei lavori e di verificarne a proprie spese lo stato. Quando, nel corso dell'opera, si accerta che la sua esecuzione non procede secondo le condizioni stabilite dal contratto e a regola d'arte, il committente può fissare un congruo termine entro il quale l'appaltatore si deve conformare a tali condizioni; trascorso inutilmente il termine stabilito, il contratto è risoluto, salvo il diritto del committente al risarcimento del danno".

It means that the contractor has a term within he must do the work according to the agreement.

10. Direct Action of Workers

Sometimes the workers of the contractor are not paid in time. That's why it was necessary a rule to protect them.

According to the Art.1856 to the extent that they have not been paid by the contractor, the persons who, under an agreement concluded with him, have carried out an activity for the provision of services or the execution of the contracted work, have direct action against the beneficiary, up to the amount owed by the latter the contractor at the time of commencement of the proceedings[17].

This action assures the payment in time of the salaries.

11. Termination of Agreement

Obviously, like any bilateral and synallagmatic agreement, the contractor Agreement can be terminated by an event that makes the obligation impossible to perform or by termination of the agreement due to the fault of one of the parties (art.1871-1872 NCC).

Assuming that the contractor was a natural person, the possibility of agreement termination is traditionally recognized when he dies during the performance of the contract, as the contract was considered an *intuitu personae* legal act[18]. It was therefore presumed that since the qualities of the contractor or handyman were the basis for concluding the contract, it was natural that by the death of the handyman, architect or contractor - as provided in Art. 1485 of the old Code - the Lease Agreement to be terminated.

The rule is also taken over by the new Civil Code which states that when the contractor dies or becomes, without any fault of his own, unable to complete the work or provide the service, the contract terminates if it was concluded in consideration of the contractor's personal skills (Art.1871 paragraph 1)[19].

The regulation of the Romanian Code follows that of the Italian Code which stipulates that „il contratto di appalto non si scioglie per la morte dell'appaltatore, salvo che la considerazione della sua persona sia stata motivo determinante del contratto (Art. 1674).

12. Conclusions

The new regulation of the contractor agreement from the Romanian Civil Code can only be welcomed. Through it, the Company agreement has acquired a special regulation and the forced similarities with the lease agreement have been removed. Even if by this new regulation the contractor agreement exceeds the influence of Roman law, clearer and more specific rules were necessary for various situations in practice and the choice of the Italian Civil Code as a source of inspiration can only be a realistic one.

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[17] V. Nemeș and G. Fierbințeanu, Dreptul contractelor civile si comerciale. Teorie, jurisprudență, modele, (Bucharest: Hamangiu, 2020), 250-51.

[18] *Idem*, 246-7.

[19] Gh. Gheorghiu, Contractul de antrepriză in Flavius-Antoniu Baias, *Noul Cod civil: comentariu pe articole: art. 1-2664*, (Bucharest: C.H. Beck, 2014), 2028.

PREVENTIVE MEASURES UNDER ENVIRONMENTAL LAW APPLICABLE TO COMPANIES GOVERNED BY LAW NO. 85/2014

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Abstract

This article addresses the relationship between environmental law and insolvent companies. The author will analyze the incidence of preventive measures in current national legislation and will identify its applicability in regards to insolvency proceedings.

The article is structured in two parts. The first part aims to define and identify the particularities of preventive measures under environmental law as well as the environmental liability of companies, followed by the second part that highlights the obligations that insolvent companies have in order to prevent environmental damage by linking the provisions of Law No. 85/2014 on insolvency prevention and insolvency procedures with the provisions of the Government Emergency Ordinance No. 68/2007 on environmental liability with regard to the prevention and repair of environmental damage.

Keywords: *insolvency proceedings, environmental damage, preventive actions, environmental liability, environmental protection, environmental law, commercial law, company law, insolvency procedures, insolvency practitioner, judicial administrator, judicial liquidator.*

1. Preventive measures provided for by environmental law

As a legal institution, environmental liability is governed by the general framework established by the Government Emergency Ordinance No. 195/2005 on environmental protection, with its subsequent amendments. A more detailed legal framework is established by the Government Emergency Ordinance No. 68/2007 regarding preventing and remedying environmental damage, as amended, which transposed and implemented in full Directive No. 2004/35/EC[1].

The main objective of Government Emergency Ordinance No. 68/2007, with its subsequent amendments, is to emphasize the preventive nature of its provisions and to promote caution as a core principle. By means of this ordinance, an important role was given to the positive obligation of the State to guarantee the fundamental right to a healthy and a balanced environment.

The fundamental right to a healthy environment is established by European conventional law and constitutionally recognized, requiring the creation of an administrative and legislative framework with the aim of preventing damage to the environment and human health[2].

In legal specialty literature it was pointed out that without the prospects of genuine liability, adapted to the particularities of the field and efficiency, in the sense of using legal means and instruments to ensure that the damage is repaired as fully as possible and appropriately and in a reasonable time, environmental law cannot be either effective or credible".[3]

Liability in environmental law is a specific type of responsibility based on principles that combine elements of environmental law with elements of administrative and civil law. Administrative law prescribes that environmental protection is an objective of major public interest, determining the possibility of establishing reparatory measures, but also the assessment of the significance of the damages done to the environment by public administration authorities for the protection of the environment.

The failure of economic operators to comply with environmental obligations regarding the prevention or mitigation of environmental damage and failure to communicate information to the competent authorities for the protection of the environment may even result in contraventional sanction.

The aforementioned environmental responsibility is based on principles specific to environmental law such as: the principle of preventive action, the principle of sustainable development, the principle of the conservation of biodiversity and ecosystems specific to the natural biogeographical framework and also the principle of the "polluter pays".

As stipulated, environmental liability occurs in the event of environmental damage, which implies that an economic operator is negatively affecting the environment through actions or inactions in the course of its activity. In order for responsibility to exist, there are certain conditions that must be cumulatively met, as follows: the committing an illicit act, causing

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[1] Directive No. 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage was published in the Official Journal of the European Union L143 of 30 April 2004, as amended by Directive 2006/21/EC of 15 March 2006 on the management of residues in the extractive industry, published in the Official Journal of the European Union L 102 of 11 April 2006.

[2] ECHR, judgment of 27 January 2009, Tatar v. Romania, para. 88.

[3] Mircea Dutu and Andrei Dutu, *Liability in environmental law,* Romanian Academy Publishing House, Bucharest, 2015, pg. 117.

environmental damage and the existence of a causal link between them[4].

In legal specialty literature it has been stated that while in the case of minor damages to the environment, the damages can be pecuniary assessed, i.e. the costs of restoring the damaged natural balance can be evaluated, in the case of significant damage to the environment, i.e. irreversible or long-term damage, caused in any way to the environment or which has caused or is likely to cause death or serious injury to the bodily integrity or health of a person, the damages may or may not be quantifiable[5].

However, it is essential to distinguish between the different meanings of the term damages, as it can mean two different notions with distinct legal regimes. The first meaning of the term is corresponding to term "damnum", which comes Latin, meaning a simple injury, harm or impairment of personality rights. The second meaning of the term is corresponding to the Latin term of "praejudicium", which refers to a material or moral loss caused by someone. Taking into consideration the different meanings of the two terms, we consider that "damnum" is a primary injury, while "praejudicium" represents the consequences of said injury. While there could be "damnum" without "praejudicium", there cannot be any "praejudicium" without "damnum".

With these said, in Romanian legal literature, the notion of "ecological damage" was borrowed from its French counterpart, in order for it to express the particularities of indirect damage resulting from harm done to the environment[6].

The notion of ecological damage has been defined as "the harm which affects the environment as a whole, or the elements of a system, which, because of its indirect and diffuse nature, does not permit the establishment of a right to compensation'. [7]

In legal literature, some authors considered that ecological damage is the one that causes harm to people and goods, the environment being considered to be a cause and not the victim, while other authors have considered that ecological damage causes damage to the environment, shaping the concept of the extent of an ecological damage[8].

Also, it was pointed out that "in the notion of 'environmental damage' were included both the damages suffered because of pollution, done to the environment, and the damages suffered by humans or goods, the environment being defined in the legislation prior to Law No. 137/1995 on environmental protection, as consisting of all natural and human created factors, civil liability regulations making no distinctions between different elements of the environment"[9].

Government Emergency Ordinance No. 195/2005 on environmental protection, as amended, keeps the notion of "damages done to the environment" in the dispositions regarding liability in Article 95(2)[10].

In matters regarding damages done to the environment, humans are the ones that cause most of the damages, including the most serious of them. If environmental damage has been caused, it will be assessed from a pecuniary point of view, in order to estimate the necessary expenditures needed to restore the damaged natural balance. In this field, environmental damage could also be irreversible, so the persons responsible will be compelled to bear the costs related to the removal of the negative consequences, as for of restitutio in integrum. Also, those responsible for environmental damage have to bear both the costs of reparation of the damages caused and the costs for preventing and restoring the ecological balance[11].

In accordance with the 'polluter pays' principle, economic operators that cause environmental damage will have to bear all the costs necessary to prevent and repair environmental damage. The person responsible could be held liable if, through his own actions or inactions, he has caused certain, direct and personal damage to the environment which has not been repaired by another person. Environmental damage is certain when its existence is proven and its extent is established.

Another principle regarding liability, for environmental damage, is that of solidarity in the case of plurality of authors. The Government Emergency Ordinance No.195/2005 on environmental protection, as amended, provides in Article 95(1) solidary liability in case of plurality of authors. In such cases, the burden of reparation can be divided proportionally by analyzing the culpability of each person, and, if the person's participation cannot be exactly established, those responsible will be equally liable for compensation for the damages done to the environment.

Economic operators, whose activities are carried out under environmental agreements or environmental authorizations, which are in insolvency proceedings, will be required to comply with all environmental legal dispositions. For environmental damages, insolvent economic operators may be required to repair any

[4] The term "damage" is defined in Article 2 Pc. 12 of G.E.O. No. 68/2007 as "a measurable negative change in a natural resource or a measurable deterioration of a service linked to natural resources, which may occur directly or indirectly'.

[5] D. Marinescu and M.C. Petre *Treaty on Environmental Law, 5th Edition,* University Publishing House, Bucharest, 2014, pag. 713.

[6] This term was first used by Michel Despax In *Droit de l`environnement,* Litec-Paris, 1980, pg. 1036.

[7] Michel Prieur, *Droit de l`environnement,* Daloz, 1991, pg. 1034.

[8] R. Drago, Preface to P. Girod's work, *La reparation domage ecologic,* These, Paris 1974, pg. 13.

[9] D. Marinescu and M.C. Petre *op. cit.*, pg. 715.

[10] Article 95 (1) of the G.E.O. No. 195/2005 on environmental protection, as amended, stipulates: *Liability for environmental damage shall be objective, independent of fault. In the case of plurality of authors, liability shall be joint*.

[11] This results from the corroboration of the provisions of Articles 6 and 94 of the G.E.O. No. 195/2005 on environmental protection, with amendments.

damages caused, as Law No. 85/2014 on insolvency prevention and insolvency procedures provides the possibility for injured creditors to have said damages repaired.

For the purpose of finding any breaches of environmental obligations, the County Environmental Protection Agency is the competent authority in the field which operates under the authority of the National Environmental Protection Agency, and which can establish preventive and reparatory measures. Furthermore, the County Environmental Protection Agency also has the power to assess damages done to the environment[12].

The assessment of environmental damage is very important in the case of an insolvent company, taking into consideration the legal dispositions of Law No. 85/2014, as amended, which impose certain obligations that the affected creditors must comply with. Thus, following an assessment carried out by it, the County Environmental Protection Agency may request the its registration in the bankrupt's estate of the insolvent debtor, or may ask the Syndic Judge to order the debtor to pay the damages caused and assessed, as well as to repair any damage done to the environment or to persons. Depending on the time and involvement of the insolvent company in causing the environmental damage, the County Environmental Protection Agency may establish obligations for the insolvent company to take preventive or reparatory measures leading to the prevention of any further environmental damages.

In order to establish preventive measures, the County Environmental Protection Agency may consult with the county commissariat of the National Environmental Guard or with other authorities responsible for environmental law that can offer support in making such decisions.

In the event of environmental damage done by an economic operator, the County Environmental Protection Agency will assess the significant nature of the environmental damage in consultation with the environmental authorities involved as well as the National Environmental Protection Agency. [13]

After drafting the assessment on the significant nature of the environmental damage, the County Environmental Protection Agency will inform the economic operator of the outcome of the assessment and, based on the conclusions of the assessment, it will impose measures to repair the environmental damage that was caused. In the case of insolvent companies, the assessment of the significant nature of the environmental damage can constitute proof for registration in the bankrupt's estate of the insolvent debtor.

Article 7 (1) of the Government Emergency Ordinance No. 68/2007, as amended, imposes that for the performing of its tasks, the County Environmental Protection Agency may:

"(a) to carry out the preventive or reparatory measures established, in accordance with the provisions of Article 11 (d), Article 12 (1), Article 15 (d) and Article 16 (1), respectively, directly or through the conclusion of contracts with natural or legal persons, in accordance with the provisions of the Government Emergency Ordinance No. 34/2006 on the assignment of public procurement contracts, public works concession contracts and service concession contracts, approved with amendments by Law No. 337/2006, as amended.

(b) order the necessary preventive or reparatory measures to be taken on the property of a third party;

(c) request the operator to carry out his own assessment and to provide any information and data necessary in the event of causing damages;'

Judicial practice at national level has concluded that the National Environmental Protection Agency together with the County Environmental Protection Agencies are obliged to take all necessary measures to prevent and repair any environmental damage. The expenditures, for measures that will be taken by the Environmental Protection Agencies, can be advanced by them and eventually recovered from the economic operators. Thus, Decision No. 3196/30.05.2016 of the Bucharest Court of Appeal judged the appeal put forward by the County Environmental Protection Agency against Civil Sentence No. 3779/ 20.05.2015 of the Bucharest Tribunal, in which the action was guaranteed and the defendant was ordered to take over the entire quantity of waste under the applicant's legal guard. The expenditures necessary to take legal measures for the disposal or recovery of waste will be advanced by the County Environmental Protection Agency[14].

Government Emergency Ordinance No. 68/2007, with amendments, imposes a time limit in which a claim ca be brough of 5 years for the recovery of the expenditures advanced by the County Environmental Protection Agency for carrying out the measures to repair environmental damage. In the case of insolvent companies, that limitation period will be suspended once the proceedings have been opened, in accordance to Article 90 of Law No. 85/2014 on insolvency prevention and insolvency procedures[15].

[12] According to Article 6 (1) of the G.E.O. No. 68/2007, the County Environmental Protection Agency is the competent authority for establishing and taking preventive and remedial measures, and for assessing the significant nature of environmental damage.

[13] According to Article 6 (3) of the G.E.O. No. 68/2007, in assessing the significant nature of the environmental damage and in determining remedial measures, the County Environmental Protection Agency shall consult the National Environmental Protection Agency, besides the authorities mentioned at (2).

[14] Decision No. 3196/30.05.2016 of the Bucharest Court of Appeal available at https://idrept.ro/Document View.aspx? DocumentId=81506204 consulted on 28.02.2021 on the website idrept.ro.

[15] Article 32(2) of the G.E.O. No. 68/2007, stipulates that the right of the County Environmental Protection Agency to file a claim against the operator for the recovery of costs shall has a statute of limitation of 5 years from the date on which those measures were carried out or from the date on which the responsible operator or third person was identified.

The decisions for establishing preventive or reparatory measures that the County Environmental Protection Agencies take can be contested by the persons concerned, in accordance with the provisions of the Law on Administrative Disputes[16].

In accordance to the provisions of Article 8(2) of the Government Emergency Ordinance No. 68/2007 on environmental liability with regard to the prevention and repair of environmental damage, the decisions of the County Environmental Protection Agency will be notified to the operator within 24 hours.

The National Environmental Protection Agency is involved in the development of sustainable development plans at all levels by actively participating in the process of integrating environmental policies into other sectors. The County Environmental Protection Agencies, under the supervision of the National Environmental Protection Agency, perform the tasks of implementing policies, legislation and strategies in the field of environmental protection at the county level.

In matters regarding the discovery of environmental damage as well as of imminent threats of such harm is the responsibility of the National Environmental Guard, through county commissioners[17].

The National Environmental Guard is the public inspection and control institution in the field of environmental protection, being the competent authority for conformity verification, which operates as a specialized body of the central public administration. The National Environmental Guard is responsible for the discovery, prevention and sanctioning of operators in breach of the legal provisions on environmental protection[18].

2. Preventive actions applicable to insolvent companies

Government Emergency Ordinance No. 68/2007 on environmental liability with regard to the prevention and repair of environmental damage, devotes an entire chapter to preventive actions, since imminent threats of environmental damage are easier to prevent than to repair.

Economic operators operating on the basis of an environmental agreement or authorization will be required to take all necessary measures to prevent any incidents with environmental consequences. Imminent threats of environmental harm will have to be reported by the operator within 2 hours of being made aware of the occurrence of such threats. The information will be transmitted by the operator, with regard to imminent threats of environmental damage, to the County Environmental Protection Agency and to the county commissioners of the National Environmental Guard, from where the activity is carried out[19].

In the case of operators covered by the Insolvency Act, the duty to inform of imminent threats of environmental harm lie with the special or judicial administrators, depending on the situation. The activity of the insolvent company is coordinated and led by the special administrator, appointed in the proceedings, under the supervision of the judicial administrator, if the right of administration has not been lifted by the opening judgment of the proceedings. In this case, the person responsible to communicate any threats of damage to the environment to the authorities is the special administrator of the company, which also directs its economic activity. The special administrator, appointed in the proceedings, is also the person responsible for taking all measures to prevent such threats of harm which may be caused to the environment.

The duty of the judicial administrator or liquidator to communicate to the authorities of any threats of damage to the environment, will be his, respectively hers, from the date of the lifting of the right of administration of the insolvent operator, respectively from the date of the opening of bankruptcy proceedings. The opening of bankruptcy proceedings of the operator has the consequence of lifting the right of administration and the appointment of a judicial liquidator, as well as stopping the company's activity in order to liquidate its assets.

We consider that the judicial liquidator appointed in bankruptcy proceedings is the person responsible for fulfilling all the obligations regulated by Article 10 (1) of the Government Emergency Ordinance No. 68/2007 on environmental liability, since he is the person designated by the Court for the representation of the insolvent company. Furthermore, the judicial liquidator is also the person responsible to take all necessary preventive measures to remove the threat to the environment.

Regarding the preventive measures necessary to avoid environmental damage taken in the context of insolvency proceedings, we consider that they are part of the company's current business and the approval of the creditors' committee is not necessary. These measures may be taken by the special administrator of the insolvent debtor, with the prior opinion of the judicial administrator.

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[16] Law No. 554/2004, on administrative litigation, with amendments, published in M.Of. No. 1154 from 7 December 2004.

[17] Article 9 of the G.E.O. No. 68/2007 stipulates that the competent authority for the assessment of environmental damage, of an imminent threat of such damage and the identification of the operator responsible shall be the National Environmental Guard, through the county commissariats.

[18] Article 2 (2) of Government Decision No. 1005/2012 on the organization and functioning of the Environmental Guard, with amendments, published in M.Of. No. 352 from 22 October 2012.

[19] Article 10 (1) of G.E.O. No. 68/2007 stipulates that in the event of an imminent threat of environmental damage, the operator shall immediately take the necessary preventive measures and, within 2 hours of becoming aware of the threat, inform the County Environmental Protection Agency and the county commissariat of the National Environmental Guard.

Preventive measures, in insolvency proceedings, for which costs cannot be covered by the insolvent company, can be requested from the creditors by the judicial administrator by holding a general meeting of the creditors, organized by the judicial administrator. If such a request is approved, creditors who have incurred the costs of the preventive measures can take precedence in recovering the allocated money and may even request to have a charge be born on certain assets of the insolvent debtor.

What must be mentioned is that the nature of the obligation, which the operator must comply with in order to prevent an imminent threat of environmental damage, is a personal one. The County Environmental Protection Agency may force the operator to do something or abstain from certain activities in order to prevent environmental damage in the event of such an imminent threat.

In the case of companies covered by Law No. 85/2014 on insolvency prevention and insolvency procedures, the County Environmental Protection Agencies may order the operator represented by a special or judicial administrator, to take certain measures to prevent possible environmental damage, as it deems appropriate. The responsibility for carrying out these measures lies primarily with the person who carries out the company's business, i.e. the special administrator, in the case in which the right of administration has not been lifted by the Syndic Judge.

Enforcement in insolvency proceedings is not possible, so the only possibility for the County Environmental Protection Agency for compelling the debtor to carry out preventive measures in order to avoid environmental damage remains the request that he can put forward to the Syndic Judge. By analyzing the request of the County Environmental Protection Agency, the judicial administrator may find that the request is well founded and request the Judge to order the debtor to fulfil his obligations.

The preventive measures which any operator must take need to be proportional to the threat, with the main aim being the avoiding of environmental damage. These measures will be taken in accordance with the precautionary principle in decision-making[20].

This principle seeks to prevent irreversible decisions with the purpose of avoiding any form of pollution. It also is a principle of anticipating any alleged damage even if it is not unquestionably demonstrated. If the risk of environmental degradation exists or is plausible, then the precautionary principle is activated to protect the environment.

In the event of an imminent threat of environmental damage, in which preventive measures have been taken, which have been proved to be ineffective, the operator must notify the County Environmental Protection Agency and the county commissariat of the National Environmental Guard in order for new preventive measures to be established.[21]

The County Environmental Protection Agency can request the operator to provide information on any imminent threat of environmental damage. The County Environmental Protection Agency can also request information from operators whenever it considers that there may be threats of environmental damage.

In the event that a threat is found by the County Environmental Protection Agency, it can request the operator to take the necessary measures to prevent environmental damage. The County Environmental Protection Agency may also direct the operator in choosing the best approach in order to prevent imminent environmental damage, but it may also take the necessary preventive measures on its own[22], with the costs being incurred by the operator's estate.[23]

In case of operators that are debtors in insolvency proceedings, requests from public authorities for the protection of the environment will have to be communicated at both the company's headquarter and at the headquarter of the judicial administrator or liquidator. Any requests for information or measures taken by public authorities for the protection of the environment will have to be communicated to judicial administrators or liquidators as the insolvency proceedings of the operator are supervised or even run by the insolvency practitioner appointed by the Court.

The County Environmental Protection Agency has the legal possibility to take the necessary preventive measures in order to avoid environmental damage, but only after these preventive measures have been requested from the operator, which remained passive and has not complied with the request. In general, the operator is the person entitled to take all the preventive measures necessary in order to avoid environmental damage. If the operator does not take any measure, the County Environmental Protection Agency will have to

[20] Article 10 (3) of G.E.O. No. 68/2007 stipulates that the preventive measures referred to in paragraph (1) must be proportionate to the imminent threat and lead to the avoidance of the damage, taking into account the precautionary principle in decision-making.

[21] Article 10 (5) of G.E.O. No. 68/2007 stipulates that if the imminent threat persists despite the preventive measures taken, the operator shall inform, within 6 hours from the moment it has observed the ineffectiveness of the measures taken, the County Environmental Protection Agency and the county commissariat of the National Environmental Guard of: a) the measures taken to prevent the damages; (b) the evolution of the situation following the application of the preventive measures; c) other additional measures necessary to be taken to prevent the deterioration of the situation, depending on the facts.

[22] Article 11 of the Government Emergency Ordinance No. 68/2007 provides that at any time the County Environmental Protection Agency may exercise the following powers: (a) to require the operator to provide information on any imminent threat of environmental damage or any suspected case of imminent threat; (b) ask the operator to take the necessary preventive measures; (c) give the operator instructions on the preventive measures needed to be taken; (d) take the necessary preventive measures.

[23] Article 26 of G.E.O. No. 68/2007 stipulates that the operator incurs the costs of the preventive and remedial actions, including the situations in which these costs were forwarded by the County Environmental Protection Agency.

take preventive measures in its stead, with the costs being incurred by the operator's estate[24].

We consider that companies covered by Law No. 85/2014 on insolvency prevention and insolvency procedures, the County Environmental Protection Agency can request the operator to take certain measures to prevent an imminent threat of environmental damage, without any limitation. If the County Environmental Protection Agency requests the insolvent operator to take certain preventive measures, the operator is required to comply with them, and if the measures exceed the current activity of the operator, the insolvent debtor will have to request, pursuant to Article 87 (2) of Law No. 85/2014, the approval of the creditors' committee. After the meeting of the creditors' committee has taken place, the judicial administrator will authorize the submitted preventive measures to be carried out by the special administrator of the debtor[25].

If the operator's right of administration is lifted, following the approval by the creditors' committee of the proposed preventive measures, the judicial administrator will be the one to carry out all proposed and approved operations.

Paragraph 2 of Article 12 of the Government Emergency Ordinance No. 68/2007 with regard to preventing and remedying environmental damage stipulates three exceptions in which the head of the County Environmental Protection Agency may take preventive measures:

"(a) has not fulfilled the obligations stipulated in Article 10 (1) or has not complied with the provisions of Article 11(b) or (c);

(b) cannot be identified;

(c) is not required to incur the costs under this Emergency Ordinance."

Whereas for the cases referred to in points (b) and (c) the situation is simple, and the head of the County Environmental Protection Agency can decide to take preventive measures much more easily, in case of operators which have not complied, although they have been requested to take preventive measures, the decision to advance the necessary costs for taking preventive actions by the Agency will always have to be justified. One of the risks that will have to be accounted for in taking these decisions is the possibility that the County Environmental Protection Agency will not be able to recover the expenditures made in order to take the preventive measures in place of the operator.

We consider that a high risk for non-compliance with the provisions of the County Environmental Protection Agency comes from those operators who are on the verge of insolvency or against whom insolvency proceedings have already been opened.

The heads of the County Environmental Protection Agencies should pay close attention to these types of insolvent operators, since any action to prevent environmental damage requires that the operator allocate a certain amount of money, which is usually not earmarked. If the operator fails to fulfil its obligations to take preventive measures in the event of imminent environmental damage, the County Environmental Protection Agency will be able to carry out these measures, at the operator's expense.

Unfortunately, Law No. 85/2014 on insolvency prevention and insolvency procedures does not have any stipulations that require the debtor to prioritize, in any way, the fulfilment of environmental obligations, even if they are actions in order to prevent the imminent damage which may be caused to the environment. The insolvent company operates, in accordance with the Code on classification of activities in the National Economy, from the opening of the insolvency proceedings until the eventual opening of bankruptcy proceedings, when its activity will be preserved, and the assets recovered. Preventive measures, in the case of companies covered by the Insolvency Law, are often transactions that exceed the debtor's current activity, which, to be carried out, require the meeting if the creditors' committee.

Government Emergency Ordinance No. 68/2007 regarding preventing and remedying environmental damage, stipulates that in the event of imminent threats of environmental damage, the operator is required to take the necessary preventive measures within 2 hours. In the case of insolvent operators, the taking of such measures would not be feasible, considering that the judicial administrator would have to present the measures that were taken to the creditors' committee, as required.

Considering that the creditors' committee can be convoked by the judicial administrator after at least 5 days from the date on which the notice appears in the Insolvency Proceedings Bulletin, meaning that the 2-hour deadline can never be met. In these circumstances, the operator cannot take the necessary preventive measures on the grounds that he does not have the

[24] Article 12 of G.E.O. No. 68/2007 states that, before carrying out the tasks referred to in Article 11 (d), the head of the County Environmental Protection Agency will request that the operator take preventive measures. (2) By way of exception to the provisions of paragraph 1, the head of the County Environmental Protection Agency may take the necessary preventive measures in case the operator: (a) has not fulfilled the obligations stated by Article 10 (1) or has not complied with the provisions of Article 11 (b) or (c); (b) cannot be identified; c) is not required to incur the costs under this G.E.O.

[25] Actions, processes and payments which exceed the conditions stipulated by paragraph (1) can be authorized in the exercise of the supervisory powers by the judicial administrator; the judicial administrator will convoke a meeting of the creditors' committee in order for the committee to cast a vote on the request of the special administrator for approval, within 5 days from the date of its receipt. If a particular operation exceeding the current activity is recommended by the judicial administrator and the proposal is approved by the creditors' committee, it will be carried out by the special administrator. If the activity is conducted by the judicial administrator, the operation will be carried out by him with the approval of the creditors' committee, without the need for the special administrator's request, in accordance with Article 87 (2) of Law No. 85/2014 on insolvency prevention and insolvency procedures, with amendments.

opinions of the judicial administrator and the creditors' committee.

This being the case, we propose a harmonization of the provisions of the Government Emergency Ordinance No. 68/2007 Law No. 85/2014, by introducing an article, which would enable quick and essential decisions to be taken to prevent an imminent threat of damage to the environment. This article would provide the right of the judicial administrator or liquidator to take the necessary measures to prevent an environmental threat without the approval of any other body, such as the creditors' committee.

We also consider that Article 5 (2) of Law No. 85/2014 could be amended to ensure that the current activity also includes any acts made to prevent environmental damage. Thus, by lege ferenda, Article 5 (2) of Law No. 85/2014 should also contain a letter (d), its content being as follows:[26]

(d) ensuring that obligations to prevent imminent threats of environmental damage are fulfilled.

We consider that the introduction of this obligation in the debtor's current activity will make it possible for the debtor to comply with all the deadlines stipulated by Government Emergency Ordinance No. 68/2007 without the need to obtain a prior opinion from the creditors' committee.

Such actions constitute a concrete expression of the principle of preventive action, based on a practical element, *i.e.* the prevention of environmental degradation through actions with polluting potential.

By amending the definition of "current activity" measures to prevent environmental damage, one can avoid the sanctions stipulated by Government Emergency Ordinance No. 68/2007.[27]

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- Statute on organizing and exercising the profession of insolvency practitioner republished in Official Journal No. 712/16.08.2018.

[26] Article 5 (2) of Law No. 85/2014 on insolvency prevention and insolvency procedures, as amended, states that current activities represent those activities of production, trade or providal of services and financial transactions, proposed to be carried out by the debtor during the observation period and during the reorganization period, in the normal course of his activity, such as: (a) the continuation of contracted activities and the conclusion of new contracts, according to the object of activity; (b) the carrying out of collection operations and payments relating to them; (c) ensuring the financing of the work capital, within current limits.

[27] Article 40 (1) of G.E.O. No. 68/2007 states that (1) The following actions constitute infringements and shall be punished as follows: (a) failure to comply with the provisions of Article 7 (2) and Article 10 (5) with a fine of between 5.000 lei and 10.000 lei for individuals and between 10.000 lei and 20.000 lei for legal persons; (b) failure to comply with the provisions of Article 10 (1) second part, 13 and 14 (1) (a) with a fine of between 25.000 lei and 40.000 lei for individuals and between 50.000 lei and 80.000 lei for legal persons; (c) failure to comply with the provisions of Article 7 (3), Article 10 (1) first part, and 17 (1) with a fine of between 40.000 lei and 50.000 lei for individuals and between 80.000 lei and 100.000 lei for legal persons; (d) failure to comply with the provisions of Articles 11 (a) to (c) and 15 (a) to (d) with a fine of between 40.000 lei and 50.000 lei for individuals and between 80.000 lei and 100.000 lei for legal persons.

STILL IN DISCUSSION: HABITUAL RESIDENCE OF THE CHILD

Anca Magda VOICULESCU*

Abstract

The notion of "habitual residence" of the child is reffered to in different juridical instruments, belonging to both national and international areas, which nevertheless do not define the notion. Given that the habitual residence must be determined in concreto in case of litigations, courts worldwide (national and international) have been forced to shape their own standards.

The purpose of the article is to analyse this notion in the particular situation of international child abduction, given the continuously increasing number of cases where children are moved from one state to another, in the context of both free movement of citizens, but also respect for family life.

Hence, the objectives of the present study are to identify legal instruments applying in case of an international child abduction and also the case law of both national and international courts, relevant in connection to the notion of "habitual residence".

Furthermore, in the context of lack of definition, absent juridical criteria and divided case-law, the study aims to identify the criteria that should be taken into consideration by national courts when establishing the state of habitual residence of the child.

Keywords: *best interests of the child, parental authority, domicile of the child, habitual residence of the child, respect for family life.*

1. Introduction

Starting from the increase of international abduction cases and the difficulties encompassed by courts in solving them, the present study aims to make an inquiry into the relevant juridical texts and also the case-law, in order to identify a definition of the notion of "habitual residence" of the child, or at least the criteria upon which to rely in order to determine it.

The subject has great importance, as the principle in case of international child abductions stipulates the prompt return of children who have been wrongfully taken from their state of habitual residence or wrongfully retained outside the state of their habitual residence.

In this context, establishment of the habitual residence of the child is a key element in solving these cases.

To reach this aim, the study will concentrate on legal provisions relevant for cases of international child abduction and also the case – law, both national and international, as lack of legal definition led to a consistent body jurisprudence of overwhelming importance in shaping the standards to be considered when establishing the habitual residence of the child.

Doctrinal opinions will also be identified and presented, with the necessary note that preponderence goes to studies from abroad, as in Romanian juridical literature the subject has not yet been discussed.

2. Content

2.1. Juridical instruments

From the investigation in the legal area, it results that the notion of "habitual residence" of the child is referred to (but not defined such as) in a multitude of juridical instruments, which are different in nature.

These legal instruments can be organized in three main categories, belonging to the area of international private law, EU law, respectively national law.

The present study does not aim to present an exhaustive list of all juridical instruments, but only the most significant for the topic in discussion[1].

2.1.1. Private international law instruments

The most important juridical instrument of private international law is the **Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction**[2], to which Romania is a member state[3].

Although the Convention does not provide a clear definition of the notion of "habitual residence" of the child, the concept is at the very heart of the return mechanism provided for in the Convention and several

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[1] For a list of juridical instrument applicable in international child abduction cases, see ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. Latvia*.

[2] Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14th Session of the Hague Conference on Private International Law, which entered into force on December 1, 1983.

[3] Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

articles repeatedly make explicit referrence to the notion[4].

Juridical literature[5] underlined that "Despite the importance that determining a child's habitual residence plays in Child Abduction Convention proceedings, it is a tradition of the Hague Conferences not to define this term."

Given the variety of national laws and traditions of states, it would indeed have been a very difficult task to formulate a precise definition. Also, it seemed more appropriate to leave a margin of appreciation to contracting states. In addition, the diversity of circumstances that may occur in every specific case resulted in failure of any attempt to establish a precise definition.

The Explanatory Report on the 1980 Hague Child Abduction Convention[6] seeks to underline and explain the principles which form the basis of the 1980 Hague Convention and also provides a detailed commentary on its provisions.

Nor in this Explanatory Report is to be found any definition of the notion in discussion, the author explaining in para. 66 of the same report that a definition was not necessary, as the notion of habitual residence was already a "well-established concept": "(...) the notion of habitual residence, a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile"[7].

Although the report provided no definition, it underlined an important principle, namely that habitual residence was always a question of fact, to be established individually from case to case.

Also, the Report identified another crucial principle to be taken into consideration, namely the bests interests of the child (paras. 21-25).

Still, no clues were construed regarding the standards to be considered when applying these principles for establishing the habitual residence of the child.

Another important private international law instrument, the **Convention on the Rights of the Child**[8]**,** does not make any explicit reference to the notion of "habitual residence", acknowledging nevertheless in a implicit manner the main elements in discussion in case of international child abduction and habitual residence of the child.

The UN Convention stipulates that any child "should grow up in a family environment, in an atmosphere of happiness, love and understanding"[9] and stress the idea that both parents have common responsibilities for the upbringing and development of the child, who shall not be separated from his or her parents against their will[10].

Neither does the **European Convention for the Protection of Human Rights and Fundamental Freedoms** [11] contain any definition or even reference to the notion of "habitual residence".

The inquiry in the texts of this Convention is justified, as the ECHR case law points out the close connection between the Hague Convention 1980, the Convention on the Rights of the Child and the ECHR Convention (particularly art. 8 of ECHR Convention – respect for family life).

As to the „relationship between the Convention and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980, the Court reiterates that *in the area of international child abduction the obligations imposed by Article 8 on the Contracting States must be interpreted in the light of the requirements of the Hague Convention (…) and those of the Convention on the Rights of the Child of 20 November 1989* (…), and of the relevant rules and principles of international law applicable in relations between the Contracting Parties (…)"[12] (our underline).

Conclusion is to be drawn that private international law offers neither a definition of the notion, nor criteria upon which it is to be established.

2.1.2. EU instruments

Council Regulation (EC) no. 2201/2003 of 27 November 2003[13], known as "the Brussels II bis

[4] E.g., Article 3, Article 4, Article 5, Article 13 of the 1980 Hague Convention.

[5] Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, in Fordham Law Review, vol. 77, no. 6/2009, pp. 3325 – 3369, p. 3338, available at the following link: https://ir.lawnet.fordham.edu/flr, last accession on 21.01.2021, 15,08.

[6] Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: https://www.hcch.net/en/publications-and studies/publications2/explanatory-reports, last accession on 28.02.2018; 17,57.

[7] The difference between notions of habitual residence and domicile was also acknowledged by ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania:* "The Court of Appeal's decision does not explain why that court gave precedence to what appears to be the parents' Romanian domicile over the clear factual elements before it indicating that the family had been living in Italy".

[8]Adopted by United Nations General Assembly, signed in New York on November 20, 1989, which entered into force on September 2nd, 1990. Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001, subsequent to differences in translation from English to Romanian in the content of the Convention.

[9] Preamble of the Convention.

[10] Articles 9 and 18.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in Rome, on November 4, 1950, which entered into force on September 3, 1953. Romania ratified the Convention by Law no. 30/18.05.1994, published in the Official Gazette of Romania no. 135/31.05.1994.

[12] ECtHR, Decision adopted on 26 November 2013, Application no. 27853/09, case *X v. LATVIA*, precited.

[13] Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003.

Regulation" is of the highest significance in the area of EU law instruments.

Similar to the conventions in the area of international law, the Regulation does not include any definition for the notion of "habitual residence".

Although not providing a definition, it makes references to it in Article 10 and Article 11, thus explicitly acknowledging the term.

Charter of Fundamental Rights of the European Union[14], by contrast, contains only indirect references to elements specific for the notion of "habitual residence", namely respect for family life[15] and the right of the child to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests [16].

Therefore, the conclusion is the same as in case on texts of private international law: no definition or legal criteria.

2.1.3. National instruments

In Romanian law, references to the notion of "habitual residence" appear in provisions of Law no. 369/2004 on the enforcement of the Hague Convention[17], respectively Article 11 (3) and Article 14.

Such as in case of the juridical instruments of private international law and EU law, this national legal instrument does not provide a definition of the notion in discussion or even criteria to be considered when applying the notion.

2.2. Case-law

As research into the relevant legislation has not led to any conclusive result as to the notion or even guiding criteria, an investigation of the jurisprudence may prove useful.

To this respect, the study will take into discussion the case-law pronounced in contracting states under Hague Convention 1980, jurisprudence of European Court of Justice and the European Court for Human Rights, and also national decisions (including Romanian decisions).

2.2.1. Case-law in contracting states of 1980 Hague Convention

Although the drafters of the 1980 Hague Convention considered that a flexible approach would ensure a reasonable margin of appreciation for the courts, the lack of definition lead in practice to ambiguity and uncertainty.

In these circumstances, a consistent case-law had to be developed regarding not a precise definition, but criteria upon which a court should determine a child's habitual residence[18].

Moreover, as there was no international court invested with interpretive powers, this difficult task had to be accomplished by national courts of signatory countries during the years that followed the conclusion of the 1980 Hague Convention.

Unfortunately, this resulted in a divided case-law and a variety of factors taken into consideration.

In United States, jurisprudence[19] based either on subjective criteria in relation to the parents' last common intention in establishing the child's residence[20], or on objective indicators of the child's acclimatization[21]. Common or "middle" approach was difficult[22].

Analisying the case-law of other states, it is clear that, generally, the objective approach was considered better suited to meet the need for uniformity in application among contracting states.

To this end, a part of juridical literature[23] pointed out that few jurisdictions place much emphasis on

[14] Proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission and entered into force with the Treaty of Lisbon in December 2009.

[15] Article 7.

[16] Article 24.

[17] Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished in the Official Gazette of Romania no. 468/25.06.2014.

[18] "It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions." (Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children*, in Oklahoma Law Review, University of Oklahoma College of Law Digital Commons, vol. 63, no. 4/2011, pp. 647 – 661, p. 649, available at the following link: https://digitalcommons.law.ou.edu/olr?utm_source=digitalcommons.law.ou.edu%2Folr%2Fvol63%2Fiss4%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 13,25).

[19] For a very detailed presentation of US case-law, see Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369.

[20] In any circumstances, there must be a firm intention of parents to establish in the territory of the new state of residence in order to consider the latter as the state of habitual residence.

[21] E. g.: school enrollment, participation in social activities, length of stay in the country, child's age.

[22] Jeffrey Edleson, Taryn Lindhorst, Battered Mothers Seeking Safety Across International Borders: Examining Hague Convention Cases involving Allegations of Domestic Violence, in The Judges' Newsletter on International Child Protection - Vol. XVIII / Spring-Summer 2012, available at the following link: https://assets.hcch.net/docs/7624595a-b207-464b-b95d-8222e9ce8d56.pdf, last accession on 22.01.202118,44, pp. 22-24, p. 23 ("U.S. courts are divided on whether to evaluate the shared intent between parents to reside in a certain place as indicative of habitual residence").

[23] Morgan McDonald, Home Sweet Home? Determining Habitual Residence Within the Meaning of the Hague Convention, in Boston College Law Review, Law Journals at Digital Commons @ Boston College Law School, vol. 59, no. 9/2018, pp. 427 – 443, p. 442, available at the following link: http://lawdigitalcommons.bc.edu/bclr?utm_source=lawdigitalcommons.bc.edu%2Fbclr%2Fvol59%2Fiss9%2F24&utm_medium=PDF&utm_campaign=PDFCoverPages, last accession on 21.01.2021, 14,53.

parental intent. "Generally, other common law countries focus on objective evidence. (...) Many civil law jurisdictions also use an objective, child-centered method of analysis. Argentinian courts have defined habitual residence as the place that provides the child with stability and permanence. In Sweden, courts have held that the analysis requires an examination of all objective evidence that would show a permanent attachment to a nation. Finally, Italian courts have found that habitual residence is the place where the child spends most of his or her time."

Another part of doctrine[24] opposed to the subjective approach in very categorical terms: „Any analysis that focuses on the shared subjective intentions of parents is not only illogical, but rigid, inconsistent, and wrought with uncertainty. Where a court is presented with a Child Abduction Convention proceeding, it must act with restraint, focusing only on the objective evidence, and avoid reverting to more comfortable concepts, such as best interests."

The best interests of the child are though the main directing vector in any decision concerning children and could therefore not easily be ignored.

In spite of the various concrete manifestations of the principle of best interests of the child, we are of the opinion that it should always be considered and, due to its broadness, may encompass both objective and subjective factors.

Supreme Court of Canada has emphasised to this respect that the "hybrid" approach is to be preferred to the approach focused solely either on the acclimatisation of the child or the parental intention[25].

Even US jurisprudence has recently changed divided criteria for a uniform legal standard, as the US Supreme Court held for the first time in a decision pronounced on 2018 that a child's habitual residence depends on the totality of the circumstances specific to the case.[26]

As part of the 1980 Hague Convention, Romania has at present a unified case-law, based on a unified jurisdiction[27], which supports the opinion expressed above focusing on the "hybrid approach".

Romanian jurisprudence[28] establishes the habitual residence of the child based on both subjective and objective factors, which are considered and weighed *in concreto* depending on the specificity of the case.

2.2.2. Court of Justice of the European Union

Court of Justice of the European Union (CJEU) first analised the notion of "habitual residence" in the context of assessment of the habitual residence of children for the purposes of Article 8 (1) of the Regulation in case *A*[29].

CJEU appreciated that the concept of "habitual residence" must be interpreted as meaning that it corresponds to "the place which reflects some degree of **integration by the child in a social and family environment.** To that end, in particular the **duration**, **regularity**, **conditions and reasons for the stay** on the territory of a Member State and the family's move to that State, the **child's nationality**, the place and conditions of attendance at **school**, **linguistic knowledge** and the family and social **relationships of the child** in that State must be taken into consideration"[30].

These considerations were reiterated and developed in the well-known *Mercredi* case[31], of which the most relevant considerations are to be found in the following.

"To ensure that the **best interests of the child** are given the utmost consideration, the Court has previously ruled that the concept of 'habitual residence' under Article 8 (1) of the Regulation corresponds to the place which reflects some **degree of integration by the child in a social and family environment**. That place must be established by the national court, taking account of **all the circumstances of fact specific to each individual case** (see *A*, paragraph 44).

Among the tests which should be applied by the national court to establish the place where a child is habitually resident, particular mention should be made of the **conditions and reasons for the child's stay on the territory of a Member State**, and the **child's nationality** (see *A*, paragraph 44).

As the Court explained, moreover, in paragraph 38 of *A*, in order to determine where a child is habitually resident, in addition to the **physical presence of the child** in a Member State, other factors must also make it clear that that **presence is not in any way temporary or intermittent**.

In that context, the Court has stated that the **intention of the person with parental responsibility** to settle permanently with the child in another Member State, manifested by certain tangible steps such as the

[24] Tai Vivatvaraphol, Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention, op. cit., pp. 3325 – 3369, p. 3365.

[25] Supreme Court of Canada, decision pronounced on 20 April 2018, case Balev, paragraphs 50 to 57.

[26] US Supreme Court, decision pronounced on 25 February 2020, case Monasky v. Taglieri.

[27] Romania has unified territorial competence on international abduction cases by Law no. 369/2004 (Bucharest Tribunal – first instance court and Bucharest Court of Appeal – recourse court).

[28] Bucharest Tribunal, Fourth Civil Section, decision no. 1272/11.09.2020, case no. 19673/3/2020, definitive, not published ("The Tribunal notes that the common intention of both parties was to establish with the child in France (…) the parties lived in France at the time of the birth of the child and throughout the period following this time and until August 2019 (…) the minor was enrolled in kindergarten (…) benefited from the medical service repeatedly (…) the plaintiff is employed in France").

[29] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A* ("the case-law of the Court relating to the concept of habitual residence in other areas of European Union law (…) cannot be directly transposed in the context of the assessment of the habitual residence of children for the purposes of Article 8(1) of the Regulation.")

[30] Para. 44.

[31] ECJ, Decision adopted on 22.12.2010, C-497/10 PPU, case *Barbara Mercredi v. Richard Chaffe*, paragraphs 47 to 57.

purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence (see *A*, paragraph 40).

In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a **certain duration which reflects an adequate degree of permanence**. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character.

(…)

The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the **age of the child**.

(…)

An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently (…) it is necessary to assess **the mother's integration in her social and family environment**.

(…)

If the application of the abovementioned tests were (…) to lead to the conclusion that the child's habitual residence cannot be established, which court has jurisdiction would have to be determined on the basis of the criterion of the **child's presence**, under Article 13 of the Regulation". (our underline)

It appears from considerations presented that the European Court of Justice favours the "hybrid approach". Also, the principle of best interests of the child was referred to as of the "utmost consideration" at the very beginning of the reasoning, thus encompassing both subjective and objective factors discussed further on by the Court.

2.2.3. European Court of Human Rights

In the recent case *Michnea v. Romania*[32], the ECHR firmly supported the principle of **bests interests of the child** as paramount in all decisions concerning children, aligning with the drafters of the 1980 Hague Convention and the EU case-law.

The Court stated that there was no indication in the national court's decision in case under discussion that "court identified the best interests of the child and appropriately took them into account in making its assessment of the family situation, as required by Article 8 of the Convention".

Also, the Court underlined that "article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child's return, the courts must make a ruling giving specific **reasons in the light of the circumstances of the case**".

Again, the pattern adopted by 1980 Hague Convention and ECJ was followed, as habitual residence was explained as a factual element, to be established after consideration of the circumstances of the case.

Subsequently, the Court argued the breach of Article 8 of the Convention as follows: "it appears that the Court of Appeal relied on the CJEU findings in the *Barbara Mercredi* judgment without making any assessment of the contextual difference between that case and the case brought before it by the applicant. (…) The Court considers that the particular circumstances of that case, which were significantly different than those of the case currently under examination, did call for a more in depth examination".

Also, the Court had obviously in mind the **parents' shared intention** to establish their and the child's residence in Italy (subjective factors) when pointing out that "the family had been living in Italy at the time of the child's birth and until her removal and had made all the arrangements upon her birth to register her in Italy and to allow her to benefit from the Italian welfare system".

Furthermore, reiterated that "draws inspiration from the principles of the Brussels II bis Regulation as interpreted by the CJEU in its case-law and cannot but note that prior to her removal from Italy, the child had been, at least to a certain degree, **integrated in a social and family environment**" in Italy (objective factors).

For reasons above presented, the Court concluded that the interpretation and application of the provisions of the Hague Convention and of the Brussels II bis Regulation by the Romanian national court failed to secure the guarantees of Article 8 of the Convention and that the interference with the applicant's right to respect for his family life had not been "necessary in a democratic society" within the meaning of Article 8 § 2 of the Convention.

2.3. Going deeper: determination of the habitual residence of the child

2.3.1. Criteria

As it resulted from ECJ and ECHR case-law presented before, it is for the national court to establish the habitual residence of the child, taking account of two sets of factors, both subjective and objective.

Neither one set of factors or yet one factor alone is decisive, and therefore national courts should pay attention to multiple (and often conflicting) indicators, both subjective and objective, when making a decision on habitual residence.

Nevertheless, it should be kept in mind that all these different factors are acting under the common and large umbrella of the concept of the best interests of the child, and therefore this concept should be the standard

[32] ECtHR, Decision adopted on 07 July 2020, Application no. 10395/19, case *Michnea v. Romania*, already cited.

vector when determining the habitual residence of the child[33].

Also, the list of factors to be presented and discussed as follows is not exhausting and courts should take account of all the circumstances of fact specific to each individual case[34].

Not least, it is important to bear in mind the proximity criterion, which means that the courts of the child's habitual residence are, owing to their proximity to the child's environment, the best placed to assess its situation.

Subjective criteria

This category refers to the parents' shared intention in establishing the child's residence in one state (or transfer it to another).

Generally, the importance of the subjective criteria was argued in the sense that children lack the material and psychological background to decide where they will reside, and therefore a child's habitual residence is consistent with the intentions of those entitled to exercise parental authority (which includes fixing the residence of the child).

In making the appreciation upon the intent, the courts should look not only (and primarily) at declarations, but also at actions and facts.

Juridical literature[35] and case-law included in this area factors such as:

- ***parental employment*** – decision to maintain a job in a state after divorce was appreciated as indicating the intent of holding to the preexisting habitual residence[36]; on the contrary, decision to leave an employment in a state and gain of a job in another was considered a factor showing the intent to permanently move to another state;
- ***purchase of home*** – more likely to express a long-term stay, in opposition to rental of a lodging;
- ***moving of belongings*** – partial moving of belongings may nevertheless express incertitude towars the internt of a permanent movement to another state;
- ***citizenship*** - if parents and child come to a country on a tourist visa and do not ask for a more permanent residency status, the habitual residence in the prior country may not have been abandoned;
- ***location of bank accounts*** – importance of this factor is diminished, as at present on-line transactions may easily be activated and option to have accounts in different states may also be taken in relation to financial opportunities;
- ***purpose of movement to the new state*** –journeys for vacations do not express the intent to change the habitual residence and are considered temporary[37];
- ***obtaining professional licenses*** specific to the new state is a factor that indicates intention to gain a new habitual residence.

Objective criteria

This set of criteria ponder generally on inquiry whether children have "gained roots" in the new environment (the degree of the child's integration in a social and family environment).

It looks for indicia of the child's connectivity to a place through criteria such as school, extracurricular activities, social activities, significant relationships with people in that place, registrations concerning the child, physical presence of the child.

- ***school enrollment*** is considered a key factor in determining if the child has acclimated to a new residence[38]
- ***medical enrollment*** usually accompanies school inscription[39]
- ***registration of birth*** in official registers[40]
- ***participation in social activities*** – social life at school or outside is also considered as an indicator that the child has adapted to the new surroundings
- ***length of stay in the country*** - the length of time is not fixed and the courts appreciate depending to the specific circumstances in each case[41]
- ***the age of the child*** - different nuances are to be considered related to the child's age.

On the one hand, the age of the child is closely connected to the degree of maturity.

On the other hand, the factors to be taken into account in the case of a child of school age are not the same as those relevant for an infant. The environment

[33] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, case no. 19673/3/2020, definitive, not published: "The Court points out that the best interests of the child are presumed to be in favour of his return to the country of residence."

[34] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 37.

[35] Jeff Atkinson, *The meaning of "habitual residence" under the Hague Convention on the civil aspects of international child abduction and the Hague Convention on the protection of children, op. cit.*, pp. 654 – 655.

[36] Bucharest Tribunal, Fourth Civil Section, decision no. 1522/27.10.2017, case no. 24670/3/2017, defintive, not published.

[37] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 720/24.11.2020, already cited: "The Court finds the temporary nature of the stay in Romania to which the applicant consented, being only a holiday."

[38] Bucharest Tribunal, Fourth Civil Section, decision no. 1996/10.12.2020, case no. 16406/3/2020, not published.

[39] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, case no. 21763/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 432/23.02.2018, case no. 46495/3/2017, definitive, not published.

[40] Bucharest Tribunal, Fourth Civil Section, decision no. 472/14.03.2019, case no. 3813/3/2019, definitive, not published. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 1215/16.10.2014, case no. 22913/3/2014, definitive, not published.

[41] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "the fact that the minor was born in Romania and lived in this country with the mother from 24.01.2018 until 06.04.2018 is not such as to lead to the conclusion of the establishment of the residence of the minor in this country."

of an infant (or even young) child is essentially a family environment, determined by the reference person(s)[42].

▪ ***integration of the child's person(s) of reference*** – depends on the degree of the child's dependence (which varies according to his or her age), and also languages spoken by parents, geographic and family origins[43]

▪ ***child's physical presence*** - if the child's habitual residence cannot be established by applying the tests above-mentioned, under Article 13 of the Regulation, the physical presence of the child should be taken into consideration (although it is not sufficient by itself to establish the habitual residence of the child[44]).

2.3.2. (More) habitual residences

It is generally agreed that one person can have only one habitual residence at a time.

To this respect, Article 2570 of Romanian Civil Code stipulates for general relations under private international law that: "the habitual residence of a natural person is in the state where the person has his principal place of residence, even if he has not fulfilled the legal registration formalities. (…) For the determination of the main dwelling, account shall be taken of those personal and professional circumstances which indicate lasting connections with the state concerned or the intention to establish such connections"[45].

Albeit the case-law in this respect is also divided, practical experience has proved that there are situations when an alternate habitual residence was considered (persons who split time more or less evenly between two locations).

Juridical literature[46] underlined that the approach of the courts differs in how they handle cases in which there are elements which may lead to the conclusion that the child has more than one residence.

Reference was made to decisions pronounced by Australian courts (which agreed that the notion of dual habitual residence was inconsistent with the wording and the spirit of 1980 Hague Convention), whereas courts from United Kingdom found it was possible for habitual residence to change periodically if "that should be the intended regular order of life for parents and children".

We share the opinion already expressed by the doctrine that the Hague Convention "does not contemplate more than one habitual residence and was not intended to deal with such a circumstance"[47].

Similarly, case-law considered that "the Hague Convention enshrines the principle of exclusive recourse to the attachment to the child's habitual residence, which prevents a child from having several simultaneous habitual residences."[48]

Nevertheless, as cases where courts accepted a dual residence have already appeared, we consider that an amendment of the Hague Convention and the Regulation might be taken into consideration, so that a legal solution should be agreed upon.

In absence of a legal solution, situations of alternate habitual residences of the child are very difficult to be solved in the framework of international child abduction in case of transfer of the child between two (or more) states of habitual residence.

Indeed, one might easily consider that no international child abduction occurred at all, since no wrongful movement or retain of the child could be argued, as both states are considered habitual residences.

3. Conclusions

Following the adoption of the 1980 Hague Convention and even after the Brussels II bis Regulation, as no legal definition was provided for the notion of "habitual residence", courts all over the world have struggled to structure the criteria upon which to establish the habitual residence of a child in international abduction cases.

The omission to provide a definition was indeed intentional, aimed to ensure a margin of appreciation for the courts and avoid rigid and formal determinations, which might have excluded circumstances specific to each case.

On the contrast to these "good intentions", the lack of clarity resulted in divergent views of jurisprudence, emphasizing solely either the child's (objective) or the parents' (subjective) perspective.

We argue that a "hybrid perspective" is more fitted to serve the bests interests of the child, as the question of the child's habitual residence is far more complex than a simple application of tests ellaborated

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[42] Bucharest Court of Appeal, Third Section Civil and for minors and family matters, decision no. 753/07.12.2020, already cited: "In relation to the age of the child at the time when the father brought him to Romania, respectively 11 months, it is clear that the integration of the child targets the family and social environment determined by the reference persons in whose care the minor is (in the case, the mother) and assumes as such the evaluation of the integration of the reference persons"

[43] The logic of this approach is most evident when the habitual residence of a newly-born child is involved, who by definition had no time to become himself/herself integrated in any place at all and would be deprived of an habitual residence.

[44] ECJ, Decision adopted on 02.04.2009, C-523/07, case *A*, already cited, para. 33. Also, Bucharest Tribunal, Fourth Civil Section, decision no. 857/25.06.2015, case no. 40891/3/2014, definitive, not published. Related to this factor, there were also argued opposed opinions that a child's physical presence in a particular state is not even a prerequisite for determining that it is habitually resident in that state (Advocate General Saugmandsgaard Øe, Opinion delivered on 20 September 2018, C-393/18 PPU, case *UD v XB*).

[45] From the wording of the text, it follows that the legislator took into account both subjective and objective factors.

[46] James Marks, *The application of the Hague Convention where there is more than one habitual residence*, p. 6, available at the following link: http://www.jamesmarks.ca/files/Hague-Paper.pdf, last accession on 22.01.2021, 15,26.

[47] James Marks, *The application of the Hague Convention where there is more than one habitual residence, op. cit.*, p. 14.

[48] Federal Supreme Court of Switzerland, decision no. 5A_846/06.11.2018, case no. C/21206/2018; DAS/190/2018, available at the following link: id1448-full-text-fr.pdf, last accession on 29.01.2021, 16,13.

on the basis of case-law criteria (which are exemplificative and non-exhaustive).

Both the child's acclimatization and the parents' intention are important factors, albeit the weight given in particular to objective or subjective factors can vary from case to case.

The use of multiple factors from both perspectives, without pre-assigned weight, would also be consistent with the 1980 Hague Convention's and the Regulation's approach not to have a precise definition of "habitual residence".

Analyse of all factors related to the issue of habitual residence should be explored and settled by national courts taking into account the principle of bests interests of the child and also all circumstances of the case.

Amendment of the 1980 Hague Convention and the Regulation would be a solution for cases where dual (or more) habitual residences of the child are accepted.

Finally, as case-law is (still) divided, greater importance should be attached to a consistent and uniform application of the criteria of habitual residence both within the European Union and all the states signatories to the 1980 Hague Convention.

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PROTECTION ORDER VERSUS (?) PARENTAL AUTHORITY

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Abstract

Parental authority includes in its scope important decisions related to minors, as identified by Article 36 of Law no. 272/2004 (form of education and professional training, complex medical treatments and surgery, residence of the child or administration of property), which are by consequence to be taken only by agreement of both parents. It is an institution which is genuinely based on collaboration of parents.

Apparently a totally distinct institution, protection order is provided for by Law no. 217/2003 as a legal instrument to ensure the protection of victims against domestic violence. It is often used by one parent against the other, in the larger context of juridical disputes generated by divorce, and implies categorical opposition.

Although the two legal institutions are distinguished and the premises on which they act are indeed different, case-law has revealed the existence of significant interferences, which exceed simple terminological differences and arise problematic issues both in substance, as in procedure.

The purpose of this article is to examine these interconnections from a double perspective, both theoretical and practical, starting from a natural question: does the existence of a protection order interfere (and in the affirmative, to what extent) with the exercise of parental authority?

Therefore, the objectives of this study are to examine relevant procedural and substantial matters as they derive from the experience so far and propose solutions, in an attempt to demonstrate that these two institutions may function together.

Keywords: *protection order, parental authority, important decisions, parental disagreement, juridical interferences*.

1. Introduction

The area of family law comprises a large variety of issues, which are inevitably connected to one another from multiple and intricate perspectives, as they all cover the same main subject: family and interconnections among its members.

The present study will only ponder on two of the most significant and actual subjects in family law, respectively parental authority and protection orders.

As these two institutions generally function on different premises (collaboration of parents in case of parental authority/conflict in case of protection orders), but in the common context of issues concerning the same family, the question arises if existence of protection orders affects the exercise of parental authority.

This question presents both substantial and procedural valences and implies great practical and theoretical importance, as it is often the case that procedures concerning parental authority and protection orders are pending at the same time/in short periods of time, and solutions to be pronounced influence one another.

In this context, the purpose of this article is to examine the interconnections between these two institutions, as they derive from the practical experience so far.

To reach this aim, the study will examine the interferences from a double perspective, both substantial and procedural.

Also, solutions are to be proposed, in an attempt to demonstrate that these two institutions, although starting from different premises, may function together.

Doctrinal opinions, where identified, will also be presented, with the necessary note that in Romanian juridical literature the topic has scarcely been discussed.

2. Content

2.1. Parental authority

Parental authority is a notion common to many legal systems (national laws, EU law[1], private international law[2]) and generally features the same characteristics as they are synthetically to be presented in case of Romanian legislation.

In the framework of this article, it will only be pointed out that parental authority is clearly to be differentiated from custody[3].

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[1] The most important EU legal instrument is Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the Official Journal L 338/1, 23 December 2003 (Article 2).

[2] E.g., Convention on the Rights of the Child, adopted by United Nations General Assembly, signed in New York on November 20, 1989, which entered into force on September 2nd, 1990 (Article 18 Para. 1).

[3] S.P. Gavrilă, *Instituții de dreptul familiei în reglementarea Noului Cod Civil*, Hamangiu Publishing House, 2012, p. 205: „ (…) notion borrowed from other legal systems, which does not overlap identically to exercise of parental authority (…)". For a comparative perspective

2.1.1. Notion, forms and premises

In Romanian legislation, the general provisions of Romanian Civil Code[4] are to be corroborated to the special provisions comprised in Law no. 272/2004[5].

The definition and main characteristics of the notion of parental authority are to be found in Article 483 of Romanian Civil Code („Parental Authority")[6], whereas Article 487 of the same legislative act („Content of parental authority")[7] details the content of the same concept.

It results from the above-mentioned articles that, in essence, parental authority is a set of rights and obligations concerning both person, and property of the child.

In case of divorce, the general rule is represented by common parental authority (Article 397 of Romanian Civil Code[8]), whereas exclusive/sole parental authority is the exception.

Exceptions referred to are either objective (expressly prescribed by Romanian Civil Code[9]), or subjective (Romanian Civil Code and Law no. 272/2004[10] - courts have the possibility to appreciate upon sole parental authority in subjective situations, given circumstances specific to each case).

As the standard is represented by common parental authority, which imposes consent of both parents in taking (important) decisisons concerning children, it can be concluded that the premise on which parental authority operates is collaboration of parents.

2.1.2. Area of application

At present, Article 36 Para 3 of Law no. 272/2004[11] clearly defines the area of important decisions belonging to the sphere of common parental authority, which must achieve joint consent[12].

These decisions are related *in concreto* to type of education or training, complex medical treatment or surgery, residence of the child or administration of property.

As in these cases common consent is mandatory by law (but nevertheless the law does not offer a solution in case of disagreement between parents), the solution conceived by jurisprudence was substitution of consent of the opposant parent[13].

Generally, important decisions reffered to above are discussed in opposition to routine (day-to-day) decisions. The first must be agreed upon by parents, whereas the latter are to be made individually by the parent who is currently taking care of the child.

2.2. Protection orders

Similar to parental authority, protection order is an institution which appears in different legal systems

between parental authority and custody, A.M. Voiculescu, *Parental authority versus common custody*, Lex et Scientia International Journal, no. XXV, vol. 1/2018, published by Nicolae Titulescu University and Foundation of Law and International Relations Niculae Titulescu, Nicolae Titulescu Publishing House, pp. 43 – 44.

[4] Law no. 287/2009, published in the Official Gazette of Romania no. 511/24.07.2009 and republished per Article 218 from Law no. 711/2011, published in the Official Gazette of Romania no. 409/10.06.2011.

[5] Law no. 272/2004 concerning protection and promotion of children's rights, published in the Official Gazette of Romania no. 557/23.06.2004, successively modified and lastly republished in the Official Gazette of Romania no. 159/05.03.2014.

[6] "(1) *Parental authority is the set of rights and obligations concerning both person and property of the child which belong equally to both parents.* (2) Parents exercise parental authority only in the best interests of the child, with due respect to his person, and associate the child in all decisions affecting him, considering the age and maturity of the child. (3) Both parents are responsible for bringing up their minor children" (our underline).

[7] "Parents have the right and duty to raise the child, taking care of the child's health, physical, mental and intellectual upbringing, and also the child's education and training, according to their own beliefs, characteristics and needs of the child; they are bound to give the child guidance and advice needed in order to properly exercise the rights granted by the law".

[8] "After divorce, parental authority rests jointly to both parents, unless the court decides otherwise".

[9] Article 507 of Romanian Civil Code ("Exclusive parental authority") stipulates an exhaustive list: "If one parent is *deceased*, *declared dead* by judgment, under *interdiction*, *deprived of the exercise of parental rights* or if, for any reason, it is *impossible* for him or her to express his or her will, the other parent exercises parental authority alone" (our underline).

[10] Article 398 of Romanian Civil Code ("Exclusive parental authority"): "For *serious reasons*, given the interests of the child, the court decides that parental authority is exercised exclusively by a parent. (2) The other parent retains the right to watch over the child's care and education and the right to consent to adoption" (our underline). Subsequently, Article 36 Para 7 of Law no. 272/2004 exemplifies in a nonexhaustive list the subjective reasons mentioned by Civil Code in a general manner, as follows: "There are considered serious grounds for the court to decide that parental authority is exercised by a single parent *alcoholism*, *mental illness*, *drug addiction* of the other parent, *violence* against children or against the other parent, convictions for human trafficking, drug trafficking, crimes concerning sexual life, crimes of violence, as well as any other reason related to risks for the child that would derive from the exercise by that parent of parental authority" (our underline).

[11] "If both parents exercise parental authority, but do not live together, important decisions, such as type of education or training, complex medical treatment or surgery, residence of the child or administration of property shall be taken only with the consent of both parents."

[12] The initial form of Law no. 272/2004 did not prescribe either types of important decisions, or at least general criteria upon which to determine them.

[13] In case of disagreement, Article 486 of Romanian Civil Code offers solutions formulated in a very general manner (the court decides according to the best interests of the child), nevertheless without defining *in concreto* the juridical mechanism that courts should take into account.

belonging both to national[14], EU[15] and private international[16] law sphere of application.

2.2.1. Notion, forms and premises

Protection order was conceived as an instrument to provide protection for victims of domestic violence.

According to Law no. 217/2003[17], preventing and combating domestic violence is part of the integrated family care and support policy, considered an important public health issue.

At present, Romanian legislation offers two forms of this legal instrument: protection order (issued by the court) and provisional protection order (issued by police forces).

As it derives from the very reason leading to adoption of this instrument (safeguarding victims of violence), protection order functions on premises of violence and conflict (generally among members of the same family).

2.2.2. Area of application

The law acknowledged for protection orders a larger sphere of application compared to provisional protection orders.

In terms of provisional protection orders, Article 31 Para. 1 opens possibility to take one/more of the following measures: temporary eviction of the abuser from the common dwelling, reintegration into the common dwelling of the victim and the children, obligation for the aggressor to maintain a specified minimum distance, obligation for the abuser to wear an electronic surveillance system at all times, order to the aggressor to hand over the weapons held to the police.

By comparison, Article 38 Para. 1 regulating protection orders prescribes all the measures above mentioned in case of provisional protection orders, and in addition: limitation of the aggressor's right of use of only a part of the common dwelling, accommodation/placement of the victim and children in a support center, prohibition for the abuser to travel to certain specific localities or areas, prohibition of any contact with the victim, including telephone, mail or otherwise, entrusting minor children or establishing their residence.

Indeed, measures available in the framework of protection orders are more diversified in number and nature, and therefore may be better adapted to particular circumstances of each case.

This disctinction may be explained both in relation to the authority taking the measures (courts are given extended competences compared to police forces), but also to the speediness of the procedure (provisional protection orders are issued promptly in case of imminent risk, whereas adoption of protection orders is made in case of a risk only after a trial before a court).

2.3. Interferences between parental authority and protection orders

None of the measures to be taken by provisional protection orders interfere in any way to parental authority.

By contrast, two of the measures provided in the framework of protection orders issued by courts are relevant for the topic in discussion, respectively: "prohibition of any contact, including by telephone, by mail or in any other way, with the victim"[18] and "entrusting minor children or establishing their residence"[19].

Although not in an obvious manner, prohibition of *any* type of contact in case the victim and the aggressor are also acting as parents interferes with the joint exercise of parental authority, as parents have to be in a *minimum* contact (in whatever form) in order to take important decisions.

On the other hand, the measure of entrusting the child ("încredinţare") available in the procedure of protection orders has obvious interconnections with parental authority, as the first implies both domicile of the child, and also the right to make decisions concerning the child's life (and this aspect belongs to the area of parental authority).

In these two cases, the institutions of parental authority and protection orders present more or less obvious interferences, which start from simple terminological differences and develop in problematic issues both in procedure and substance, as it will be further discussed.

2.3.1. Terminological differences

It can easily be noticed that the Civil Code and Law no. 272/2004 operate with the notion of "**parental authority**", whereas Law no. 217/2003 uses the notion of "**încredinţare**".

This terminological difference is of significant importance, as there is a major distinction between the notion of "parental authority" (introduced by Romanian

[14] The "POEMS" project, co-funded by the Daphne program of the European Union, focused on analysing the law on protection orders in 27 EU Member States. This project and its final report are available along with the country fiches at the following link: http://poems-project.com/results/country-data, last accession on 08.03.2021, 18,46.

[15] There are two EU legal instruments, one applying in civil matters (Regulation (EU) no. 606/2013 of 12 June 2013 on mutual recognition of protection measures in civil matters of the European Parliament and of the Council, published in the Official Journal L 181, 29 June 2013), and the other one in criminal area (Directive 2011/99/EU of the European Parliament and the Council of 13 December 2011 on the European protection order, published in the Official Journal L 338, 21 December 2011).

[16] Council of Europe Convention on preventing and combating violence against women and domestic violence (*Istanbul Convention*), adopted in Istanbul, Turkey on 11 May 2011, into force on 1 August 2014.

[17] Law no. 217/2003 on the prevention and combating of domestic violence, published in the Official Gazzette of Romania no. 367/29.05.2003, republished in the Official Gazzette of Romania no. 365/30.05.2012, no. 205/24.03.2014 and no. 758/19.08.2020.

[18] Article 38 Para. 1 h) of Law. no. 217/2003.

[19] Article 38 Para. 1 j) of Law. no. 217/2003.

Civil Code in 2011) and the notion of "încredințare" (legiferated by the former Romanian Family Code[20]).

The notion of "încredințare" implied domicile of the child, and also the right to make unilaterally decisions with respect to all aspects of the child's life, both in favour of the parent who had the domicile of the child.

In opposition, the notion of "parental authority" stipulated in the present legislation encompasses only the right to make decisions (jointly or exclusively), without including the domicile of the child (which is to be decided in favour of one of the parents, based on different criteria from those taken in consideration when deciding the form of parental authority – sole or common).

This difference in terminology (and also substance) was indeed justifiable in the beginning, as at the time of adoption of Law no. 217/2003 the former Family Code was still in force, and therefore it seemed natural to take over its terminology and notions.

Nevertheless, maintenance of this difference can no longer be explained at present, 10 years after entry into force of the Civil Code and successive amendments of Law no. 217/2003 (the last one by Law no. 106/2020[21]).

This "prolongement" of notions which are no longer actual resulted sometimes in conflicting case-law.

Thus, when issuing a protection order under the form stipulated by Article 38 Para. 1 j), some courts decided only on domicile of the child[22], whereas others decided both on domicile and exercise of parental authority (exclusive/common)[23].

This distinction has of course practical implications, as parental authority and domicile are currently different notions and cover different aspects, and it is therefore of importance if both/only one of them can be decided in the framework of protection orders procedure.

On the other hand, it should also be pointed out that, in the same Article 38 Para. 1 j), Law no. 217/2003 uses the notion of "**residence**" of minor children.

In our opinion, the legislator had in mind the "**domicile**" of the child, as reffered to by the Civil Code and Law no. 272/2004, which is a notion distinct from „residence".

Our opinion is supported by the case-law, where the quasimajority of jurisprudence disposed (when adopting protection orders under Article 38 Para. 1 j) of Law no. 272/2004) upon domicile, and not residence of the child[24].

This divided case-law, but also the necessity to adapt terminology to the actual legislation justify in our opinion, *de lege ferenda*, new amendments on Law no. 217/2003, in order to replace the notions of "încredințare" and "residence" with the notions of "parental authority" and "domicile" of the child.

2.3.2. Procedural interferences

In the broader context created by divorce, it is often common that there are litigations pending at the same time, where practically the same measures are requested, but following different procedural ways.

Exemplifying one of these situations relevant to the subject in discussion, it is a rather frequent case where one parent claims existence of acts of violence against the minor exercised by the other parent.

In this case, the parent asks for single parental authority and establishment of the minor's domicile using the special procedural path of presidential order ("ordonanță președințială").

In parallel, by another special procedure consisting in protection order, the same parent requests entrustment of the child and establishment of the residence of the child.

As the same measures are asked for by two different special procedures, the question arises whether these two procedures may coexist and, if so, which takes precedence[25].

We are of the opinion that procedural coexistence cannot be denied, and therefore concomitent pending of

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[20] Law no. 4/1953, published in the Official Gazette of Romania no. 4/04.01.1954, amended by Law no. 4/1956 published in the Official Gazette of Romania no. 11/ 04.04.1956, republished in the Official Gazette of Romania no. 13/18.04.1956, succesively amended, lastly by Law no. 59/1993, published in the Official Gazette of Romania no. 177/26.07.1993.

[21] Law no. 106/2020 on amending and supplementing Law no. 217/2003 for preventing and combating domestic violence, published in the Official Gazette of Romania no. 588/06.07.2020.

[22] Judecătoria Sector 5 București, decision no. 194/16.01.2019, case no. 782/302/2019, definitive on the aspect under discussion by Bucharest Tribunal, Fourth Civil Section, decision no. 670A/25.02.2019, not published (the appeal was approved on aspects different from the one in discussion). The courts decided in this case only on domicile of the child.

[23] Judecătoria Sector 3 București, decision no. 5463/03.05.2018, case no. 9490/301/2018, definitive by Bucharest Tribunal, Fourth Civil Section, decision no. 2321A/11.06.2018, not published. The courts decided in this case both on domicile of the child, and exclusive parental authority in favour of the mother.

[24] E.g., Judecătoria Sector 3 București, decision no. 9014/17.08.2017, case no. 20207/301/2017, definitive by Bucharest Tribunal, Fourth Civil Section, decision no. 2971A/25.09.2017, not published. For an exception, Judecătoria Sector 5 București, decision no. 3454/13.05.2019, case no. 11039/302/2019, not published, which decided establishment of residence of the children.

[25] Protection order was considered a variety of presidential ordinance (O. Ghiță, *Ordinul de protecţie – varietate a ordonanţei preşedinţiale*, available online at the following link: https://www.unbr.ro/ordinul de protecţie – varietate a ordonanţei preşedinţiale - UNBR, last accession on 23.03.2021, 18,51).

the procedures mentioned above cannot result in inadmissibility[26] or suspension[27] of the either of them.

Indeed, both procedures have "equal status": they are special in nature, have urgent character, and the measures adopted have limited function in time (in case of presidential order measures last at most until the litigation on the merits is solved in first instance[28], whereas in case of the protection order measures take effect for a period of maximum 6 months[29]).

At the same time, judgements pronounced by courts of first instance are executory in both procedures and it is not possible to assess which will be solved first.

Given the reasons presented, we argue that nor protection order or presidential order should take *de plano* procedural precedence (by means either of inadmissibility, or suspension).

On the other hand, it is obvious that connection between procedures cannot be ignored, as long as the same measures are at stake on the merits in both cases and the solutions to be pronounced should not be contradictorial.

It is the reason why we opinate that this interference should be regulated not by way of procedural inadmissibility or suspension, but by way of another procedural solution, consisting in the exception of "lack of interest".

In this line of reasoning, as soon as one of the procedures is solved by an executory decision of the first instance, the other procedure *may remain* without interest.

Thus, if measures requested are granted (either by way of presidential order or protection order), the interest in continuing the other procedure (although existing at the time of registering the procedure) no longer subsists.

If measures requested are rejected by the court that first decides on one of the procedures, the interest in maintaining the other procedure still subsists.

2.3.3. Substantial interferences

As already underlined, substantial interconnections appear in case of two of the measures available by way of protection orders, respectively prohibition of any contact between the victim and the aggressor and entrusting minor children or establishing their residence.

Whether "prohibition of any contact" does not raise any problems in case of sole parental authority, further caution is to be taken in case of common parental authority.

Indeed, the juridical difference between exclusive and joint parental authority is (mandatory) collaboration and communication between parents.

Thus, where parents are totally independent in taking all types of decisions concerning children in case of sole parental authority, they must communicate and collaborate on important decisions in case of common parental authority.

Consequently, from a practical point of view, important decisions concerning minors may be agreed upon only in a context of parental discussions, which obviously imply existence of at least a *minimum contact* between parents.

Therefore, we opinate that, in case of joint parental authority, prohibition by the court of *any contact* should be avoided, so that the minimum contact necessary for taking important decision should be preserved.

We argue that Article 38 Para 1 j) of Law no. 217/2003 leaves courts a large margin of appreciation, as it defines prohibition of any contact in a generous manner: including *telephone*, *mail* or *any other way*.

Depending on the circumstances of each individual case, when issuing a protection order in the form of prohibition of contact between parents, courts may allow certain easily controllable forms of contact e.g., exclusively by mail and only when important decisions as prescribed by law must be taken.

This is the case, for example, when parents must decide *in due time* on the school the child is to be enrolled to, or *promptly* on performing a complex medical surgery on the child. In case these decisions are not taken in sometimes a very limited period of time, the child's right to education/health/life might be endangered.

Should these situations appear inside the period the protection order is in force, interdiction of any contact will result in no possibility to take the decision at the time it is needed.

To this respect, it should carefully be considered that compliance with the protection order is mandatory

[26] Which might be argued following the reasoning that relation between protection order or presidential order is to be determined by the principle *lex generalia – lex specialia*.

[27] Which might be taken into consideration as the same measures are asked in both procedures, according to Article 413 Para. 1 of Romanian Procedural Civil Code ("1. The court may suspend the judgment: 1. where solving the case depends, in whole or in part, on the existence or non-existence of a right which is the subject of another judgment").

[28] Corroboration of Article 997 and Article 448 of Romanian Procedural Civil Code. According to Article 997: "The order is provisional and executory. *If the judgment does not include any mention of its duration and the factual circumstances envisaged have not changed, the measures ordered shall take effect until the dispute over the substance has been resolved*." On the other hand, Article 448 Para. 1 provides that: "The judgments of the first court shall be *executory by law* where they concern: 1. establishing the *exercise of parental authority, establishing the residence of the minor*, and how to exercise the right to have personal ties with the minor" (our underline).

[29] According to Article 39 of Law no. 217/2003: "1. The duration of the measures ordered by the protection order shall be determined by the judge, not exceeding 6 months from the date of issue of the order.

2. *If the judgment does not include any mention of the duration of the measures ordered, they shall take effect for a period of 6 months from the date of issue*" (our underline).

by law both for the offeder (Article 47 Para. 1[30]), and also for the person protected by it (Article 44 Para 3[31]).

Prohibition of any contact by way of protection orders might therefore create an impossibility to exercise common parental authority as long as the protection order is in force.

This will ultimately directly affect the child, although the bests interests of the child are at the very heart and protected by all institutions belonging to the area of family law.

Nevertheless, the "collision" between protection orders and parental authority may be avoided by the way courts formulate *in concreto* the interdiction of contact, as the margin of appreciation granted by the legislator allows harmonization of institutions.

As far as the measure of entrusting minor children or establishing their residence is concerned by way of protection order, we consider a special attention should be taken in formulating the measure according to the actual terminology used by Romanian Civil Code and Law no. 272/2004.

Therefore, courts should precise if the measure refers only to exercise of parental authority (joint or exclusive)/establishment of the domicile of the child/both of them, instead of using the imprecise terminology used by Law no. 217/2003.

If not, discrepancies and collisions might appear if different procedures concerning the same family are pending or succeeding, as imprecise previous judgements might create misjudgements for those following.

3. Conclusions

Although a long period of time has elapsed since the adoption of the new Romanian Civil Code which represents the general framework, there are still situations where specific legislation has not been adapted to its new terminology and institutions.

Such is the case of Law no. 217/2003, which should be further amended in order to take over the notions provided for in the Civil Code, as it still operates with the notion of "încredinţare", different both in terminology, as in content, from the notion of "parental authority" introduced by the Civil Code.

This inadequacy has consequences not only from a theoretical point of view, but also practically, as it sometimes resulted in divided case-law concerning measures to be taken in the procedure of protection orders (parental authority/domicile of the child/both).

Apparently, the institutions of parental authority and protection orders are totally distinct, as they function on different premises (collaboration/conflict) and are designed to offer solutions to different situations (adoption of important decisions concerning children/protection and safeguarding from violence).

Nevertheless, there are important interconnections between these institutions from a double perspective, both theoretical and practical, as the existence of a protection order may interfere (in procedure, as well as in substance) with the exercise of common parental authority.

As they serve different goals, it is important that these two institutions may function together, in spite of terminological discrepancies and a process of legislation harmonising still to be done.

Although conceived to solve different problematics, the institutions of parental authority and protection orders may (and must) coexist, and it is the task of the courts to practically ensure their concomitent and proper functioning.

This conclusion represents once more the reason to reiterate an opinion we already expressed that the legislator should seriously consider the idea of a reasonable number of courts in Romania specialised in family law (following the pattern of Braşov Family and Minors Tribunal) by way of ensuring the actual functioning of the so called "instanțe de tutelă".

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[30] "Violation by the person against whom a protection order has been issued for any of the measures referred to in Article 38 (1) shall be (…) punishable by imprisonment from 6 months to 5 years".

[31] According to Article 46 Para 8: "If the person protected by the protection order violates its provisions, he will be obliged to cover the costs arising from the issuance and enforcement of the order".

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EMERGENCE AND EVOLUTION OF THE ECONOMIC AND MONETARY UNION: OVERLOOK AT THE DECISION-MAKING PROCESS AND THE LEGAL INSTRUMENTS USED (FROM ITS ORIGINS TO THE MAASTRICHT TREATY)

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Abstract

As we write this, the Economic and Monetary Union seems to have overcome the crisis that has affected its credibility since 2009, continuing to present itself as the most successful monetary integration initiative in the world. This impression cannot be considered unfounded, as although economic and monetary unions existed before (such as those between England and Scotland in the 18th century, Belgium and Luxembourg or, ultimately, between the former British colonies that made up the United States of America), the Economic and Monetary Union to which we refer is the only such construction that brings together a number of 27 states, of which 19 have adopted a single currency (Euro), 27 states between which there have been and can still be found numerous differences in language, culture, level of development and values of the main economic indicators. Like any legal construction of this magnitude, Economic and Monetary Union did not emerge suddenly, but is the result of several decades of efforts, creative interpretations of the Community / Union and public international law, including an original but no less efficient use of mixed legal instruments. To these aspects we will refer in the approach we submit to your attention, consisting of two researches that address the evolution of Economic and Monetary Union from its premises to the present. Thus, in the first of these, which is the subject of this study, we will refer to the main moments that defined the development of the future Economic and Monetary Union even before its consecration at the level of European Union primary law, using, in the absence of other legal grounds, both a set of provisions of primary law which led, by way of interpretation, to the possibility of establishing a monetary cooperation between Member States, and a number of instruments specific to public international law rather than Community law but which, nevertheless, by way of the member states voluntarily assuming the application of their provisions, have produced the desired effects in the legal order of the Communities, notwithstanding the absence of an obligation to that effect.

Keywords: *European Union, Economic and Monetary Union, Euro, Werner Report, the snake, the European Monetary System, the ECU.*

1. Introductory considerations

Whether we support the Union project or not and whether we sympathize with the Economic and Monetary Union project or not, both of them are the realities that define not only the framework for the development of international relations, but also, in more and more situations, the legal relations between the subjects of law (public and private alike) in the Member States. And perhaps not only that, because the existence of the European Union, its economic force, its political role and, above all, its legal personality each have legal and / or political effects, including on third countries which, in their external action and even in their internal affairs, not only cannot ignore the existence of the Union, but also find themselves, in no few situations, forced to establish relations with it.

This reality, however, has one more defining characteristic: it is unique in human history. Of course, empires existed, expanded and collapsed before, but they were built and maintained only by armed force. State unions also existed before. Some of them have evolved from personal or other types of unions to federal or unitary states and time has proven them sustainable. Most, however, felt apart. There was also an example in which a large number of state entities formed a confederation and then a federal state, and they are still a successful example today. We are referring, of course, to the United States of America. But those states, when they began the journey that would turn them into a single federal state, shared a common past, a common language, and a set of similar socio-economic conditions. However, an example in which 27 states with such different historical, linguistic, social, economic, political conditions, as those that today make up the European Union managed to build up a construction with characteristics so close to a federal state of their own wills, without the use of force, we do not consider to be identifiable outside the Union. For this reason, the way in which these states have reached today's level of integration and, in this context, the way in which 19 of them have come to share the same currency may seem almost incomprehensible without the use of evolutionary analysis.

In this sense, it seems essential to remember that, although the process of establishing the European

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Communities was initially justified by security concerns, in the view of the Founding Fathers, it was never limited to them, but has always had a political finality, and we could even say a federal one. Or, as the literature states, "*the history of European integration is marked by two main political aims: the first focuses on the internal functions of integration, such as creating favorable conditions for economic and social development or equalizing living and working conditions in the Member States. The second is characterized by the affirmation of the European identity and the role of Europe in the world, being understood the fact that the European action oriented towards the outside must presuppose the existence of an economic force and an internal political stability. These two dimensions have been present since the beginning of the integration process, but have never been equivalent, neither in European policy, nor in the thinking or the action of the Member States. They are successive stages, as economic integration must sooner or later lead to political integration*"[1].

Beyond the use of the historical method of legal research, illustrated by the aforementioned references to the evolutionary analysis of the emergence and development of Economic and Monetary Union, our research cannot carry on, given the many economic aspects it addresses, without the use of the economic approach to law or, as understood in the specialized doctrine, the "*may include any analysis of the law, of its institutions and norms, which uses the conceptual instruments of the science of economics*"[2].

In this framework, which from the very beginning was intended to be integrative, in the sense of transferring more and more state competences to the supra-state level, we must also understand the emergence of an Economic and Monetary Union that finds its true role only in such a context, being almost inconceivable within a classical international, cooperative organization.

2. Emergence of the economic and monetary union project – main premises

The analysis of the emergence and development of Economic and Monetary Union, carried out within the natural limits of a scientific article, cannot in any case aspire to the status of an exhaustive presentation, nor do we intend to do so. However, in order to be at least reasonably complete, it must include some indispensable references to the political-economic-legal system in the context of which the project of this Union was developed, since its imperatives also gave rise to legal solutions that gave birth to the current EMU.

2.1. The post-war world and the Bretton Woods system

Thus, the post-war world was governed, from a monetary point of view, by the effects of the Bretton Woods Agreements, concluded by the representatives of 44 states, allied in the war effort against the Axis powers, on the occasion of the United Nations Financial and Monetary Conference that took place New Hampshire (United States), July 1-22, 1944.

Of course, a detailed analysis of the provisions of the Bretton Woods Agreements is not one of the objectives of our approach. However, we find it useful to note that, in addition to the establishment of the International Monetary Fund and the World Bank, the provisions of the agreements in question "*once implemented (in a gradual process completed in 1958), required the connection of the value of the US Dollar with that of gold. Moreover, the value of all the other currencies in the system was, in the same idea, related to that of the American Dollar*"[3].

For the operation of this system, "Member States (...) have agreed on (...) permitted fluctuations (of each currency) of up to 1%, relative to the value of the Dollar. States were required to monitor and maintain the exchange rates of their currencies, an objective achieved mainly by using their own currencies to buy or sell dollars, as appropriate. Therefore, the Bretton Woods System minimized the volatility of international monetary exchange (...)"[4].

Around the same time, a number of states on the European continent were laying the foundations for a series of agreements that, while not decisive in this regard, have at least contributed to building a culture of cooperation in the area under analysis. These, as the specialized doctrine put it, "*had as their initial purpose that of liberalizing payments between the states of the old continent and of building a system of multilateral agreements between central banks*"[5]. In this regard, "*the first Agreement on Intra-European Payments and Compensation was signed in 1948, the European Payments Union was established in 1950, and the European Monetary Agreement was formulated in 1955*"[6].

The common feature of all these agreements was, from our perspective, that they can be seen as specific to the public international law, as they functioned and

[1] Mihaela-Augustina Dumitrașcu, Evoluția Comunităților Europene de la integrare economică la integrare politică – implicații asupra ordinii juridice comunitare, Analele Universității București, Seria Drept, nr.III/2006, Editura C.H. Beck, București, 2006, pp. 29-56.

[2] Monica Florentina Popa, Ce nu poate să facă analiza economică în drept - capcane și implicații practice" (What the economic analysis of law can't do - pitfalls and practical implications), paper presented within the International Business Law Conference, november 13th 2020 (Perspective ale dreptului afacerilor în mileniul al treilea), Bucharest, 2020, available at www.businesslawconference.ro, 2020, accessed 20.03.2021.

[3] James Chen, Bretton Woods Agreement and System, www.investopedia.com, updated 05.09.2019, accessed 26.10.2019.

[4] Ibidem.

[5] Gerhard Maier, Monetary Co-operation in Europe, Intereconomics magazine, Vol. 23, No 1/1988, pp. 3-7.

[6] Ibidem.

instituted mechanisms typical of it and therefore they do not make the transition to an entity with a specific specific decision-making process, similar to that of the Member States.

Back the gold standard and the dollar's exchange rate, experts could argue for or against its existence, but from our perspective, what is interesting is that, "*in 1971, concerned that the gold reserve of the States United States was no longer enough to cover the amount of dollars in circulation, President Richard M. Nixon announced the temporary suspension of the convertibility of the dollar into gold*"[7], a suspension that ultimately remained final, as "*from 1973, the Bretton Woods system it collapsed, making the states free to choose whatever exchange method they would want for their currencies, except to link their exchange rate to the price of gold. For example, states became free to link their exchange rates to those of other states or to the value of a coin basket, or to allow them to fluctuate freely, leaving their value in relation to other currencies to be determined by market forces*"[8].

2.2. Relevant provisions for the establishment of Economic and Monetary Union in the Treaty establishing the European Economic Community

As regards the Treaty establishing the European Community, first of all, we see as relevant the fact that it contained, in its Article 2, the objectives (missions) of the Community, established as follows: "*establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States*"[9]. In order to achieve these objectives, art. 3 TEEC provided, inter alia, "*the application of procedures which shall make it possible to co-ordinate the economic policies of Member States and to remedy disequilibria in their balances of payments*"[10] as well as "*the establishment of a European Investment Bank intended to facilitate the economic expansion of the Community through the creation of new resources*"[11].

In the same idea, art. 6 TEEC stipulated that "Member States, acting in close collaboration with the institutions of the Community, shall co-ordinate their respective economic policies to the extent that is necessary to attain the objectives of this Treaty"[12] and that "the institutions of the Community shall take care not to prejudice the internal and external financial stability of Member States"[13]

Furthermore, art. 105 TEEC provided that "in order to facilitate the attainment of the objectives stated in Article 104[14], Member States shall coordinate their economic policies. They shall for this purpose institute a collaboration between the competent services of their administrative departments and between their central banks"[15]. The respective coordination of economic policies was ensured, according to art. 145 TCEE, by the Council.

Also, art. 107 of the same Treaty provided that "Each Member State shall treat its policy with regard to exchange rates as a matter of common interest"[16] and that "if a Member State alters its exchange rate in a manner which is incompatible with the objectives laid down in Article 104 and which seriously distorts the conditions of competition, the Commission may, after consulting the Monetary Committee, authorise other Member States to take for a strictly limited period the necessary measures, of which it shall determine the conditions and particulars, in order to deal with the consequences of such alteration"[17].

As regards the institutional framework created by the Treaty establishing the European Economic Community, it consisted of an Assembly (the forerunner of the current European Parliament), a Council, a Commission and a Court of Justice, which were responsible for carrying out the tasks set by the Treaty in order to achieve the objectives also set by it. Between these institutions a permanent dialogue was carried on, organized, according to the specialized doctrine, "*on the basis of collaboration and not of subordination, each of the institutions exercising its own functions within a complete decision-making system of a pre-federal nature*"[18]. In addition, a Monetary Committee was added to the institutions concerned, composed of two members appointed by each Member State, in order to "*keep under review the monetary and financial situation of Member States and of the Community and also the general payments system of Member States and to report regularly thereon to the Council and to the Commission* (...) *and to formulate opinions, at the request of the Council or*

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[7] James Chen, *op.cit*.
[8] Ibidem.
[9] Art. 2 of the Treaty establishing the European Economic Community (TEEC as follows).
[10] Art. 3 lit. (g) TEEC.
[11] Art. 3 lit. (j) TEEC.
[12] Art. 6 alin. (1) TEEC.
[13] Art. 6 alin. (2) TEEC.
[14] *Each Member State shall pursue the economic policy necessary to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while ensuring a high level of employment and the stability of the level of prices*.
[15] Art. 105 alin. (1) TEEC.
[16] Art. 107 alin. (1) TEEC.
[17] Art. 107 alin. (2) TEEC.
[18] Augustin Fuerea, *Manualul Uniunii Europene, Ediția a V-a revizuită și adăugită după Tratatul de la Lisabona*, Universul Juridic, Bucharest, 2011, p. 35.

of the Commission or on its own initiative, for submission to the said institutions"[19].

From all these facts and treaty provisions we can conclude that, although the Treaty establishing the European Economic Community established an institutional and regulatory framework conducive to the coordination of the economic policies of the Member States, it did not include neither the legal basis for establishing an Economic and Monetary Union, nor the means to achieve that coordination. But, as we will see during this study, these obstacles were overcomed thanks to the fact that "*the drafters of the TEC have set up a <<valve>> through which to cover possible new areas of community cooperation; we are talking about art. 352 (ex 235), which states: <<If EC action is required for the achievement of one of the objectives of the EC within the framework of the functioning of the common market, without unanimously, on a proposal from the Commission and after consulting the European Parliament, shall take appropriate action* >>"[20] and through the creative use of instruments of public international law, in conjunction with those specific to Community law (at that time, of the European Union, after the entry into force of the Treaty of Lisbon).

At the end of this section, we would also like to mention that a Committee of Governors of the Central Banks of the Member States of the EEC Member States was added to the above institutional framework, starting with 1964 (by Decision of the Council of Ministers of 8 May 1964), in order to promote the cooperation between them, by organizing consultations and facilitating the exchange of information on monetary policies and other relevant measures, with a special focus on lending and foreign exchange markets. The committee met mainly in Basel, at the headquarters of the Bank for International Settlements, which provided logistical support and secretarial services. In accordance with its Rules of Procedure, the Committee could adopt opinions by a majority of its members, divergent views being allowed, and could draw up memoranda to be sent to the entities concerned.

3. Difficulties in identifying alternatives to the Bretton Woods system. The Monetary Snake

Before actually starting this section, we would like to point out that almost all the moments highlighted in it take place against the background of the oil shocks of 1970-1980, with their multiple causes (OPEC actions between 1973-1974, the Iranian Revolution, etc.), which not only supported the development of monetary cooperation at Community level, by highlighting the potentially catastrophic consequences of major and untimely monetary fluctuations, but can also be seen by the modern observer as an almost perfect argument in favor of the importance of the globalization process on the evolution of legal systems, a phenomenon that "*is not* (...) *unidirectional, coming only from the western civilization, but a multidirectional one, of reciprocity,* [in which] (...) *several tendencies* [can be identified (...) *coming from the western world, Islam and Asia* "[21].

So, the United States' renunciation of the gold standard and the turmoil it has created have necessitated the development of a new cartel to make up, as far as possible, for the instability caused by the act in question. In this context, during the year 1971, a temporary agreement was negotiated and concluded (known as the Smithsonian Agreement, after the headquarters of the Smithsonian Institution in Washington, where it was signed) "*between the ten most developed nations in the world, namely Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom of Great Britain and Northern Ireland, respectively the United States*"[22].

A brief overview of the main provisions of the Agreement in question could include, in our opinion, that it "*devalued the US dollar by 8.5% against gold, lowering the price of an ounce of gold from US $ 35 to US $ 38* [while] *the other G10 states* [listed above] *agreed to revalue their currencies accordingly against the dollar*"[23].

Also, along with the appreciation of the other major currencies, in addition to the US Dollar, the Smithsonian Agreement introduced "*the establishment of a margin for their fluctuation in relation to the Dollar of +/- 2.25%. However, they could create significant fluctuations between the currencies of the currencies of the EEC Member States that were parties to that Agreement, which could reach a maximum of 4.5%, which* (…) *created major risks for common policies such as the CAP. To address this issue, the EEC Member States have decided to reconfigure their monetary policy concerns towards reducing the links of their currencies with the US Dollar and at the same time reducing intra-Community fluctuation margins*"[24].

To this end, the Governors of the central banks of the Member States of the European Economic

[19] Art. 105 TEEC.

[20] Augustina Dumitrașcu, *Federalism în Europa – privire generală asupra acestei perspective*, paper presented within the "*Pregătirea economică și juridică a specialiștilor – premisă esențială a integrării României în Uniunea Europeană*" Symposium, Ars Docendi Publishing House, Bucharest, 2002, pp.93-98.

[21] Monica Florentina Popa, *Tipologiile juridice între pragmatism și ciocnirea civilizațiilor (Legal Taxonomies between Pragmatism and the Clash of Civilizations)*, Revista de Drept Public Magazine, No. 1/2016, Universul Juridic Publishing House, Bucharest, 2016, pp. 58-67.

[22] James Chen, *Smithsonian Agreement*, www.investopedia.com, updated 18.06.2018, accessed 28.10.2019.

[23] Ibidem.

[24] Angelos Delivorias, *A history of European monetary integration*, European Parliamentary Research Service, www.europarl.europa.eu, 2015, p. 3.

Community signed the so-called *Basel Agreement* on 24 April 1972, which laid the foundations of the mechanism known as the *snake in the tunnel*. Under it, "*Member States' currencies could fluctuate (like a snake) within tight limits against the US Dollar, and Member States' central banks could buy or sell any amount of other Member States' currencies, subject to the margin of fluctuation of 2.25%. The Member States that have participated in this mechanism since its inception have been France, Germany, Italy, Luxembourg and the Netherlands, and Denmark, Norway and the United Kingdom have joined soon*"[25].

Thus began the first of the three stages identified by the author Liviu C. Andrei, of monetary integration in the Community and, subsequently, Union, respectively: "*The Monetary Snake, the European Monetary System and, finally, the single currency*"[26].

What we observe from the presentation of this mechanism is, first of all, the fact that it was established by an instrument of public international law, namely an agreement between the Governors of the participating Member States (thus placing itself somewhat outside the Community law at the time) and, secondly, both the lack of common obligations imposed to all Member States (as evidenced by the absence of Belgium) and the possibility of accession to the provisions of the Agreement by States not then part of the European Communities, namely Norway.

Despite its theoretical viability, we can retrospectively say that the system in question, established by the Smithsonian Agreement and the Basel Agreement was not a successful one. For example, "*in mid-1972, the German mark, the Dutch guilder, the Belgian franc and the pound sterling fell prey to a speculative attack that pushed their exchange rates to the allowed limits. Consequently, on 23 June, the British Government decided to suspend the application of the exchange rate margin mechanism and to allow the exchange rate of its currency to fluctuate freely on the market, which meant that the pound was leaving the tunnel in practice. Subsequently, in January 1973, Italy, which was in a similar situation as the United Kingdom, also abandoned the* snake in the tunnel *mechanism, although the State concerned had obtained a derogation from the intervention arrangements provided for in The Basel Accord, allowing it, first of all, not to make repayments on the basis of the composition of the monetary reserves for the credits it had already obtained through the short-term support mechanism, although the procedure in question would have forced Italy to make gold transfers at its official exchange rate and, secondly, by allowing its central bank to use US dollars for further market interventions, instead of the currencies of the EEC Member States*"[27].

"At the same time, the economic situation in the United States continued to deteriorate, necessitating a further 10% depreciation of the dollar on February 13, 1973. This devaluation and the strong and widespread fluctuations it caused marked the irrevocable collapse. of the Bretton Woods System in March the same year"[28].

It is also noteworthy that "the depreciation of the dollar led to the closure of foreign exchange markets within the Community. In the light of these difficulties, the Commission has reaffirmed its position in favor of an international monetary system based on fixed but adjustable currency parities, the convertibility of national currencies and an effective adjustment tool, and therefore proposed a system in which national currencies of Member States fluctuated in unison against the dollar. Consequently, the Council met on 3 successive occasions, on 4, 8 and 11-12 March 1973, to discuss monetary issues"[29].

Following these meetings, the Council adopted a Statement agreeing to the following decisions (NB): "to maintain the maximum variation in the exchange rate of the German mark, the Danish krone, the guilder, the Belgian franc, the Luxembourg franc and the French franc within the limit of 2.25% and, respectively, to release the National Banks of the Member States from the obligation to intervene in order to maintain the fluctuation margins against the US dollar"[30].

What we notice in this act and in its content is its mixed and innovative character at the same time, which could almost be considered sui generis. More precisely, it is an act adopted by an institution of the European Communities (Council), but which is not found in the enumeration from art. 43 pt. 2 TEEC, which listed the acts which the institutions of the Union could adopt, namely *regulations*, *directives* and *decisions*. In other words, we can consider that we are at most facing a complementary source of Community law, the binding legal force of which can be called into question. Rather, its legal basis could be found in art. 105 of the Treaty establishing the European Economic Community, which stipulated that "*in order to facilitate the fulfillment of the objectives provided in art. 104*[31], *Member States shall coordinate their economic policies* (...) *and, to this end, lay the foundations for cooperation between the relevant administrative structures and*

[25] Ibidem.

[26] Liviu C. Andrei, Dalina Maria Andrei, *The European Union between the Monetary „Snake" and the Common Currency*, Revista Economică Magazine, „Lucian Blaga" University of Sibiu, Supplement No. 3/2009, Sibiu-Chișinău, 2009, pp. 26-32.

[27] Elena Rodica Dănescu, *The difficulties of the monetary snake and the EMCF*, www.cvce.eu, 07.07.2016, accessed 28.10.2019.

[28] Elena Dănescu, *Pierre Werner and Europe: The Family Archives Behind the Werner Report*, Palgrave Macmillan, 2018, p. 312.

[29] Elena Rodica Dănescu, *The difficulties of the monetary snake and the EMCF*, op. cit.

[30] www.cvce.eu, *Statement by the Council of the EC on the international monetary crisis*, Official Bulletin of the European Communities, No. 3/March 1973, 20.12.2013, accessed 28.10.2019.

[31] *Each Member State shall pursue the economic policy necessary to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while ensuring a high level of employment and the stability of the level of prices.*

between their central banks"[32]. Even so, the establishment or elimination of obligations for central banks goes beyond the concept of consultation, but as long as the states and the Central Banks have assumed the obligations of that act as obligations, they have produced in practice the binding legal effects that they could theoretically not have had. In other words, in this case, the political will of the Member States and the institutions within them has created obligations where the law would have been insufficient to impose them.

In this situation, Germany, France, Denmark and the Benelux states decided to allow their currencies to fluctuate freely in the *snake*. At the same time, the Italian pound, the pound sterling and the Irish pound were too weak to do so, and therefore the Member States decided to allow them to fluctuate separately, instead of entering the *snake* mechanism, until economic conditions would have allowed this. As a result of these developments, a stable monetary area was established between the Benelux states, France and Germany, which also encouraged non-member states (at least then), such as Norway (which has retained its non-member status to this day), and Sweden to join the Snake, soon followed by Austria, which unilaterally decided to submit to the same mechanism[33].

4. Establishment of the European Monetary fund

However, the year 1973 did not pass without any progress in terms of economic and monetary integration. More specifically, the Resolution adopted by the Council of Ministers on 22 March 1971 provided for the establishment of a European Monetary Cooperation Fund. Subsequently, on 21 March 1972, the Council of Ministers requested the Monetary Committee and the Board of Governors of the Central Banks to draw up, by 30 June 1972 at the latest, a report on the organization, operation and status of a European Monetary Cooperation Fund. Under this mandate, the Committees concerned set up a group of experts to draw up a report on the main options available to policy makers for setting up the Fund. The draft, adopted by the Council and the Commission, was the basis for reaching a consensus on the need for a meeting of the Ministers of Finance and Foreign Affairs of the nine Member States of the Community, held in Rome from 10 to 11 September 1972, for the establishment of the European Monetary Co-operation Fund, even since the start of the first stage of Economic and Monetary Union.

At the Meeting of the Heads of State and Government in Paris from 19 to 21 October 1972, they also reached an agreement, as set out in the *Conclusions* of that meeting, on the establishment of the EMCF by 1 April 1973 at the latest. and, which is of interest from the perspective of the decision-making process, the aforementioned Fund to be administered by the Board of Governors of the Central Banks of the Member States. Generally speaking, the objectives and prerogatives of the Fund were to develop accounting procedures for operating of credit and intervention mechanisms, under foreign exchange mechanisms, as well as to manage the various short- and medium-term support mechanisms. In practice, the Fund's transactions were conducted through the Bank for International Settlements, and no control mechanisms were introduced over its capital movements, in particular over transactions in Eurodollars on that occasion.

5. The role of the European Council in deepening and building the mechanisms preceding the Economic and Monetary Union

The Heads of State and Government of the Member States of the European Union have agreed, on the basis of preparatory acts carried out by the Council, the Monetary Committee and the Board of Governors of the Central Banks, on the establishment of a European Monetary System with effect from 1 January 1979.

The objective of the system in question was to contribute to greater monetary stability within the Community. The system should also be seen, in the view of the same Heads of State and Government, as a "*fundamental component of a more comprehensive strategy to ensure sustainable development and stability, the gradual return to full employment, the harmonization of employment levels, living and reducing regional disparities within the Community*"[34]. Moreover, the European Monetary System was to "*facilitate the convergence of the development of Member States' economies and give a new impetus to the process of building the European Union*"[35]. To this end, "*the Council expected the European Monetary System to have a stabilizing effect on international relations in the economic and monetary fields*"[36] and to serve, at the same time, the interests of "*industrialized and developing countries*"[37].

With regard to the proper functioning of the European Monetary System, it seems of interest to specify that, in accordance with the Resolution of the European Council of 5 December 1978, annexed to the Conclusions of this meeting and which therefore takes over its legal value, which however, in the absence of a

[32] Art. 105 alin. (1) TEEC.
[33] For further details see www.cvce.eu, *The difficulties of the monetary snake and the EMCF*.
[34] Statement from the Paris Summit (19 to 21 October 1972), Bulletin of the European Communities. October 1972, No 10. Luxembourg: Office for official publications of the European Communities, p. 14-26.
[35] Idem.
[36] Idem.
[37] Idem.

consecration in Community primary law, it remains that of a legal act of public international law, it was composed of a scriptural monetary unit called ECU (European Currency Unit), an Exchange Rate Mechanism, under which the exchange rate currency exchange rate of the participating States was expressed in ECU, and an intervention mechanism, related to the Exchange Rate Mechanism, which obliges the participating States to ensure that the fluctuation margins of the exchange rate of their currencies are kept within a limit of +/- 2, 25% of the ECU.

As for the decision-making process that made it possible to fulfill these obligations, it presupposed, at least as regards the exchange rate adjustment, the common agreement of the participating States and the Commission and the mutual consultations within the Community institutional framework on the most important exchange rates policy decisions between the participating States and third countries.

In other words, the decision-making process within the SME had, we might say, a mixed character, of public international law (through the provisions related to the need for the agreement of the Member States, on matters not enshrined at least in the primary law of the Communities at that time, but also of Community law, by using the institutional framework provided by the Institutional and Amending Treaties.

Consultations could also be held within Community institutions, bodies, offices and agencies, including the Council, whenever deemed necessary.

As it progresses, the European Council Resolution continues in a different register, shifting the preponderance to the use of Community law instruments. Specifically, for the implementation of the decisions set out in Annex A (of the aforementioned Resolution), the European Council requested the Council to examine by 18 December 1978 at the latest, the Commission's proposals for a Regulation amending the unit of account used by the European Monetary Cooperation Fund (in ECU), on the Regulation allowing the European Cooperation Fund to receive monetary reserves and issue ECUs to the monetary authorities of the Member States, of the proposal for a Regulation on the impact of the European Monetary System on Common Agricultural Policy etc. and also calls on the Commission to issue, within a reasonable time, a proposal for an act amending the Council Decision of 22 March 1971 establishing a medium-term financial assistance mechanism to allow the Council to take a decision on those proposals by not later than 18 December 1978. The European Council also requested the Central Banks of the Member States to amend their Agreement of 10 April 1972 on the reduction of fluctuations in the currencies of the countries of origin in order to comply with the provisions of the Resolution under consideration and to amend the mechanisms for the short - term monetary support mechanism by 1 January 1979 at the latest.

Therefore, we are dealing with a decision-making process with a character that we can characterize as mixed or sui generis, in which international agreements specific to public international law, concluded between states or between structures within states, coexist with legal acts of institutions in order to build together an innovative but effective system for achieving the proposed objectives. Moreover, a new element seems to us to be the imposition, by agreement of the Heads of State and Government of the participating States, of obligations on the Community institutions, which they might have considered unfounded under primary Community law (consisting of the institutive and amending Treaties), but those institutions have chosen not to do so and to assume their fulfillment, in a manner similar to natural obligations, giving them legal effects by their own will.

Pursuant to the Conclusions of the Meeting of the European Council of 5 December 1978, on 13 March 1979, the Representatives of the Central Banks of the Member States of the European Economic Community concluded an Agreement on the Functioning of the European Monetary System in Basel (Switzerland) on 13 March 1979 (in other words, another instrument of public international law).

Regarding the decision-making process, the main aspects of its content which we consider useful should be the communication, by each participating Central Bank, to the Secretariat of the Board of Governors of a pivot rate of its currency, expressed in ECU, the Committee on informing the other central banks of that exchange rate, and those relating to the setting of mandatory intervention rates, expressed in national currencies, to the same Secretariat.

Therefore, even in this situation, we are witnessing the same mixed use of instruments of public international law and institutions of Community law and, therefore, of the decision-making processes specific to these two paradigms.

The following Conclusions addressing the issue of Economic and Monetary Union are those of the European Council in Hanover of 27-28 June 1988. It reaffirms that, with the adoption of the Single European Act, Member States have confirmed the objective of the progressive achievement of an Economic and Monetary Affairs and, in this context, the representatives of the Member States, meeting within the European Council, decided to examine, at the next meeting of the European Council, in Madrid in June 1989, the means of achieving the objective of this Union. To this end, they decided to entrust a special Committee set up to study and propose a series of concrete steps leading to the achievement of EMU, (...) chaired by Jacques Delors, President of the European Commission. The Heads of State and Government also agreed to invite the Presidents or Governors of the Central Banks of the Member States to take part, in their personal names, in the work of the Committee, together with three

personalities appointed by common accord of the Heads of State or Governments[38].

The report resulting from the Committee's work, also known as the "Delors Report", addresses a wide range of issues, covering both economic and monetary issues.

From its inception, the Report noted that a possible Economic and Monetary Union would imply complete freedom of movement for persons, goods, services and capital, as well as an irrevocably fixed exchange rate between national currencies and, finally, a single currency. They would also imply a common monetary policy, would require a high degree of compatibility between economic policies and would involve a high degree of convergence in a number of other policy areas, in particular fiscal policy. Those policies needed to be geared towards ensuring price stability, balanced growth, convergence of living standards, ensuring a high level of employment and external balance. In practice, Economic and Monetary Union would be the end result of the process of progressive economic integration in Europe[39].

However, the Report also stated that even after achieving the objective of Economic and Monetary Union, the Community would continue to be made up of individual states with a number of different economic, social, cultural and political characteristics. The existence and maintenance of such a plurality would mean maintaining a degree of autonomy in economic decision-making at national level and ensuring a balance between Community and State competences. For this reason, (**and we would like to emphasize the following statements**), it would not be possible to take the example of the federal states, but it would be necessary to develop an innovative and unique approach[40].

But the authors of the Delors Report also pointed out the lack of sufficient legal grounds in the institutive and amending Treaties in order to achieve the aforementioned objectives.

Thus, the Report in question stated that, although the Treaty of Rome, as amended by the Single European Act, provided the legal basis for many of the stages necessary for economic integration, it is not sufficient for the creation of an Economic and Monetary Union. Achieving this goal would require new arrangements, which could only be established through the revision of the Treaties and subsequent amendments to national legislation. For this reason, EMU should be enshrined in a Treaty that clearly sets out the necessary functional and institutional arrangements, as well as the provisions on their gradual implementation[41].

In roughly the same vein, the Report noted that in view of the aspects already provided for in the Treaties, the need for a transfer of decision-making powers from Member States to the Community as a whole could arise in particular in a Monetary union that would imply a single monetary policy, and the responsibility for formulating this policy should be assigned to a single institutional decision-making center. In the economic field, a wide range of decisions would remain reserved for national and regional authorities. However, given their potential impact on the internal and external economic situation of the Community and their implications for the conduct of a common monetary policy, such decisions should be placed within a specially agreed macroeconomic framework and should be subject to rules, regulations and mandatory procedures[42].

The Report further specifies that the management of Economic and Monetary Union would require an institutional framework to enable the adoption and implementation of policies at Community level, in those areas which would be of direct relevance to the functioning of EMU, which should ensure an efficient economic management, properly anchored in the democratic process. Economic and Monetary Union would also necessitate the creation of a new monetary institution, placed within the framework of the Community institutions (...), and the formulation and implementation of common policies in non-monetary areas, as well as the coordination of policies remaining under national competence would not only require a new institution, but a review and, possibly, a restructuring of existing Community institutions, bodies, offices and agencies, including any delegations of powers. Also, a new monetary institution would be necessary because a single monetary policy cannot result from independent decisions or actions of the various central banks. Moreover, day-to-day monetary policy operations can only respond quickly to changing market conditions when they are decided centrally. Given the political structure of the Community and the advantages of making existing central banks part of a new system, the Community's domestic and international monetary decision-making process should be organized in a federal form, as far as possible. called the European System of Central Banks. This new system should have the full status of a Community institution and should act in accordance with the provisions of the Treaty, consisting of a central institution and national central banks. Finally, in the last stage of EMU, the ESCB, acting through the Council, would be responsible for the formulation and implementation of monetary policies, as well as for the management of the exchange rate of the single currency in relation to those of third countries. The Central Banks of the Member States would also be entrusted with the implementation of those policies, in

[38] According to www.cvce.eu, Report on economic and monetary union in the European Community, 30.06.2014, accessed 10.11.2019.
[39] Idem.
[40] Idem.
[41] Idem.
[42] Idem.

accordance with the guidelines established by the ESCB Council and the instructions issued by the central institution[43].

As regards the structure and organization of the ESCB, they should, in accordance with the Delors Report, have had a federal structure, which would best correspond to the political diversity of the Community, with the establishment of an ESCB Council, composed of the Governors of the Central Banks and of members of an Executive Committee, appointed by the European Council and who were to be responsible for formulating and implementing monetary policy decisions, in accordance with the voting arrangements laid down in the Treaty, of a Committee to monitor developments in the field of monetary policy and to supervise the implementation of the common monetary policy, as well as in the national central banks, which were to carry out various monetary operations in accordance with the decisions of the ESCB Council[44].

Significant emphasis was placed on the independent status of the ESCB. Specifically, the Report stated that the ESCB should be independent of instructions issued by national governments and Community institutions, bodies, offices or agencies, to that end, members of the ESCB Council (both Governors and members of the Committee) should be provided with appropriate safeguards, but also made responsible, in the form of an annual report submitted by the ESCB to the European Parliament and the European Council; moreover, the President of the ESCB could be invited to report to these institutions. The supervision of the administration of the System was to be carried out by independent Community institutions, bodies, offices or agencies, such as, for example, a supervisory board or a committee of independent auditors[45].

The Report further emphasized the need to develop legally binding rules and procedures in the field of budgetary policies, involving upper limits of budget deficits for Member States, excluding access to credit from central banks or other forms of financing, monetary policy, restrictions on lending in non-EU currencies, definition of general coordinates of medium-term fiscal policies, including limits and financing of budget deficits.

With regard to the prospects for the establishment of a single currency, the Committee expressed in its Report that although a monetary union does not necessarily require a single currency, it would be a beneficial feature of such a Union (...), being, at the same time), of the opinion that the ECU had the potential to develop into such a single currency, which would involve its transformation from a basket to a currency in itself. Moreover, the irrevocable setting of exchange rates would imply the absence of a discontinuity between the ECU and the single currency, as well as the fact that payment obligations contracted in ECU could be paid at the same value in that currency, until the moment of their maturation[46].

Also from a procedural point of view, the Report recommends revising the 1974 Council Decision on achieving economic convergence, inter alia to clarify that the task of coordinating economic policies would belong to the Council, in the ECOFIN formation, and that convergence between economic and monetary policies would be facilitated by the participation of the Chairman of the Board of Governors of the Central Banks in the meetings of the Council. It was also proposed to establish a multilateral mechanism for monitoring economic developments and compliance with agreed indicators, with the possibility of formulating recommendations for their correction.

In conclusion, in our view, from all the proposals made by the Delors Report, one can see the transition it wanted to make from a system based on the coordination of the action of Member States and central banks through instruments of international law complemented by instruments of law, using the Community institutional infrastructure, but the implementation of which was largely based on the good faith of the States concerned, to a Community system based on instruments of Community law (legal acts of the Community institutions, including newly established ones) , such as the ESCB, with binding legal force and adopted following a series of decision-making procedures that would have important similarities with those specific to federal states.

As regards the Delors Report, it was approved by the Commission and submitted to the European Council on 12 April 1989[47] for consideration at its meeting in Madrid, scheduled for June 1989.

In its Conclusions, the members of the European Council reaffirmed their determination to progressively build the projected Economic and Monetary Union, mentioned in the Single European Act, with a view to completing the construction of the Internal Market and achieving the strongest economic and social cohesion possible. In this context, the European Council recommended using the Delors Report as a basis for future developments in the field and decided that the first stage of achieving Economic and Monetary Union should begin on 1 July 1990.

To this end, the European Council called on the Council, in the General Affairs and ECOFIN formations, as well as on the Commission, the Board of Governors of the Central Banks and the Monetary Committee to adopt the legal acts necessary to start the first stage of EMU and to draw the coordinates of the later stages. We note, therefore, that the decision-making process involves, in the same way as before, the

[43] Idem.
[44] Idem.
[45] Idem.
[46] Idem.
[47] Pierre Gerbet, *The Delors Report*, www.cvce.eu, 08.07.2019, accessed 30.10.2019.

European Council, the Community institutions and the Member States, in particular their Central Banks, but given the consecration of the European Council in the Single European Act, its conclusions can no longer be considered only acts of public international law, but have thus acquired a Community component.

6. Conclusions

In the face of this unique and not at all simple course of the future Economic and Monetary Union, before consecrating its legal bases in the primary Community law, we can ask ourselves what was the legal nature of this construction, as long as it does not seem to belong completely to the public international or Community law. Looking at this inextricable picture, some observers might place it somewhere in the middle of the distance between "*the absence of codifications* [specific to Brican law and a true] *mass codified by abstract general principles*"[48] contained in a multitude of instruments of different natures and legal forces. In any case, without being able to establish with certainty what this legal construction consisted of, the absence of its express enshrinement in the basic constitutional charter of Community law at the time prevents us from considering it of a federal nature, even if in practice it tended towards a such a *modus operandi*. In order to be able to draw such a parallel, we will have to wait for the reforms carried out by the Maastricht Treaty and the new configuration of the Economic and Monetary Union enshrined in it.

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EMERGENCE AND EVOLUTION OF THE ECONOMIC AND MONETARY UNION: OVERLOOK AT THE DECISION-MAKING PROCESS AND THE LEGAL INSTRUMENTS USED (FROM THE MAASTRICHT TREATY TO THE PRESENT DAY)

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Abstract

While in the previous study we presented the premises of the emergence of what is the economic and monetary Union today, and we demonstrated that in this process the European Council had a fundamental role to play even before it was enshrined in primary Community law, whose manifestation of will takes the form of public international law acts, in the present study we will address the economic and monetary Union after its consecration in the Maastricht Treaty. Normally, this approach should lead us to analyze the institutional structure of EMU in accordance with the Treaties on which the European Union is founded, but, apparently paradoxically, careful analysis shows that even after the said consecration, the mixed use of instruments of international law to fill possible gaps in union law has not been completely abandoned.

Keywords: *European Union, Economic and Monetary Union, Euro, Maastricht Treaty, Lisbon Treaty, European Central Bank, excessive deficit, stability, growth.*

1. Maastricht Treaty and the establishment of the Economic and Monetary Union. Current institutional framework of the EMU

Undoubtedly, one of the most important moments in the development of Community construction (in the middle, Union) since the end of the 20th century is the signing, followed by its entry into force, of the Maastricht Treaty. Of course, this is neither the place nor the time to discuss this Treaty in depth, but what we want to explain, as a follow-up to the previous study and before we discuss its implications for EMU, is the context of its emergence. More specifically, we want to remember two of the historic crucial moments preceding the appearance of that Treaty, namely the break-up of the Soviet block of influence and the unification of Germany, which is the latter putting France in the face of possible future economic dominance of Europe By Germany, which, like a possible German resurgence after the second World War, could only be managed and accepted within a supranational framework defined in the first case by the European Coal and Steel Community and, secondly, by the Economic and Monetary Union. These connections further underscore the fact that "*the accelerated opening up of the world economy following the end of the cold War and the collapse of the communist block was accompanied by unprecedented mobility of the law itself*"[1], together with the anchoring of law in the social and political realities of its time, without the understanding of which the evolution of law cannot be explained either.

Given the fact that the decision-making process within the Economic and Monetary Union, in its aspects involving the institutions of the Council, the European Parliament and even the European Central Bank, has a pronounced technical character and is still the subject of another research, we consider it more appropriate to present, in these lines, the general features of the composition and functioning of the European System of Central Banks, with each of its components, the distribution of competencies and the relations between them.

Thus, the Maastricht Treaty provided for the establishment of a European System of Central Banks and a European Central Bank (following a transitional process that involved the establishment of a European Monetary Institute and its subsequent transformation into the European Central Bank). As an application of the principle of conferral, both the ESCB and the ECB could act only within the limits set by the Treaties.

A particularly important feature of the new European Central Bank was its independence, enshrined from the outset in the Treaty which provided that "*in the exercise of its powers and in the performance of the tasks and duties conferred upon it* (…) *the national central bank and no member of any of their decision-making bodies may seek or accept instructions from the Community institutions or bodies, the governments of the Member States or any other*

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[1] Monica Florentina Popa, *Tipologiile juridice între pragmatism și ciocnirea civilizațiilor (Legal Taxonomies between Pragmatism and the Clash of Civilizations)*, Revista de Drept Public Magazine, No. 1/2016, Universul Juridic Publishing House, Bucharest, 2016, pp. 58-67.

body [and] *the Community institutions and bodies and the governments of the Member States are to respect this principle and not to try to influence the members of the decision-making bodies of the ECB or of the national central banks in carrying out their mission*"[2]. The ESCB was, and is still, "*made up of the European Central Bank and the central banks of the Member States* [the national central banks]. *The main objective of this System* [was] *to maintain price stability. The ESCB* [supported] *the general economic policies of the Community in order to contribute to the achievement of the objectives of the Community* (…). [Also], *the ESCB* [acted] *in accordance with the principle of an open market economy in which competition is free, promoting an efficient allocation of resources and respecting the principles set out in the* (…) *Treaty*"[3].

From that moment on, given the fact that the changes brought about by the successive reforms that have taken place since the entry into force of the Maastricht Treaty to date are minimal, we prefer to present the provisions under our study directly in their current form, so as not to it made our research unnecessarily difficult to read. For the same reason, in those cases where the provisions of the TEU / TFEU and the Protocol on the Statute of the ESCB duplicate each other, we will refer to only one of these instruments.

As for the missions of the ESCB, they are, in today's wording of its Statute, those mentioned in art. 127 (2) TFEU, "respectively to define and implement the monetary policy of the Union, to conduct foreign-exchange operations consistent with the provisions of Article 219[4], to hold and manage the official foreign reserves of the Member States [and] to promote the smooth operation of payment systems"[5].

Thus, as regards the ECB, the Treaties and the Statute state that "[t]he European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB) [while] [t]he European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union"[6].

As for the European Central Bank, it shall be consulted on any draft Union act as well as on any draft regulation at national level and may issue opinions in the areas in which it has responsibilities. The ECB shall also decide on the representation of the ESCB in the field of international cooperation on tasks entrusted to the ESCB. Both the ECB and the national central banks, subject to the agreement of the ECB, are empowered to participate in international monetary institutions. The ECB also "*lays down the general principles for financial market and credit operations carried out by itself or by national central banks, including those relating to the communication of the conditions under which they are willing to participate in such operations. For the purposes of applying this Article, the Council shall define, in accordance with the procedure laid down in Article 41*[7]*, the basis for calculating the minimum required reserves and the maximum permissible ratio between those reserves and their basis of calculation, as well as the corresponding penalties for non-compliance*"[8]. Moreover, "*in accordance with any regulation adopted by the Council pursuant to Article 127 (6) of the Treaty on the Functioning of the European Union, the ECB may carry out specific tasks relating to the prudential supervision of credit institutions and other financial institutions, with the exception of insurance undertakings. In accordance with Article 132 of the Treaty on the Functioning of the European Union, the ECB shall adopt: regulations, to the extent necessary for the fulfillment of the tasks set out in the first indent*

[2] Art. 7 of the Protocol regarding the on the Statute of the European System of Central Banks and of the European Central Bank, attached to the Treaty on European Union, Official Journal C 191, 29/07/1992 P. 0001 – 0110.

[3] Idem.

[4] 1. By way of derogation from Article 218, the Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously after consulting the European Parliament and in accordance with the procedure provided for in paragraph 3. The Council may, either on a recommendation from the European Central Bank or on a recommendation from the Commission, and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, adopt, adjust or abandon the central rates of the euro within the exchange-rate system. The President of the Council shall inform the European Parliament of the adoption, adjustment or abandonment of the euro central rates.

2. In the absence of an exchange-rate system in relation to one or more currencies of third States as referred to in paragraph 1, the Council, either on a recommendation from the Commission and after consulting the European Central Bank or on a recommendation from the European Central Bank, may formulate general orientations for exchange-rate policy in relation to these currencies. These general orientations shall be without prejudice to the primary objective of the ESCB to maintain price stability.

3. By way of derogation from Article 218, where agreements concerning monetary or foreign exchange regime matters need to be negotiated by the Union with one or more third States or international organisations, the Council, on a recommendation from the Commission and after consulting the European Central Bank, shall decide the arrangements for the negotiation and for the conclusion of such agreements. These arrangements shall ensure that the Union expresses a single position. The Commission shall be fully associated with the negotiations.

4. Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements.

[5] Art. 127 alin. (2) TFEU.

[6] Art. 282 alin. (1) TFEU.

[7] In accordance with Article 129 (4) of the Treaty on the Functioning of the European Union, the Council, acting on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of this statute.

[8] Art. 18 of the Protocol (no. 4) on the Statute of the European System of Central Banks and of the European Central Bank.

of Article 3.1[9]*, Articles 19.1*[10]*, 22*[11] *or 25.2*[12] *and in the cases provided for in Council acts referred to in Article 41*[13]*; the decisions necessary for carrying out the tasks entrusted to the ESCB in accordance with the Treaties and the Statute of the ESCB and of the ECB; recommendations and opinions*"[14].

The ECB may also decide whether to publish its decisions, recommendations and opinions.

Also, regarding the decision-making process, it may be interesting to mention that "[i]n accordance with Article 129(4) of the Treaty on the Functioning of the European Union, the Council, either on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of this Statute"[15].

From an organizational point of view, according to the Statute, „[t]he ESCB shall be governed by the decision-making bodies of the ECB"[16], namely The Board of Governors and the Executive Committee (according to art. 9 of the Statute) and the General Council (according to art. 44 of the same Statute). We will carry on our paper by presenting each one of them.

2. The decision –making bodies of the ECSB and their functioning

2.1. President and Vicepresidents

According to the Statute, "[t]he President or, in his absence, the Vice-President shall chair the Governing Council and the Executive Board of the ECB [and] [w]ithout prejudice to Article 38[17], the President or his nominee shall [also] represent the ECB externally"[18] He or, in his absence, the Vice-President shall also chair the General Council, the work of which he shall prepare.

2.2. The Executive Board

It consists of a president, a vice-president and four other members, "appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council after it has consulted the European Parliament and the Governing Council"[19] for a term of 8 years, which may not be renewed. From a procedural point of view, it should be noted that each member of the Executive Committee present at the meetings has one vote, the Committee deciding by a simple majority of the votes cast. In the event of a tie, the President shall decide. Several matters relating to the voting procedure applicable to the Executive Board may also be determined by the Rules of Procedure of the ECB and its decision-making bodies.

With regard to the prerogatives of the Executive Committee, according to the Statute, it "*is responsible for the day-to-day administration of the ECB*"[20], "*implements the monetary policy in accordance with the guidelines and decisions adopted by the Governing Council*"[21] framework in which it provides the necessary instructions to the national central banks and, where appropriate, the "*decisions on intermediate monetary targets, reference interest rates and the establishment of reserves under the ESCB, and lays down guidelines for their application*"[22]. The Executive Board may also be delegated "*certain powers by decision of the Governing Council*"[23] It is also "*responsible for the preparation of Governing Council meetings*"[24]

[9] Definition and application of the Union's monetary policy

[10] Subject to Article 2, the ECB shall be empowered to impose on credit institutions established in the Member States the obligation to make minimum minimum reserves with the ECB and national central banks in accordance with monetary policy objectives. The Council of Governors may adopt regulations for the calculation and determination of minimum reserves. In the event of non-compliance with this obligation, the ECB has the right to charge penalty interest or to impose other sanctions with similar effect.

[11] The ECB and the national central banks may provide facilities, and the ECB may adopt regulations to ensure the efficiency and soundness of clearing and payment systems within the Union and in its relations with third countries.

[12] In accordance with any regulation adopted by the Council pursuant to Article 127 (6) of the Treaty on the Functioning of the European Union, the ECB may carry out specific tasks relating to the prudential supervision of credit institutions and other financial institutions, with the exception of insurance institutions.

[13] In accordance with Article 129 (4) of the Treaty on the Functioning of the European Union, the Council, acting on a proposal from the Commission and after consulting the European Parliament and the ECB or on a recommendation from the ECB and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4 , 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of this statute.

[14] Art. 25 and 34 of the Protocol (no. 4) on the Statute of the European System of Central Banks and of the European Central Bank (ECB Statute as follows).

[15] Art. 41 of the ECB Statute.

[16] Art. 8 of the ECB Statute.

[17] The ECB shall be legally committed to third parties by the President or by two members of the Executive Board or by the signatures of two members of the staff of the ECB who have been duly authorised by the President to sign on behalf of the ECB.

[18] Art. 13.1 of the ECB Statute.

[19] Art. 283 TFEU and art. 11 of the ECB Statute.

[20] Art. 11.6 of the ECB Statute.

[21] Art. 12.1 of the ECB Statute.

[22] Idem.

[23] Idem.

[24] Idem.

2.3. The Governing Council

As regards the Governing Council, it shall „*comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro*"[25] Within the Governing Council, each member shall have one vote, but from the date on which the number of members of the Board of Governors exceeds twenty-one, each member of the Executive Committee shall have one vote and the number of governors with voting rights shall be fifteen, the vote shall be taken in accordance with a procedure laid down for that purpose by the Statute. According to the Statute, the right to vote is exercised in person, but the rules of procedure establishing the internal organization of the ECB and its decision-making bodies may provide that members of the Governing Council may exercise their right to vote by teleconference. The same rules may also provide that a member of the Board of Governors who is unable to attend meetings of that Board for a long period may appoint an alternate as a member of the Board of Governors. Other matters relating to the functioning of the Governing Council include the establishment of a quorum for voting by two-thirds of the members with the right to vote, in the event of failure to do so The statutes shall also establish the confidentiality of meetings, provided that the same Board of Governors may make public the outcome of its deliberations.

In addition, "*the Governing Council shall adopt rules of procedure which establish the internal organization of the ECB and its decision-making bodies*"[26][,] *shall exercise the advisory functions referred to in Art. 4*[27] [,] *shall adopt the decisions referred to in Article 6*[28], [and] *shall be the sole power to authorize the issue of euro banknotes within the Union*"[29].

The Governing Council may decide, by a two-thirds majority of the votes cast, to use other operational methods of monetary control which it considers appropriate, in compliance with Article 2 (on Objectives).

2.4. The General Council

The General Council "shall be constituted as a third decision-making body of the ECB"[30]. It is composed of "the President and Vice-President of the ECB and the Governors of the national central banks"[31] noting that the other members of the Executive Committee as well as the President of the Council (who may propose motions for deliberation to the General Council) "may participate, without having the right to vote, in meetings of the General Council"[32].

Its prerogatives are exhaustively listed by art. 46 of the Statute. Of these, we mention the fulfillment of the missions mentioned in art. 43[33], contributing to the performance of the advisory functions referred to in Articles 4 and 25.1[34], when collecting the statistical information mentioned in art. 5, when drawing up the ECB's activity reports referred to in Article 15, [35]when establishing the norms necessary for the application of art. Article 26 of the Staff Regulations (entitled 'Financial accounts'), the adoption of the measures necessary for the application of Article 29 (concerning the Allocation Schedule for the subscription of capital), the establishment of the arrangements applicable to the staff of the ECB and contribute to the currencies of the Member States which are subject to a derogation in relation to the euro, as provided for in Article 140 (3) of the Treaty on the Functioning of the European Union, while being informed by the President of the ECB of the decisions of the Governing Council. The General Council shall also adopt its own rules of procedure, the secretariat of which shall be provided by the ECB.

Finally, after analyzing the governing bodies of the ESCB and their functioning, we will also analyze the framework of relations between the European Central Bank and the other Union institutions involved

[25] Art. 10.1 of the ECB Statute.
[26] Art. 12.3 of the ECB Statute.
[27] In accordance with Article 127(4) of the Treaty on the Functioning of the European Union: (a)
the ECB shall be consulted: on any proposed Union act in its fields of competence; by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41; (b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.
[28] Regarding international cooperation.
[29] Art. 16 of the ECB Statute.
[30] Art. 44.1 of the ECB Statute.
[31] Art. 44.2 of the ECB Statute.
[32] Idem.
[33] The ECB shall take over the former tasks of the EMI referred to in Article 141(2) of the Treaty on the Functioning of the European Union which, because of the derogations of one or more Member States, still have to be performed after the introduction of the euro. The ECB shall give advice in the preparations for the abrogation of the derogations specified in Article 140 of the Treaty on the Functioning of the European Union.
[34] In accordance with Article 127(4) of the Treaty on the Functioning of the European Union: (a) the ECB shall be consulted: on any proposed Union act in its fields of competence; by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 41; (b) the ECB may submit opinions to the Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.
The ECB may offer advice to and be consulted by the Council, the Commission and the competent authorities of the Member States on the scope and implementation of Union legislation relating to the prudential supervision of credit institutions and to the stability of the financial system.
[35] The ECB shall draw up and publish reports on the activities of the ESCB at least quarterly.

in the decision-making process, such as the European Parliament and the Council of the European Union.

3. Relations between the ECB and the other Union institutions

According to art. 284 TFEU, "[t]he President of the Council and a Member of the Commission may participate, without having the right to vote, in meetings of the Governing Council of the European Central Bank [while] [t]he President of the Council may submit a motion for deliberation to the Governing Council of the European Central Bank"[36] Also, "[t]he European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis. The President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament"[37].

4. Continued use of the mixed use of public international law and European Union instruments. Excessive deficit procedure

Despite the enshrinement of Economic and Monetary Union in the primary law of the European Union and, alongside it, the institutional aspects necessary for its functioning, the subsequent realities of Union and world economic life have shown the inadequacy of the rules laid down in the Treaties on which the Communities were founded, respectively on which the Union is founded (at present) and have brought up to date the need to supplement them with elements of public international law.

In this direction, our analysis starts from the provisions of the former article 104c of the Treaty establishing the European Community (resulting from the revisions made by the Maastricht Treaty), the current art. 126 of the TFEU, which stipulates, in a seemingly simple way, that "*Member States shall avoid excessive government deficits*"[38]. In order to clarify the notions used by him, art. 104c of the TEC and the current art. 126 TFEU referred, respectively, to the Protocol on the excessive deficit procedure, annexed to the Treaties and drawn up on the occasion of the same Maastricht Treaty. It, in turn, states that the values in question are "*3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices* (...) [and] *60 % for the ratio of government debt to gross domestic product at market prices*"[39].

However, this enshrinement of the prohibition of excessive deficits and the significance of the terms used in the rules imposing the ban in question only seemingly simplifies economic governance in the European Union. Precisely because a number of important procedures had not yet been set up at the Madrid European Council in December 1995, it (through the Conclusions of that meeting) confirmed the crucial importance of establishing adequate budgetary discipline in the third stage of Economic and Monetary Union, and at the meeting of the European Council in Florence in 1996, it reiterated the above-mentioned goal of reaching an agreement on the main elements of the Stability and Growth Pact. More specifically, it stated that the fact that the avoidance of excessive deficits in the third stage of EMU is a clear obligation established by the Treaties. The conclusions of that European Council meeting also emphasized the importance of maintaining good economic governance, seen as a means of strengthening the preconditions for ensuring sustainable development and a source of job creation. The European Council also considered it necessary for national budgetary policies to support stability-oriented monetary policies, as adherence to the objective of a budget positioned in close proximity to the coordinates established by the Treaties or even with a surplus would allow Member States to cope with cyclical effects of the economy fluctuations, without the budget deficit reaching the 3% reference value[40].

4.1. Convergence criteria – defining elements of economic sustainability

The convergence criteria, also known as the Maastricht criteria, are a number of relevant macro-economic indicators, against which an objective assessment can be made of the level of sustainable economic convergence of a Member State. According to article 140 TFEU, "*at least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB*"[41]. Equally, for objective assessment purposes, the same Article defines the four criteria under which

[36] Art. 284 alin. (1) TFEU.
[37] Art. 284 alin. (3) TFEU.
[38] Art. 126 alin. (1) TFEU.
[39] Art. 1 of the Protocol (No 12) on the excessive deficit procedure.
[40] In accordance with the Resolution of the European Council on the Stability and Growth Pact, Official Journal of the European Communities, no. C236 / 1 of 02.08.1997.
[41] Art. 140 alin. (1) TFEU.

the degree of sustainable convergence of each state is analyzed, namely:

1. *the achievement of a high degree of price stability; this will be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability*;

2. the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6)[42]*;*

3. the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro;

4. the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels[43].

As regards the periods of time included in the analysis of the four criteria, additional information is provided for in a Protocol annexed to the Treaty. Protocol 13 thus clarifies the manner in which the macro-economic indicators used in the application of the four convergence criteria are defined and calculated.

In particular, the criterion of price stability is explained in the first Article of Protocol No 13 on the convergence criteria. Thus, sustainable price stability in a Member State is determined when the average inflation rate, during the one-year period preceding the review, shall not exceed by more than 1,5% the inflation rate of no more than three member states that have achieved the best results according to this criterion. In this analysis, the rate of inflation shall be calculated on the basis of the change in the latest available annual average of the harmonized Index of Consumer prices (HICP) as compared to the previous annual average, While the inflation rate of up to three Member States will be calculated as the unweighted arithmetic average of the inflation rate of the three countries with the lowest inflation rates (unless extreme values exist). If the price evolution in one country is significantly lower than those recorded by the other Member States as a result of the accumulation of country-specific factors, that value shall be considered to be extreme and shall not be taken into account.

The second criterion, which concerns the sound nature of public finances, is explained by Article 2 of Protocol 13. Thus, the criterion stated implies that, at the time of the examination, the Member State is not in the power of excessive deficit, as defined in Article 3(1) of the Treaty. Article 126 (6) of the Treaty.

On the application of the criterion for participation in the exchange-rate mechanism of the European Monetary System, it shall be deemed to be fulfilled where the member state examined has not exceeded the normal fluctuation margins provided for by the mechanism and has not experienced serious tensions for a period of at least two years prior to the examination. At the same time, it must be a condition that the examined state has not deliberately devalued its currency's exchange rate against the euro. The analysis of serious tensions actually implies examining the degree of deviation of exchange rates from the euro in the ERM II. The main indicators used in this analysis are exchange rate volatility against the euro, short-term interest differentials (compared to the euro area) and their evolution, but also an analysis of the extent to which currency interventions and international financial assistance programs have served to stabilize the currency[44].

Last but not least, the fourth criterion relating to the level of long-term interest rates is applied by comparing the average nominal interest rates recorded by the State in the last year before the review, with the average interest rate of no more than three member states that have achieved the best results in the field of price stability. Thus, the average nominal interest rate for the Member State may not exceed by more than 2 percentage points the arithmetical average interest rate for the three Member States that perform best according to price stability. In practice, the non-weighted arithmetic average of the long-term interest rates of the same three Member States used to calculate the benchmark for the price stability criterion will be calculated. It should be noted that interest rates are calculated on the basis of long-term government bonds or comparable securities, taking into account differences in national definitions.

Table 1: Convergence criteria/Maastricht criteria

No.	Criterion	Method for the calculation	Explanation
1.	Price stability	The inflation rate will be measured according to the prices of consumption	Price stability will translate into an average inflation rate over the 12-month period prior to the review not exceeding by more than 1.5% the average inflation rate in the 3 EU Member States with the most stable prices.
2.	Stability of public finances	Two relevant macroeconomic indicators will be analyzed: Government debt and deficit	The excessive deficit procedure has not been initiated

[42] Which states that „*the Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists*".

[43] Art. 140 alin. (1) TFEU.

[44] According to European Central Bank- Convergence Criteria.

3.	Exchange rate stability	The evolution of the exchange rate under the Exchange Rate Mechanism will be analyzed	ERM over a period of 2 years
4.	Durability of convergence	The long-term interest rate will be analyzed	12 months before the review, the long-term interest rate should not exceed the average of the top 3 EU countries by more than 2%, with the best performing according to this criterion

Source: Based on data provided by the European Commission

If the convergence criteria are satisfied, the Member State examined will have access to the euro area on the basis of a relatively simple procedure. Thus, the European Commission, on the basis of the Convergence report, will submit the proposal to the Ecofin Council, which, following consultations with the European Parliament, as well as with the Heads of State and Government of the Member States, will decide whether this decision is appropriate. In a favorable case, Ecofin will consult the ECB on the exchange rate at which the replacement of the euro by the national currency will take place.

Of the 12 Member States that joined the EU in 2003 and 2007, only 7 adopted the euro: Slovenia (2007), Cyprus and Malta (2008), Slovakia (2009), Estonia (2011), Latvia (2014) and Lithuania (2015). Totally, the euro area has 19 Member States, totaling some 338 million citizens. The rest of the States, with the exception of Denmark, whose Accession Treaty provides for a number of non-participation periods, are in the process of joining the euro area without, however, having any specific timetable, as they were previously defined and explained.

In this respect, the data in Table 2 are relevant:

Table 2: Degree of convergence achieved by non-euro area Member States

Member State	Price stability	Stability of public finances	Stability of exchange rate	Durability of convergence
Bulgaria	2.6% (> 1.8% average)	Deficit/surplus: +2% Public debt (at the end of 2019): 20.2% of GDP	Since 29 June 2018 the Bulgarian authorities have expressed their intention to include the leva in ERM II. During the reference period (1 April 2018 to 31 March 2020), Cursulam 1,95583 BGN/1 EUR	Between April 2019 and March 2020, long-term interest rates (12 months) were on average 0,3%, net of the reference rate (2,9%).
Czech Republic	2.9% (> 1.8%)	Deficit/surplus +0.3% Government debt (at the end of 2019) <60% (30.2%)	In the two-year reference period (1 April 2018 to 31 March 2020, the Czech koruna did not participate in ERM II but was traded under a flexible exchange rate regime. Rate as at 31 March 2020: 27,312 kroons per euro (7,7% less than average April 2018)	Between April 2019 and March 2020, long-term interest rates stood at 1,5% on average, the 2,9% reference value for the convergence criterion on interest rates.
Croatia	0.9%(<1.8%)	Deficit/surplus +0.4% Government debt > 60% (end of 2019-72.7%)	During the 2-year reference period (1 April 2018 to 31 March 2020), the Croatian kuna did not participate in the ERM II but was traded under a closely controlled exchange rate regime. Since July 2019, Croatian authorities have expressed their intention to include kuna in ERM II. Exchange rate as of 31 March 2020: 7,6255 kunas/euro (2,8% less than the average level of April 2018).	Between April 2019 and March 2020, long-term interest rates stood at 0,9% on average, thus remaining well below the 2,9% reference rate.
Hungary	3.7% (>1.8%)	Deficit/surplus 2% Government debt (at end 2019) 65.5% >60%	Between 1 April 2018 and 31 March 2020, the Hungarian Forint did not participate in ERM II but was traded under a flexible exchange rate regime. Exchange rate on 31 March 2020: 360,02 forints for one euro, 15,5% more depreciated compared to the average level in April 2018.	Between 1 April 2018 and 31 March 2020, the Hungarian Forint did not participate in ERM II but was traded under a flexible exchange rate regime. Exchange rate on 31 March 2020: 360,02 forints for one euro, 15,5% more depreciated compared to the average level in April 2018.
Poland	2.8% (>1.8%)	Deficit/surplus -0.7% Public debt (end of 2019) 45.7% < 60%	In the period from 1 April 2018 to 31 March 2020, the Polish zloty did not participate in ERM II but was traded under flexible exchange rate arrangements. Rate on 31 March 2020: 4,5506 zlots for one euro, 8,5% more depreciated	In the reference period April 2019 to March 2020, Poland's long-term interest rates were on average 2,2 %, lower than the 2,9 % reference rate

			compared to the average level in April 2018.	
România	3.7% (>1.8%)	Excessive deficit procedure initiated in April 2020 (deficit >3%). Deadline for correction: 2022 The budget deficit in 2019: -4.4% Government debt (December 2019): 35.3%	In the two years analyzed (April 1, 2018 and March 31, 2020) the Romanian leu did not participate in the MCS II, but was traded under a flexible exchange rate regime with controlled flotation. Exchange rate on March 31, 2020: Lei 4,8238/ euro, 3,7% more depreciated compared to the average level in April 2018.	Between April 2019 and March 2020, Romania's long-term interest rates stood on average at 4,4% > the 2,9% reference rate in line with the convergence criterion on interest rates.
Sweden	1.6% (<1.8%)	Deficit/surplus +0.5% Government debt: 35.1%	In the 2-year reference period (1 April 2018 to 31 March 2020), the Swedish krona did not participate in ERM II but was traded under flexible exchange rate arrangements. Exchange rate on 31 March 2020: 11,0613 kroons/euro, 6,6% more depreciated compared to the average level in April 2018.	Between April 2019 and March 2020, long-term interest rates in Sweden were on average -0,1%, thus remaining well below the 2,9% reference rate.

Source: Based on data provided by the ECB[1]

Table 3: Government debt evolution in Q3-2020 compared to Q3-2019

Member state	Government debt - Q3 2019	Government debt – Q3 2020
Bulgaria	20.5%	25.3%
Czech Republic	31.5%	38.4%
Croatia	74.4%	86.4%
Hungary	67.2%	74.3%
Poland	47%	56.7%
Romania	35.2%	43.1%
Sweden	35.2%	38.4%

Source: Processing based on Eurostat data

In the context of activity restrictions imposed by the Covid 19 pandemic, during 2020 Member States experienced a deterioration of the relevant macroeconomic indicators in the convergence process. Thus, without exception, the stability of public finances has been severely affected, so that both budget deficits and public debt have increased. Table 3 provides comparative data on the level of government debt in the third quarter of 2020 compared to the similar period of the previous year.

The impact of the pandemic was also felt in what was the volatility of the exchange rate in terms of the depreciation of national currencies against the euro. Long-term interest rates are starting to experience significant fluctuations since April 2020 as a result of the impact of the pandemic on the financial markets. It is therefore easy to understand that the process of joining the euro area will be delayed by the continuing economic effects of the health crisis.

4.2. Public international law instruments related to Economic and Monetary Union

In order to better fulfill the objectives of the EMU, at the Dublin meeting of December 1996, the members of the European Council called for the preparation of a Stability and Growth Pact, in accordance with the principles and procedures established by the Treaties and which could in no way be amended, neither the criteria for participation in stage III of EMU, nor the fact that Member States remained responsible for national budgetary policies, subject, however, to compliance with the conditions laid down by primary law of the European Union[1].

Thus, the Stability and Growth Pact, which provides for both preventive measures and sanctions, consists of a European Council Resolution and two Council Regulations, one on strengthening budgetary surveillance and surveillance of economic policy coordination, and another on to accelerate and clarify the implementation of the excessive deficit procedure[2].

The resolution contained obligations for the Member States, the Commission and the Council. Even if we do not analyze those that fell to the Member States in our research, those relating to the Commission and the Council will be presented below.

Thus, the Commission exercises its right of initiative enshrined in the Treaties in a manner that facilitates the strict, timely and efficient implementation of the Stability and Growth Pact; presents, without delay, the necessary reports, opinions and recommendations to enable the Council to take decisions (...) (enshrined in the Treaty provisions on the avoidance of excessive deficits), which will facilitate the effective operation of the early warning mechanism

[1] European Central Bank- Convergence Raport 2020
[1] According to the European Council Resolution on the Stability Pact and Growth
[2] *** Stability and growth pact, www.eurlex.europa.eu, f.a., accessed 21.03.2021.

and the rapid and strict launch the excessive deficit procedure; undertakes to draw up, without delay, a report on the existence of a risk of an excessive deficit whenever the existing or projected deficit of a State exceeds the 3% of GDP reference value; undertakes that, in the event that the Commission considers that a deficit exceeding 3% of GDP was not classified as excessive and that its opinion differs from that of the Economic and Financial Committee, it shall submit to the Council the reasons for its position and that, at the request of the Council (...), it draw up a recommendation to the Council on a decision on the existence of an excessive deficit[3] in a Member State

For its part, the Council stated its commitment to rigorously and timely implement all elements of the Stability and Growth Pact that fell within its competence (...), to consider the deadlines for the application of excessive deficit procedures as maximum deadlines and, in particular, to recommend that excessive deficits be corrected as soon as possible after their occurrence, and in no case later than one year after their identification, unless special circumstances exist; was called upon to always impose sanctions in the event that a participating Member State does not comply with the obligation to take the necessary measures to put an end to an excessive deficit situation, on the recommendation of the Council; was urged to always consider imposing a non-interest-bearing deposit creation whenever it decided to impose sanctions on a participating Member State (...); was urged to always convert a non-interest-bearing deposit into a fine applicable to the Member State concerned, two years after the decision to impose sanctions in accordance with (the provisions of the Treaties on the prohibition of excessive deficits), unless considers that the identified excessive deficit has been corrected; respectively always state in writing the reasons for a decision not to act at any stage of the procedures applicable to the excessive deficit or the supervision of budgetary discipline, provided that there is a Commission recommendation to act and, in the same situation, to make public the votes cast by the representatives of each Member State[4].

Following these recommendations of the European Council, the Council adopted. Regulation (EC) No 146/97 of 7 July 1997 on the acceleration and clarification of the implementation of the excessive deficit procedure and Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of budgetary surveillance and the surveillance and coordination of economic policies.

Later, in 2005, the Stability and Growth Pact was revised, with the amendments being made to "allow it to take better account of national circumstances and to add additional elements of economic reasoning to the rules imposing obligations on Member States"[5].

To these, in 2011 were added, against the background of the sovereign debt crisis affecting the Eurozone, the measures within the "Package of Six", respectively: Regulation (EU) no. Regulation (EC) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective application of budgetary surveillance in the euro area; Regulation (EC) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on implementing measures to correct excessive macroeconomic imbalances in the euro area;. Regulation (EC) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No Council Regulation (EC) No 1466/97 on strengthening the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EC) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Council Regulation (EC) No 1177/2011 of 8 November 2011 Amending Regulation (EC) No 1467/97 accelerating and clarifying the application of the excessive deficit procedure and Council Directive 2011/85 / EU of 8 November 2011 on requirements relating to the budgetary frameworks of the Member States.

However, against the background of the economic and financial crisis that has hit the humanity since 2008 and the debt crisis that has ravaged the Eurozone as a result, in 2012, to the EU monetary policy edifice based on the TFEU (which, following the entry into force of the Maastricht Treaty, replaced by the TEC in 2009), including the Protocol on the excessive deficit procedure, the Stability and Growth Pact and the derivative instruments mentioned, another element was added, this time a public international law agreement. Specifically, it is the Treaty on Stability, Coordination and Governance within the Economic and Monetary Union.

In that Treaty, the Contracting Parties have agreed, "as Member States of the European Union, to strengthen the economic pillar of economic and monetary union by adopting a set of rules aimed at promoting budgetary discipline by means of a budgetary pact, Strengthening the coordination of their economic policies and improving governance in the euro area, thereby supporting the achievement of the European Union's objectives of sustainable growth, employment, competitiveness and social cohesion"[6].

As regards the possibility of new members being admitted, the Treaty in question, although primarily addressed to euro area Member States, can be considered to be open or at least semi-open, "*it shall apply in full to the contracting parties whose currency is the euro* (…) *and to the other contracting parties to*

[3] In accordance with the Resolution of the European Council on the Stability and Growth Pact.
[4] Idem.
[5] www.ec.europa.eu, *History of the Stability and Growth Pact*, f.a., accessed 09.11.2019.
[6] Article 1 of the Treaty on Stability, coordination and governance in the Economic and Monetary Union (TSCG as follows).

the extent and under the conditions laid down in article 14"[7].

Most interestingly, the Treaty in its Article 2 sets out its relationship with the instruments of European Union law. In particular, it States that "*it shall apply and be interpreted by the Contracting Parties in accordance with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and in accordance with the law of the European Union, including procedural law where secondary legislation is required [and] applies in so far as it is compatible with the Treaties on which the European Union is founded and with EU law* (...) *without prejudice to the competences of the Union to act in the field of economic union*"[8].

With regard to matters of an institutional nature, article 10 of the Treaty stated that "in accordance with the requirements laid down in the Treaties on which the European Union is founded, the Contracting Parties were prepared to make use, whenever appropriate and necessary, of specific measures for the Member States whose currency is the euro, as laid down in Article 136 of the Treaty on the Functioning of the European Union, and enhanced cooperation as provided for in Article 20 of the Treaty on European Union and Articles 326-334 to 300 of the Treaty on the Functioning of the European Union, as regards issues that are essential for the smooth functioning of the euro area, without prejudice to the internal market"[9] In the same idea, for comparative assessment purposes aimed at "the best practices and cooperation toward closer economic policy coordination, the contracting parties shall ensure that all major economic policy reforms they plan will be discussed ex ante and, where appropriate, coordinated between the parties. That coordination shall involve the institutions of the European Union in accordance with European Union law"[10]

From the decision-making point of view, article 12 of the Treaty States that "the Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally at euro area summits, together with the President of the European Commission. The President of the European Central Bank shall be invited to attend these meetings [and] the President of the Euro Summit shall be designated by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the election of its President by the European Council and for the same period of office"[11].

As regards euro area meetings, they "shall be organized when necessary and at least twice a year so that the Contracting Parties whose currency is the euro discuss issues related to their specific responsibilities with regard to the single currency, other issues related to euro area governance and its rules, as well as strategic guidelines for the delivery of economic policies with a view to increasing convergence in the euro area"[12]. In the same idea, "the Heads of State or Government of the Contracting Parties, other than those whose currency is the euro, which have ratified this Treaty, shall also participate in the discussions at the Euro Summit on the competitiveness of Contracting Parties, changing the overall architecture of the euro area and the fundamental rules that will apply to it in the future and, where appropriate and at least once a year, in discussions on specific issues related to the implementation of this treaty on stability, coordination and governance in the economic and monetary union"[13].

From the point of view of the relations between the Summit provided for by the Treaty and the institutions of the Union, it should be noted that "*the President of the Euro Summit shall ensure the preparation and continuity of euro area summits, in close cooperation with the President of the European Commission. The body in charge of preparing and following up the results of the Euro Summit shall be the Eurogroup and its Chair may be invited to attend these meetings for that purpose*"[14]. In the same vein, "*the President of the European Parliament may be invited to be heard. The President of the Euro Summit shall report to the European Parliament after each Euro Summit*"[15], while "*the President of the Euro Summit shall closely inform contracting parties other than those whose currency is the euro and the other Member States of the European Union on preparation and results of euro area summits*"[16]. We also consider it important to note that "*as provided for in Title II of the Protocol (No 1) on the role of national parliaments in the European Union annexed to the Treaties of the European Union, the European Parliament and the national parliaments of the Contracting Parties will jointly decide to organize and promote a conference of representatives of the relevant committees of the European Parliament and of the representatives of the relevant committees of national parliaments, in order to discuss budgetary policies and other matters covered by this Treaty*"[17].

[7] Art. 2 of the TSCG.
[8] Art. 3 of the TSCG.
[9] Art. 10 of the TSCG.
[10] Art. 11 of the TSCG.
[11] Art. 12 of the TSCG.
[12] Idem.
[13] Idem.
[14] Idem.
[15] Idem.
[16] Idem.
[17] Idem.

5. Conclusions

In the conclusion of this study, we note that, since its inception, the political and legal construction that led to the establishment of Economic and Monetary Union has faced and had to overcome the inadequacy of the legal bases identified in the institutive or amending Treaties. Although complex and not always linear (being defined, as the whole evolution of the Union construction, of crises and failures which, far from undermining the project arising from Robert Schuman's Declaration, defined and consolidated it[18]), the progress of economic and monetary Union once again shows that "*from the point of view of the evolution of competences within the Communities and the European Union, (...) initially, the responsibility of the European Community involved only in economic and commercial matters. As the EU becomes a political partner, Member States give it more powers, realizing that certain issues are better coordinated at supranational level*"[19]. This supranational nature implies, of course, some sovereignty sharing but, in the economic field that our study touches and not only, "*the question is* [always] *that of the first national sovereignty and that of the economy*", which essentially depends on political will. However, this has not always been done by means typical to European Union law, but also by using the public international law creatively and as an expression of the said political will. And it is precisely in this political will that, we believe, lies the future of Economic and Monetary Union, because the financial crisis that the world experienced in 2008-2012 demonstrated that the eternal problem of "*the quest for legal and ethical grounding of the decisions to be made by public authorities in case of a crisis continues unabated*"[20], particularly in an area where technical and cold criteria and the desiderate of macroeconomic stability are faced with the need to safeguard the values on which both the Union and the societies of which it is composed, of which human dignity must always be at the forefront.

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[18] For further details, see Augustin Fuerea, *Manualul Uniunii Europene*, *Ediția a VI-a revizuită și adăugită*, Editura Universul Juridic, București, 2016, passim.

[19] Mihaela Augustina Dumitrașcu, Oana Mihaela Salomia, *Dreptul Uniunii Europene II, Curs universitar*, Editura Universul Juridic, 2020, p. 56.

[20] Monica Florentina Popa, *Ce nu poate să facă analiza economică în drept - capcane și implicații practice" (What the economic analysis of law can't do - pitfalls and practical implications)*, paper presented within the International Business Law Conference, november 13th 2020 (*Perspective ale dreptului afacerilor în mileniul al treilea*), Bucharest, 2020, available at www.businesslawconference.ro, 2020, accessed 20.03.2021.

THE INFLUENCE OF THE EUROPEAN LAW AND OF THE CASE LAW DEVELOPED BY THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE CONSTITUTIONAL REVIEW IN ROMANIA

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Abstract

The paper intends to highlight the complex influences that are inherent to the interaction of the European law and domestic law, from the perspective of the constitutional review. Constitutional adjudication is one of the most effective instruments of the rule of law, but usually the reference norm is the national Basic Law. Nevertheless, as a Member State of the European Union, Romania has recognized the guiding principles developed by the Court of Justice of the European Union Democratic in its case law, namely the direct effect and the precedence of European law in case of inconsistency of domestic law. Thus, under certain conditions, the Constitutional Court of Romania had to extend the reference norms in order to take into consideration the European law, as well. Hence, one of the consequences of Romania's accession to the European Union was that certain norms of European Union law became a reference tool for exercising constitutional review through the glass of Article 148 of the Romanian Basic Law which enshrines the prevalence of the founding treaties of the European Union and of other binding Community (European) regulations over contrary provisions of national law. Furthermore, CJEU-s case law gained an important place in the reasoning of the Romanian Constitutional Court-s decisions. Last, but not least, the paper will present the interaction of the two fore mentioned courts in relation with the preliminary rulings rendered by CJEU in accordance with Article 267 of the Treaty on the Functioning of the European Union.

Keywords: *Review of constitutionality, European law, binding European regulations, preliminary rulings procedure, CJUE case-law.*

1. Introduction

The paper is focused on the complex interactions between the national and European law. The interplay of the two normative systems leads to situations that are sometimes rather difficult to manage and rests to ordinary courts the delicate task to find the proper solution. Since the accession of Romania to the European Union, the Constitutional Court was also often asked to bring its contribution in this context. The issue was brought to the attention of the Constitutional Court even prior to this moment, in 2003, when it had to adjudicate over the constitutionality of amending the Romanian Basic Law, initiated with the declared intention to harmonize it with the European standards and values. After that, in numerous cases the review of constitutionality proved its importance in what concerns the process of accurate understanding and integrating the European law in the Romanian legal system. The purpose of this paper also consists in showing the influence of the case law developed by the Court of Justice the European Union which acquired a quasi-normative function, that redefined the position of domestic law in relation with the provisions of the founding treaties and other binding normative acts at the level of the European Union. The Constitutional Court of Romania often invokes the assessments of the CJEU in the reasoning of its decisions. The paper will bring into light the relevant case law of the Constitutional Court and will use it in order to prove its contribution in implementing European law into the national legal system. Due to its impact on various fields of law, the issue was taken into consideration by certain scholars[1], but the complexity of the topic offers a very wide range of approaches, including the one emerged from the present study.

2. The relationship between the constitutionality review exercised by the Romanian Constitutional Court and the European law

Accession to the European Union - international entity based on its own legal order, which is, in the same time, a specific and an integrative one - requires a constant effort to harmonize the national legislation of each Member State with the European standards and to adapt to the normative requirements of this supranational structure.

The purpose of this constant approach is the unification of national legal systems, the achievement of a single European order, as an implicit objective, negotiated by the Member States and enshrined in the

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[1] See, for instance, Marieta Safta, „Notă de jurisprudență a Curții Constituționale [18-22 noiembrie 2019]. Raporturile între dreptul național, internațional, european în cadrul controlului de constituționalitate (I)" published on www.juridice.ro https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitutionale-18-noiembrie-22-noiembrie-2019.html#_ftn5; Gabriela Zanfir Fortuna, „Curtea Constituțională a României și procedura întrebărilor preliminare. De ce nu?", *Revista Română de Drept European* nr. 5/2011, pp. 82-97, Viorel Tatu, „Influența jurisprudenței Curții Europene de Justiție asupra dreptului românesc", *Universul Juridic Premium* nr. 8/2017.

founding treaties[2]. During this process, the interplay of national and supranational law can sometimes be problematic, involving complex legal analyzes that should take into account both the supremacy of the Member States' Basic Laws and the specific effects of the European law over their national legal systems.

In what concerns Romania, its intention to acquire the status of full member of the European Union[3] required a multitude of changes in order to adapt its legal system at the values imposed by the European Union. The most significant change took place in 2003, when its Basic Law was amended at the end of a long process, concluded with the popular approval given by the Romanian citizens throughout a referendum[4]. On that occasion, the Basic Law was supplemented with numerous new provisions in order to elevate the standard of protection of fundamental human rights and to enforce the guarantees of the rule of law.

In the context of the topic approached in the present paper, Article 148 of the revised Basic Law has a particular significance because it clarifies the relationship between domestic law and the European Union's law. According to paragraph (2) of the said article, following accession, the provisions of the founding treaties of the European Union, as well as the other mandatory community [European][5] regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.

Due to its power provided by the Basic Law[6], the Constitutional Court of Romania adjudicates *ex officio* on initiatives to revise the Constitution. Analyzing the initiative that lead to the 2003 revision of the Basic Law, the Court stated[7] that accession to the European Union, once achieved, implies a series of consequences that could not occur without proper regulation, including those of constitutional rank. The Court stated that the first of these consequences requires the integration into the domestic law of the *acquis communautaire*, as well as the precise determination of the relationship between European normative acts and domestic law. In this respect, the Romanian Constitutional Court noted that the solution proposed by the authors of the amending initiative took into account the implementation of European law in the national space and the establishment of the rule of prevalent application of European law over contrary provisions of domestic law, in accordance with the provisions of the act of accession.

The Court emphasized that the Member States of the European Union have decided to place the *acquis communautaire*, the founding treaties of the European Union and the regulations derived from them, on an intermediate level, right between the Constitution and other laws, when it comes to binding European normative acts. The Court considered that such a rule does not prejudice the constitutional provisions regarding the limits of revision, nor other provisions of the Fundamental Law, being a particular application of Article 11 Paragraph (2) of the Basic Law, according to which "Once ratified by Parliament, according to the law, treaties are part of domestic law".

The issue of the relationship between national and European law was again brought to the attention of the Constitutional Court in 2014, when a new proposal to revise the Basic Law was verified *ex officio*. According to the initiators, Article 148 paragraph (2) of the Constitution was to be amended and to provide that "Romania ensures the observance, within the national legal order, of the European Union's law, according to the obligations assumed by the act of accession and by the other treaties signed within the Union ".

The Court found[8] that this new wording violates the constitutional limits on matters of revision[9]. Thus, establishing that European Union's law applies without any circumstances within the national legal order and not distinguishing, in this regard, between the

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[2] Ioan Muraru, Simina Tănăsescu, (coordonatori), *Constituţia României – Comentariu pe articole*, Editura C.H.Beck, Bucureşti, 2008, p.1437.

[3] In 1995, Romania applied to join the European Union. Accession negotiations were launched in December 1999 and officially opened in February 2000. The Treaty of Accession to the European Union was signed by the President of Romania on April 25, 2005, in an official ceremony held at the Neumunster Abbey in Luxembourg. On January 1, 2007, Romania became a member state of the European Union (https://ec.europa.eu/romania/about-us/eu_romania_ro).

[4] The law on the revision of the Romanian Constitution was approved by the national referendum of October 18-19, 2003 and entered into force on October 29, 2003, the date of publication in the Official Gazette of Romania of the Decision of the Constitutional Court no. 3 of October 22, 2003 for the confirmation of the result of the national referendum of October 18-19, 2003 regarding the Law on the revision of the Romanian Constitution.

[5] The institutional reform implemented by the Treaty of Lisbon, which entered into force on 1 December 2009, has changed the term "Community law" and replaced it with "European law". Prior to that Treaty, the term "Community law" was used due to the fact that the European Communities (European Economic Community - EEC, European Coal and Steel Community - ECSC and Euratom) were one of the three pillars of European construction, along with Member States' cooperation in common foreign and security policy (CFSP) and Member States' cooperation in areas such as justice and home affairs (JHA).
(see https://op.europa.eu/webpub/com/abc-of-eu-law/ro/).

[6] Article 144 letter a) of the Basic Law as it was before the revision. After the revision, the same provisions are contained in Article 146 letter a).

[7] Decision no. 148 of April 16, 2003, published in the Official Gazette of Romania no. 317 of May 12, 2003.

[8] Decision no. 80 of February 16, 2014, paragraphs 455, 456, published in the Official Gazette of Romania no. 246 of April 7, 2014.

[9] There are several fundamental values that are considered the "hard core" of the Fundamental Law of Romania. These values are provided by Article 152 according to which "(1) None of the provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms or of the safeguards thereof".

Constitution and other domestic laws, the new normative content of the provisions of Article 148 paragraph (2) of the Constitution is equivalent to placing the Basic Law on a secondary level toward the legal order of the European Union. From this perspective, the Court noted that the fundamental law of the state - the Constitution - is the expression of the sovereign will of the people, which means that it cannot lose its binding force only by the existence of an inconsistency between its provisions and those of the European law. In assessing this statement, one has to keep in mind the essential detail that the current Romanian Basic Law is already the result of a major amending process, concluded in 2003, which was focused on bringing it in accordance with the values enshrined in the European law. Also, the Court stated that the accession to the European Union cannot affect the supremacy of the Constitution over the entire legal order.

Subsequently, the Court deepened and detailed the reasoning. Thus, it stressed[10] that the legislator has a constitutional obligation to guarantee, within the enacted normative acts, at least the same level of protection of rights as that provided by the binding acts of the European Union[11], as well as to bring national legislation in line with the binding acts of the European Union, as a permanent and continuous concern regarding the content of legislative activity. This is the interpretation of Article148 paragraph (4) of the Basic Law, according to which the Parliament, the President of Romania, the Government and the judicial authority guarantee the fulfillment of the obligations resulting from the accession act and from the principle of precedence of the European Union's constitutive treaties and other binding European regulations.

In order to properly present the subject matter of this paper, it is necessary to bear in mind that the European Union has developed its own, specific and special legal order both in relation with the internal legal orders of the Member States and in relation with the international legal order. Within it, several categories of sources of law governing the interplay between the European Union and the Member States and various other international organizations, as well as between natural and legal persons, nationals or foreigners, have been identified[12]. First of all, there are the norms with fundamental, constitutional value, which form the sources of primary European law. These are represented by the constitutive and amending European treaties. Then, there is the secondary European law that consists of all unilateral acts issued by the institutions of the European Union. The scholars[13] noticed that one of the consequences of Romania's accession to the European Union consisted in the fact that the norms of European Union law became a reference tool for exercising constitutional review through the glass of Article 148 of the Romanian Basic Law.

The Constitutional Court has developed a rich case-law in this regard. Moreover, it was said[14] that it has built a genuine "doctrine" of the incidence / use of European law in constitutional review, which is necessary to be taken into account in motivating the decisions rendered with regard of the exceptions of unconstitutionality were Article 148 of the Fundamental law is invoked. The Court specified under what conditions European acts - others then constitutive treaties - may be invoked. These conditions were established for the first time in Decision no. 668 of May 18th 2011[15]. The Court specified that the use of a norm of European law within the review of constitutionality as a norm interposed to the reference one[16] implies, based on Article 148 paragraph (2) and (4) of the Constitution, a cumulative conditionality: on one hand, this rule must be sufficiently clear, precise and unequivocal in itself or its meaning has been clearly, precisely and unequivocally established by the Court of Justice of the European Union. On the other hand, the norm must be limited to a certain level of constitutional relevance, so that its normative content to sustain the check of a possible violation of the Constitution by the national law – keeping in mind the decisive fact that the national Basic Law in the only direct reference norm in the review of constitutionality[17].

However, it has to be once again highlighted that these are not provisions contained in the founding or amending European treaties. The Romanian Constitutional Court firmly stated that it is not within its competence to analyze the consistency of a provision of national law with the texts of these treaties, in the light of Article 148 of the Romanian Basic Law. Such power rests with the regular courts, which, in order to reach an accurate conclusion as to the resolution of the dispute before it, may formulate - *ex officio* or at the request of one of the parties - a preliminary question within the scope of Article 267 of the Treaty on the Functioning of the European Union,

[10] See Decision no. 64 of February 24, 2015, published in the Official Gazette of Romania no. 286 of April 28, 2015, paragraph 33.
[11] That specific case adjudicated by the Constitutional Court concerned the right to social protection measures.
[12] Augustin Fuerea, *Manualul Uniunii Europene*, Ediția a IV-a, Editura Universul Juridic, București, 2010, p.122.
[13] M. Safta, „Notă de jurisprudență a Curții Constituționale [18-22 noiembrie 2019]. Raporturile între dreptul național, internațional, european în cadrul controlului de constituționalitate (I). Interpretarea art. 20 din Constituție – *Tratatele internaționale privind drepturile omului*. Interpretarea art. 148 din Constituție – *Integrarea în Uniunea Europeană. Condițiile cumulative în ceea ce privește folosirea unei norme de drept european în cadrul controlului de constituționalitate ca normă interpusă celei de referință",* published on www.juridice.ro, (a se vedea https://www.juridice.ro/662254/nota-de-jurisprudenta-a-curtii-constitutionale-18-noiembrie-22-noiembrie-2019.html#_ftn5).
[14] Ibidem.
[15] Published in the Official Gazette of Romania no. 487 of July 8, 2011.
[16] That is, the provisions and principles contained in the Romanian Constitution.
[17] See also Decision no. 64/2015, published in the Official Gazette no. 286 of April 28, 2015.

addressed to the Court of Justice of the European Union. If the Constitutional Court considers itself competent to rule on the consistency of national legislation with the European law, there would be a possible conflict of jurisdictions between the two courts, which, at this level, would be unacceptable[18].

In this regard, the Court decided[19] that the exceptions of unconstitutionality where the argument of unconstitutionality is made with reference to the provisions of Article 148 paragraph (2) of the Constitution - which enshrines the primacy of the provisions of the founding treaties of the European Union and other binding Community (European) regulations over contrary provisions of national law - to be rejected as inadmissible, because they raise issues related to the application of the law, which does not fall within the scope of the Constitutional Court's power, but of the regular courts'.

The Constitutional Court also stated[20] that it does not have the power to interpret the European rules in order to clarify or establish their content, as that task rests with the Court of Justice of the European Union. However, taking into consideration the place that the Community (European) regulations occupy in relation to domestic law, according to Article 148 paragraph (2) of the Constitution, the Court has to invoke, in its reasoning, the binding acts of the European Union, whenever they are relevant to the case, as long as their content is not unequivocal and as long as they do not require any interpretation whatsoever.

Finally, with regard to the reference to European acts, the Court stated[21] that it has no jurisdiction to review the consistency of a national law transposing a directive and the respective directive. Moreover, a possible inconsistency of the national act with the European one does not implicitly attract the unconstitutionality of the national transposition act. Thus, there is nothing to prevent the national legislature from granting or providing a higher level of protection in national law than in the European law[22].

From the perspective of constitutional review, an interesting aftermath of Romania's accession to the European Union is the arising of a new justification for the Government emergency ordinances, consisting in the intention to avoid sanctions imposed on Romania by the European Commission for not fulfilling its obligations at European level. Thus, the Court examined[23] the pleas of extrinsic constitutionality regarding a Government emergency ordinance, in view of the alleged violation of the provisions of Article 115 paragraph (4) of the Romanian Constitution, according to which the emergency ordinances can only be adopted in extraordinary situations, the regulation of which cannot be postponed. The Constitutional Court held[24] that the criticized emergency ordinance was adopted in the context of the opening of the infringement procedure against Romania by the European Commission, pursuant to Article 226 of the Treaty establishing the European Community. The Government issued the said emergency ordinance in order to avoid a possible procedure before the Court of Justice of the European Union. In the explanatory memorandum, the extraordinary situation as well as the urgency of the regulation were motivated on the imperative need to take legal measures to ensure compliance with the applicable rules of Community (European) law, including the case-law of the Court of Justice of the European Communities (Union). The Court also found that, in accordance with the provisions of Article 148 paragraph (4) of the Constitution, the Romanian authorities have undertaken to guarantee the fulfillment of the obligations resulting from the founding treaties of the European Union, from the binding Community (European) regulations and from the act of accession. To this end, the Government is empowered, at a constitutional level, to guarantee the fulfillment of Romania's obligations towards the European Union. Accordingly, the Court considered fully constitutional the use of emergency ordinances when it is necessary to render the domestic legislation consistent with the European law, especially when there is the menace of imminent initiation of infringement proceedings before the Court of Justice of European Union.

A special mention should be made in what concerns the review of constitutionality in the Romanian legal system with reference to the provisions of the Charter of Fundamental Rights of the European Union, given the fact that there is an interference, from the point of view of human rights protection, between the European Union legal order and the legal framework established by the Convention for the Protection of Human Rights and Fundamental Freedoms, as essential normative document of the Council of Europe. Thus, regarding the incidence of the provisions of Article 47 of the Charter of Fundamental Rights of the European Union, comprising the right to an effective remedy and to a fair trial, the Constitutional

[18] See, in this regard, Decision no. 1249 of October 7, 2010, published in the Official Gazette of Romania, Part I, no. 764 of November 16, 2010, Decision no. 137 of February 25, 2010, published in the Official Gazette of Romania, Part I, no. 182 of March 22, 2010, Decision no. 1596 of November 26, 2009, published in the Official Gazette of Romania, Part I, no. 37 of January 18, 2010, Decision no. 668/2011, Official Gazette no. 487 of July 8, 2011.

[19] See, for example, Decision no.1119/2010, published in the Official Gazette no. 745 of November 8, 2010.

[20] Decision no. 383/2011, published in the Official Gazette. no. 281 of April 21, 2011.

[21] Decision no. 137/2010, published in the Official Gazette. no. 182 of March 22, 2010 or Decision no. 646/2010, published in the Official Gazette. no. 368 of June 4, 2010.

[22] For a more complex and detailed analyze of a similar issue, see Solange I and II decisions of The Germann Federal Constitutional Court (Bundesverfassungsgericht).

[23] Government Emergency Ordinance no. 50/2008 for the establishment of the pollution tax for motor vehicles, published in the Official Gazette of Romania, Part I, no. 327 of April 25, 2008.

[24] Decision no. 1596 of November 26, 2009, cited above, Decision no. 802/2009, published in the Official Gazette no. 428 of June 23, 2009.

Court noticed[25] that in the case law of the Court of Justice of the European Union, for example, the Judgment of 22 December 2010 in Case C-279/09 - *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, paragraph 35, it was held that, according to Article 52 paragraph (3) of the Charter, insofar as it contains rights corresponding to those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and scope are the same as those provided for in the Convention.

The meaning and extent of the guaranteed rights are determined not only by the text of the Convention, but also, in particular, by the case law of the European Court of Human Rights. Article 52 paragraph (3) the second sentence of the Charter provides that the first sentence of the same paragraph shall not preclude Union law from conferring wider protection. Therefore, regarding the content of the right to an effective appeal and to a fair trial provided by Article 47 of the Charter, the Court from Luxembourg held in its Judgment of 26 February 2013 rendered in Case C-311/11 - *Stefano Melloni v. Prosecutor's Office*, paragraph 50, that it corresponds to the content that the case law of the European Court of Human Rights recognizes to the rights guaranteed by art. 6 paragraphs 1 and 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (see the judgments of the European Court of Human Rights of 14 June 2001, 1 March 2006 and 24 April 2012 in *Medenica v. Switzerland*, paragraphs 56-59, *Sejdovic v. Italy*, paragraphs 84, 86 and 98, and *Haralampiev v. Bulgaria*, paragraphs 32 and 33).

In the same time, the Constitutional Court held[26] that, as a principle, the provisions of the Charter of Fundamental Rights of the European Union are applicable in constitutional review insofar as they ensure, guarantee and develop constitutional provisions on fundamental rights, in other words, insofar as their level of protection is at least at the level of constitutional norms in the field of human rights[27]. This view corresponds to that outlined in the practice of the most representative authorities of constitutional jurisdiction in Europe[28], which, in view of the principle of the supremacy of the Constitution, considered that, in the field of the human rights, European law cannot take precedence if the level of protection granted by the national fundamental laws is superior to that offered by European legislation[29].

3. Relationship between the case law of the Court of Justice of the European Union and the review of constitutionality exercised by the Constitutional Court of Romania

Within the legal order of the European Union, the judgments of the Court of Luxembourg are an essential element in explaining the rules and measures ordered by the European institutions. Due to the interpretations included in the reasoning of its judgments, the Court of Justice has a major influence on the whole European law. Although it is not a source of law in the sense that the judicial precedent has got in the common law system, due to the fact that its solutions do not have *erga omnes* effects, its decisions are mandatory in terms of interpretation of the provisions of European law. Nevertheless, the case law of the Court of Justice the European Union has acquired a quasi-normative function, by clarifying and specifying the provisions of the treaties and other normative acts at the level of the Union.

Moreover, the fundamental principles of European law are the creation of the Court of Justice. The ideas comprised in the reasoning of some certain cases that represent historical jurisprudential landmarks have been transformed into general principles of European law, creating the structure of resistance of the European legal edifice. Thus, thanks to the case law of the Court from Luxembourg, have emerged two legal mechanisms, essential for the efficient functioning of the European Union, namely, the direct applicability of the European law (direct effect) and the precedence of the European norms in conflict with the domestic ones. The latter rule has been taken over explicitly also by Article 148 paragraph (2) of the Romanian Constitution, with reference to the provisions of the founding treaties of the European Union, as well as the other binding community (European) regulations.

The judgment in the case *Van Gend and Loos v. Nederlandse Administratis*[30] is one of the most important decisions for the development of the European legal order, thus establishing the fundamental **principle of the direct effect of Community / European law**. According to the Court of Justice, the European Community is a new legal order of international law, in favor of which Member States have limited their sovereign rights and to which not only States but also their nationals are subject, as Community / European law creates directly rights and obligations not only to the institutions of the European

[25] Decision no. 216/2019, published in the Official Gazette no. 548 of July 3, 2019, paragraph 24.

[26] Decision no. 216/2019, cited above, paragraph 25, Decision no. 339/2013, M.Of. 704 of November 18, 2013 or Decision no. 1237/2010, M.Of. 785 of November 24, 2010.

[27] See, in this regard, Decisions no. 872 and 874 of June 25, 2010, published in the Official Gazette of Romania, Part I, no. 433 of June 28, 2010, and Decision no. 4 of January 18, 2011, published in the Official Gazette of Romania, Part I, no. 194 of March 21, 2011.

[28] These are famous cases, such as the "Frotini" Judgment of the Italian Constitutional Court, the "Solange I", "Solange II" Decisions and the "Maastricht" Decision of the Federal Constitutional Court of Germany.

[29] See, for details, I. Muraru, S.E. Tănăsescu, op.cit., p.1440.

[30] NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen, Judgment of 5 February 1963 in Case 26/62.

Union and the Member States, but also to their nationals.

Of particular significance is the judgment in *Flaminio Costa v. Enel* case[31], which enshrined the **principle of the precedence of Community / European law**, which complements its direct effect, in the sense that, where, by a Community / European provision, citizens of the European Union are granted rights or obligations through European acts whose content is contrary to national law, the application of European law over domestic law will be the one that prevails.

The European legal order is autonomous from the law of the Member States, but at the same time it is integrated into national legal systems, so that European law can only be achieved if it is perceived and integrated in the domestic legal order of each Member State[32]. It has been shown that, in this way, a complex report of complementarity is outlined, the law of the European Union needing the support of the systems of national law, but it equally is imposing itself on them. It is essential that, whenever there are inconsistencies, elements of contradiction or conflicts between the Union legal order and the legal order of the Member States, they must be resolved in the light of the principle of the priority/precedence of European law.

The courts of each EU Member States have the responsibility to ensure the accurate application of European law on their territories. But there is a risk that courts in different states would interpret the same European provisions differently. In order to prevent such situations, when a matter of European law is at stake, there can be used the procedure for pronouncing preliminary solutions. When a domestic court has doubts about the interpretation or validity of a provision of European law, it may, and sometimes is even obliged[33] to seek the advice of the Court of Justice of the European Union in the form of a preliminary ruling.

The preliminary rulings procedure[34] is based on the basic principles of European law, namely its validity in the national law of the Member States (direct effect) and the precedence of its application over the domestic legislation of the Member States. Due to this procedure, the CJEU plays a particularly important role in the development and improvement of European law, thanks to its explanations and clarifications on the Union Treaties. Through this type of procedure, a mechanism of collaboration between the Court of Justice and the national courts is developed, without, however, any hierarchical subordination relationship between these two types of jurisdictions. This is also the reason why the Court in Luxembourg cannot be challenged in a preliminary ruling which seeks to clarify issues relating to the extent to which domestic legislation is compatible with European law. Such jurisdiction rests with national courts, in the sense that the national judge is said to be the "ordinary judge" in the European legal system. This aspect was also taken into account in the case law of the Romanian Constitutional Court[35], which noted that the CJUE does not have the competence to issue a decision aimed to establish the validity or invalidity of the national law. But the CJEU is the one that interprets the founding Treaties provisions and the aftermath of this power may be that a provision of national law appears to be inconsistent with European law.

The effects of preliminary rulings have been specified by the CJEU itself in its settled case-law, namely that "the interpretation which, in exercising the jurisdiction conferred by Article 177 (now Article 267 of the Treaty on the Functioning of the European Union), the Court of Justice shall give to a rule of Community (European) law, clarifies and defines, where necessary, the meaning and the scope of that rule, as it is or should be understood and applied from the time of its entry into force" (Judgment of 27 March 1980, Case 61/79 *Denkavit italiana v Amministrazione delle finanze dello Stato*, paragraph 16, judgment of 2 February 1988, Case 24/86 *Blaizot v University of Liege and Others*, paragraph 27, judgment of 15 December 1995, in Case C-415/93 *Bosman and Others v Union royale belge des societes de football association and Others*, paragraph 141).

The conditions for referral to the Court of Justice of the European Union have been developed in its settled case-law. In this regard, by its Judgment of 6 October 1982 in Case C-283/81, *SRL CILFIT and Lanificio di Gavardo SpA*, the CJEU ruled that Article 177 (now Article 267 TFEU) "is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt; the existence of such a possibility must be assessed in the light of the specific

[31] Judgment of 15 July 1964 in Case 6/64 on the reference for a preliminary ruling from the Giudice Conciliatore in Milan in the case of Flaminio Costa v. Enel.

[32] Vasile Pătulea, "Principiul primordialității dreptului comunitar față de sistemele de drept naționale ale statelor membre ale Uniunii Europene", in *Dreptul* nr. 7/2005, p. 235.

[33] The national judge has the duty to address such a question to the CJEU when the decision to be given in the pending dispute is not open to any ordinary appeal. In addition, the assistance of the ECJ must be sought when the interpretation given by the European court is likely to have a significant effect on the resolution of the dispute, being decisive for pronouncing a fair solution.

[34] In accordance with Article 267 of the Treaty on the Functioning of the European Union (formerly Article 243 TEC), the CJEU may issue preliminary rulings on the interpretation of the Treaties, as well as on the validity and interpretation of acts adopted by the institutions, bodies, offices or agencies of the European Union.

[35] See, for example, Decision no. 921/2011, published in the Official Gazette no.673 of September 21, 2011.

characteristics of community law, the particular difficulties to which its interpretation rises and the risk of divergences in judicial decisions within the community". Also, in its Judgment of 9 September 2015 in Case C-160/14, *Joao Filipe Ferreira da Silva e Brito and Others*, paragraph 40, the Court of Justice of the European Union ruled that "the national court or tribunal has sole responsibility for determining whether the correct application of EU law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court a question concerning the interpretation of EU law which has been raised before it" [36].

In the light of this case-law of the Court of Justice of the European Union, it is for the Constitutional Court to determine whether or not the questions in the request for referral to the CJEU are relevant and necessary to the *a quo* case. The Constitutional Court of Romania has referred a question to the Court from Luxembourg[37], considering that the interpretation given by the European Court is imperative for resolving a certain exception of unconstitutionality. The Constitutional Court of Romania thus entered among the European constitutional contentious jurisdictions that used such a procedure to refer to the Luxembourg Court.

Therefore, as it was said[38], the Constitutional Court of Romania is one of the main factors in the process of Europeanization of the domestic legal system, respecting the national constitutional identity. This is the conclusion drawn of the many cases in which the Court ruled on the obligations of national authorities from the perspective of Article 148 of the Constitution and the manner of fulfilling these obligations.

4. Conclusions

Apparently an intricate weaving, the interaction between the European law and the domestic law was and still is a pretty challenging task for the Romanian authorities, regardless of the field they activate in. However, the Romanian Basic Law provides an accurate grid to clear up the interplay of the two normative systems. Thus, Article 148 paragraph (2) of the Constitution enshrines the primacy of the provisions of the founding treaties of the European Union and other binding Community (European) regulations over contrary provisions of national law. Looking through the glass of this principle, the judges from the ordinary courts have the power to adjudicate over the inconsistency of the domestic legislation. The constitutional review had to adapt as well to this interference. The main reference is obviously the Romanian Basic Law. But the Constitutional Court also stated that, under certain conditions, it may refer, in the reasoning of its decisions, to the binding acts of the European Union, whenever they are relevant to the case and as long as their content is not unequivocal. The present paper tried to depict the significant case law of the Constitutional Court in what concerns the interaction of the two normative systems, the European and the Romanian one and to underline its contribution in counteracting the difficulties engendered by this operation. The analyzed topic opens the door for further researches concerning especially the view of the Constitutional Court of Romania regarding the referral of requests for preliminary rulings to the Court of Justice of the European Union on the interpretation of European Union law, if it is necessary for the review of constitutionality of the Romanian legislation.

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THE LEGAL REGIME OF INTERNATIONAL SANCTIONS IN ROMANIA

Adrian COROBANĂ*

Abstract

This article analyzes the legal framework through which the Romanian state implements, in concrete terms, at national level, the acts with binding legal force of the United Nations and the European Union through which international sanctions are established. The paper focuses mainly on the interpretation of Romanian legal norms governing the legal regime of the application of international sanctions on the territory of Romania. In this sense, as a research methodology are used the systematic method and the historical method of interpreting the legal norms regarding the application of international sanctions in Romania. The research shows that the Romanian legislator is in line with the international trend to increase the effectiveness of targeted sanctions by regulating the way in which they are implemented on the national territory international sanctions established at the level of the United Nations or at the level of European Union.

Keywords: *international sanctions, legal regime, targeted sanctions*.

1. Introduction

Taking into account art. 39 of the Charter of the United Nations, according to which: "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security"[1], international sanctions are binding restrictive measures for member states of the United Nations.

Until 1990, the UN Security Council imposed classical international sanctions (so-called comprehensive sanctions) - which affected the entire state or the entire population of a state or territory, for example - the embargo, the non-issuance of visas to all citizens of that state, and so on They had a rather harmful effect on the population and not on the ruling elite of that state, which was responsible for those illicit acts that violated public international law.

After 1990, the practice of the Security Council and the practice of states focused mainly on so-called targeted sanctions, which more severely affect the ruling elite of states with illicit conduct. And here we have mainly sanctions such as freezing funds, withdrawing visas and residence permits for those in the ruling elite, banning the provision of funds or economic resources, and so on.

At the same time, by imposing targeted sanctions, states have a much greater role to play in implementing these sanctions and ensuring that such measures, which are taken in particular against natural or legal persons, are taken in compliance with all necessary rights and guarantees. -a democratic state.

Therefore, there was a need to create a legal framework consisting of several normative acts at national level to regulate the following aspects: 1. What kind of international sanctions will be implemented by the state authorities at national level? 2. Which institutions will have the power to implement international sanctions? 3. What will be the procedure for implementing international sanctions? 4. What kind of legal acts will be issued for the implementation of international sanctions? 5. Can these legal acts be challenged in court by persons considered to be harmed by the application of international sanctions?

This article analyzes the legal regime of the implementation of international sanctions in Romania.

2. Relevant legal provisions

In Romania, the main normative act that regulates the implementation of international sanctions is the Government Emergency Ordinance no. 202/2008 on the implementation of international sanctions[2] approved by the Romanian Parliament by Law no. 217/2009 and entered into force on December 8, 2008.

In addition to this emergency ordinance, there are a series of infralegal normative acts that regulate the procedure for the application of international sanctions at the level of each institution that has been assigned attributions in this field:

- Regulation of the National Bank of Romania no. 28/2009 on the supervision of the implementation of international sanctions for blocking funds;[3]

- Government Decision no. 603/2011 for the approval of the Norms regarding the supervision by the National Office for Prevention and Combating Money Laundering of the manner of implementation of international sanctions;[4]

- The procedure regarding the manner of fulfilling the attributions of the National Agency for Fiscal

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[1] Art. 39 – UN Charter.

[2] Published in the Official Gazette, Part I no. 825 of December 8, 2008.

[3] Published in the Official Gazette, Part I no. 891 of December 18, 2009.

[4] Published in the Official Gazette, Part I no. 426 of June 17, 2011.

Administration in the field of international sanctions, from 14.09.2020 approved by the Order of the President of the National Agency for Fiscal Administration no. 3486/2020;[5]

- Regulation no. 25/2020 on the supervision of the implementation of international sanctions by the Financial Supervisory Authority and the entities regulated by it[6], which repealed the Regulation of the National Securities Commission no. 9/2009 on the supervision of the implementation of international sanctions on the capital market, the Norm of the Insurance Supervisory Commission on the supervision procedure, in the field of insurance, of the application of international sanctions of 30.07.2009 and the Norm of the Commission for Supervision of the Private Pension System no. 11/2009 on the procedure for supervising the implementation of international sanctions in the private pension system.

3. Categories of international sanctions

Government Emergency Ordinance no. 202/2008 on the implementation of international sanctions regulates the manner of implementation, at national level, of international sanctions established by: 1. resolutions of the United Nations Security Council or other acts adopted pursuant to art. 41 of the Charter of the United Nations; 2. regulations, decisions, common positions, joint actions and other legal instruments of the European Union; 3. Legal acts of international organizations (non-binding international sanctions); 4. Legal acts of other states (non-binding international sanctions); 5. Unilateral decisions of Romania.

Therefore, we note that the Government Emergency Ordinance no. 202/2008 delimits between two types of international sanctions: binding international sanctions (those adopted by the Security Council of the United Nations and those adopted by the European Union) and non-binding international sanctions (adopted by other international organizations, adopted unilaterally by Romania or those adopted by other states).

With regard to non-binding international sanctions, they must fulfill the purposes provided by art. 2 lit. a) of the Government Emergency Ordinance no. 202/2008:

- maintaining international peace and security;
- preventing and combating terrorism;
- ensuring respect for human rights and fundamental freedoms;
- ensuring the development and consolidation of democracy and the rule of law;
- the pursuit of other purposes, in accordance with the objectives of the international community, international law and European Union law.

These sanctions, which are not adopted by the United Nations Security Council or by the European Union, shall become binding in national law by the adoption of a normative act, which shall also establish the necessary implementing measures, including the criminalization of their violation, as appropriate.

The types of international sanctions to be implemented by Romania are as follows:

1. blocking of funds and economic resources;
2. trade restrictions;
3. restrictions on operations with dual-use and military products and technologies;
4. travel restrictions;
5. transport and communications restrictions;
6. diplomatic sanctions;
7. sanctions in the technical-scientific, cultural or sports fields.

4. Public authorities which are competent to implement international sanctions

Legal acts by which international sanctions have been adopted are binding in domestic law for all public authorities and institutions in Romania, as well as for Romanian natural or legal persons or located in Romania, under the regulations establishing the legal regime of each category of acts.

Therefore, any person who has data and information about persons or entities that are subject to international sanctions, who owns or has control over goods or who has data and information about them, about transactions related to goods or in which persons or entities are involved has the obligation to notify the competent authority as soon as it becomes aware of the existence of the situation requiring notification.

Any person may notify the competent authority in writing of any identification error concerning the designated persons or entities, as well as the assets.

The competent authorities to receive and resolve notifications are the following:

- National Agency for Fiscal Administration (in case of sanctions for blocking funds or economic resources);
- National Office for the Prevention and Combating of Money Laundering (in case of restrictions on certain transfers of funds and financial services and aimed at preventing nuclear proliferation);

At the same time, the competent authorities to supervise the implementation of international sanctions are:

- National Agency for Fiscal Administration;
- National Office for Preventing and Combating Money Laundering;
- The National Bank of Romania;
- Financial Supervisory Authority;
- the management structures of the liberal professions;
- Ministry of National Defense.

[5] Published in the Official Gazette, Part I no. 881 of September 28, 2020.
[6] Published in the Official Gazette, Part I no. 1169 of December 3, 2020.

Each of the competent authorities listed above has adopted a number of illegal sub-legal acts setting out their powers in detail.

Thus, the National Agency for Fiscal Administration adopted the Procedure on how to carry out the duties of the National Agency for Fiscal Administration in the field of international sanctions, from 14.09.2020 approved by Order of the President of the National Agency for Fiscal Administration no. 3486/2020.

The activity of the National Office for Preventing and Combating Money Laundering in the field of application of international sanctions is also regulated by Government Decision no. 603/2011 for the approval of the Norms regarding the supervision by the National Office for Prevention and Combating Money Laundering of the manner of implementation of international sanctions.

Also, the Financial Supervisory Authority adopted Regulation no. 25/2020 on the supervision of the implementation of international sanctions, regulation entered into force on January 2, 2021.

As a rule, these infralegal normative acts establish obligations on economic operators and persons exercising a liberal profession (lawyers, accountants, notaries, bailiffs).

Therefore, those obligations are established to adopt internal policies, procedures and mechanisms for the implementation of international sanctions, which include at least the following elements: a) the detection of persons or entities subject to international sanctions and operations involving goods, applicable to potential customers and applicants for occasional transactions; b) acceptance as a customer, including in the case of occasional transactions, for persons or entities subject to international sanctions or for persons or entities requesting the performance of operations in which goods are involved; c) the detection of the persons or entities that are the object of international sanctions and of the operations in which goods are involved, applicable to the existing clientele in the context of the modification and/or completion of the international sanctioning regimes; d) the regime applicable to customers who have been identified as persons or entities subject to international sanctions, starting with the date on which they no longer fall under international sanctions, as well as the regime applicable to persons or entities that have requested operations in which goods are involved; e) the modalities of drawing up and keeping records regarding the persons or entities that are the object of international sanctions and the persons or entities that have requested the performance of operations in which goods are involved; f) the standards for employment and the verifications carried out in this respect, as well as the training programs for the personnel with attributions in the field of international sanctions and for the training and regular evaluation of the employees; g) the access of the persons with attributions in the field to the records of the regulated entity in order to examine the operations carried out in the past with persons or entities detected as persons or entities that are the object of international sanctions; h) the competences of the persons with responsibilities in the implementation of the internal norms for the implementation of the international sanctions; i) the measures applicable to internal control, risk assessment and management, compliance management and communication; j) the obligations incumbent on professionals from the perspective of blocking the property belonging to the person or entity that is the subject of an international sanction; k) the regime applicable to the persons or entities that have requested the performance of operations in which goods are involved according to Government Emergency Ordinance no. 202/2008; l) the procedures for reporting, internally and to the competent authorities, as well as for the prompt provision of data at their request, in the format and methodology established by the authorities.

From our point of view, these infralegal normative acts establish some burdensome obligations. If banks had the necessary architecture to draw up and implement such procedures, when we talk about professionals practicing the liberal professions (lawyers, accountants, notaries, bailiffs), these infralegal normative acts establish some obligations for them that can lead to block the activity of these professionals, as these people often work on their own, without hiring other people.

At the same time, the issue of respecting professional secrecy arises from these professionals, especially among lawyers.

Unfortunately, non-compliance with these obligations imposed on professionals attracts sanctions in their charge: from 10,000 to 30,000 lei.

Compliance with the obligations imposed by these infralegal acts and in particular the obligation to notify the competent authorities when entering into a legal relationship with a person subject to an international sanction is hampered by the competent authorities who often do not comply with their obligations by art. 5 of the Government Emergency Ordinance no. 202/2008 for publishing on its own website the legal acts by which international sanctions are established.

Our *de lege ferenda* proposal would be for the Ministry of Foreign Affairs to establish the obligation to publish on its website a daily updated document that would include a list of all individuals and legal persons and all entities subject to international sanctions. It is necessary for this document to be drafted by the Ministry of Foreign Affairs and not just to publish United Nations resolutions or European Union regulations in this field, as professionals who are required to verify these normative acts would be much more effective in detecting persons or entities which are subject to international sanctions.

5. Legal acts issued for the implementation of international sanctions

Among the legal acts issued by the competent authorities for the application of international sanctions, we notice that the order of the President of the National Agency for Fiscal Administration and decisions of the other competent authorities are included.

The National Agency for Fiscal Administration orders, by order of the President, without delay, the blocking of funds or economic resources that are owned, held or under the control, directly or indirectly, of natural or legal persons who have been identified as being designated persons or entities. This is done also for funds or economic resources derived or generated from assets owned or controlled by natural or legal persons targeted by these sanctions or for funds or economic resources owned or controlled, individually or jointly, by persons targeted by these international sanctions.

In the process of implementing international sanctions, the other competent authorities shall carry out any further inquiries they deem necessary, taking into account the situation, including, if necessary, consulting the competent authorities of any other State, issuing decisions.

In accordance with art. 9 para. (3) of the Government Emergency Ordinance no. 202/2008, the decisions issued by the competent authorities in the field of application of international sanctions can be challenged in court, in the contentious-administrative procedure.

Also, in accordance with art. 19 para. (5) of the Government Emergency Ordinance no. 202/2008, the order of the President of the National Agency for Fiscal Administration can be challenged in court, in the contentious-administrative procedure.

Therefore, we note that the legal acts issued by the competent authorities in the process of implementing international sanctions are considered to be administrative acts, as they can be challenged in court in accordance with the contentious-administrative procedure regulated by Law no. 554/2004.

However, the right to apply to a court is only illusory, as long as the national court checks only whether that person is on the lists of United Nations resolutions or on the lists of European Union regulations, the person cannot challenge the list of sanctions itself and how who got on those lists. Moreover, the case law of the Court of Justice of the European Communities has stated that *"where there is a threat to a nation, measures may be taken that derogate from the right to an effective remedy before a court."*[7]

6. Conclusions

In this article we tried to present the legal regime of the implementation of international sanctions in Romania, analyzing the legal provisions of the Government Emergency Ordinance no. 202/2008 and the provisions of the infralegal normative acts adopted by the Government, the National Agency for Fiscal Administration and the Financial Supervision Authority.

In our approach, we answered some of the questions posed in the introductory part of the article.

The research shows that the Romanian legislator is in line with the international trend to increase the effectiveness of targeted sanctions by regulating the way in which they are implemented on the national territory international sanctions established at the level of the United Nations or at the level of European Union.

However, we note that the entire architecture of the legal regime analyzed focuses on a series of burdensome obligations that are imposed on professionals in the banking and financial field, as well as on professionals practicing the liberal professions (lawyers, notaries, accountants, bailiffs).

As an identified de lege ferenda proposal, it would be the task of the Ministry of Foreign Affairs to establish on its website a daily updated document that would include a list of all individuals and legal entities and all entities subject to sanctions. international.

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ACCESS TO CULTURE IN A DIGITALLY FRAMED EU LAW

Alina Mihaela CONEA*

Abstract

The digital shift is having a significant impact on the relation we have with culture.

Digitisation and online accessibility enable unprecedented forms of engagement. However, new methods of sharing copyright-protected content through the internet raises questions as whether these acts interfere with exclusive copyrights.

Moreover, the right to participate in cultural life implies that individuals have access to cultural heritages and that their freedom to continuously (re)create cultural heritage should be protected. Despite institutional initiatives, there is a growing concern that intellectual property rights can exclude the public from accessing and using digital cultural heritage in the public domain.

Meanwhile, the current debate about open internet has strong implications for fundamental freedoms…and everywhere in the world the courts are searching for balance….

In the search for a fair balance between various conflicting interests, it is essential to trace what values the Court of Justice of European Union protects. The relevance of the Court's judgments is no more limited to the internal market, being significant for the private life of each of us and for the way in which law builds social relations in cyberspace.

The purpose of this paper is to explore the legal base concerning culture in European Union law and in particular the dynamics between digital access to cultural heritage and intellectual property rights.

Keywords: *cultural heritage, open access, copyright, digital data.*

1. Introduction

The purpose of this paper is to explore the legal base concerning culture in European Union law and in particular the dynamics between digital access to cultural heritage and intellectual property rights.

Culture lies at the heart of the European project and is the anchor on which the European Union's "unity in diversity" is founded[1].

The relevance of the topic is multifaceted: economic (the new creativity based economic industries), anthropologic (the artificial intelligence dominance/occurrence) or social (engaging and enjoying social groups/identity).

In various legal documents, the European institutions acknowledge that the *digital shift is having a massive impact* on how cultural and creative goods and services are made, disseminated, accessed, consumed and monetized [2]. The need to seek a new balance between the accessibility of cultural and creative works, fair remuneration of artists and creators and the emergence of new business models is recognized.

Cultural diversity is seen as a source of creativity and innovation. The Council recognize that `cultural activities and creative industries, such as visual and performing arts, heritage, film and video, television and radio, new and emerging media, music, books and press, design, architecture and advertising are also playing a critical role in boosting innovation and technology, and are key engines of sustainable growth in the future`[3].

Meanwhile, the cultural diversity of the peoples of the world has been characterized as a *universal heritage of humankind*. In 1968, a UNESCO Expert Meeting defined culture as 'the essence of being human' which leaves little doubt of its connection with human rights[4]. Article 1 of the UNESCO Declaration of Cultural Diversity (2001) states that, "…as a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature".

Moreover, the right to participate in cultural life implies that individuals and communities have access to and enjoy *cultural heritages* that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected.

European Commission observed that old approaches sought to protect heritage by isolating it from daily life. New approaches focus on making it fully part of the local community. Sites are given a second life and meaning that speak to contemporary needs and concerns. Digitisation and online

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[1] Commission Report to The European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions on the implementation of the European Agenda for Culture, COM/2010/0390 final.

[2] Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, Text with EEA relevance JO L 347, 20.12.2013, p. 221-237.

[3] Council Conclusions on the contribution of the cultural and creative sectors to the achievement of the Lisbon objectives 2802nd Education, Youth and Culture Council meeting Brussels, 24-25 May 2007.

[4] Blake, Janet, *International Cultural Heritage Law*, Oxford University Press. 2015, p. 288.

accessibility enable unprecedented forms of engagement and open up new revenue streams[5].

The main questions of this paper are: Is the access to culture protected in EU law? What is the interaction between the protection of copyright in EU law and the access to cultural heritage?

In order to address this questions the paper is divided into three parts. The first part is dedicated to the concept and legal framework of EU regarding culture. The access to culture and to cultural heritage is considered in the second part. The third part of the paper investigates the dynamics between intellectual property rights and the open access to internet, focusing on Court of Justice of European Union (CJEU) case-law.

2. Culture in EU Law

2.1. Concept of *culture*

The concept of culture remains irreducible to any form of definition, especially when it is envisaged in the wide variability that is its meaning at the European level[6]. In the same fashion, the notion of '*cultural diversity*,' which is at the heart of European integration and European law, has never been explicitly defined by Community institutions[7].

The Court of Justice of European Union concede to this indefinite concept and, consequently, stated in *Fachverband der Buch* that Article 167 TFEU cannot be `invoked as a justification for any national measure in the field liable to hinder intra-Community trade`[8]. `However, the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it`[9].

In fact, the different forms of action and cultural policies is based on multiple dimensions of the notion of culture. The culture is conceptualized in a polymorphic[10] way and several dimensions can be pictured.

Culture is a way of understanding the *identity* of individuals and of distinctive national community. `The diversity of cultures within the framework of a common European civilization (…) all give the *European Identity* its originality and its own dynamism`[11].

Although, culture is seen in relation to *aesthetic*, as a set of artistic expressions and elements of heritage. The identification of what artistic dimensions culture covers is controversial[12].

Another dimension points to the belonging to a certain *social* class, which define cultural practices, archetype of a social group, or inclusion.

Perhaps the most evident understanding in EU documents is the *economic* outcome of culture. The cultural and creative sectors are increasingly viewed as being drivers of economic growth. In 2017, there were more than 1.1 million cultural enterprises in the EU-27. Together, they represented approximately 5 % of all enterprises within the non-financial business economy. The value added at factor cost of cultural enterprises was equivalent to 2.3 % of the non-financial business economy total . For comparison, the value added of the cultural sector within the EU-27 was slightly higher than that for the motor trades sector. The cultural sector's turnover (the total value of market sales of goods and services) was EUR 375 billion, which represented 1.5 % of the total turnover generated within the EU-27's non-financial business economy[13].

Under the heading cultural sector, the European Union performs different *economic activities* such: printing and reproduction of recorded media; manufacture of musical instruments and jewellery (industry-related cultural activities); retail sale in specialised stores (books; newspapers and stationery; music and video recordings); publishing (books; newspapers; journals and periodicals; computer games); motion picture and television, music; renting of video tapes and disks; programming and broadcasting; news agency activities; architecture; design; photography; translation and interpretation[14].

Cultural goods are products of artistic creativity that convey artistic, symbolic and aesthetic values. Examples include antiques, works of art, jewellery, books, newspapers, photos, films, music or video

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions -*Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[6] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, in: C. Romainville, *European Law and Cultural Policies/ Droit européen et politiques culturelles*, Peter Lang: Oxford Bern Berlin Bruxelles Frankfurt am Main, New York, Wien 2015, p. 19-36

[7] Idem, p. 20.

[8] CJEU, Judgment of the Court (Second Chamber) of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, Case C-531/07, EU:C:2009:276, parag. 33.

[9] Idem, parag. 34.

[10] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, p. 21.

[11] Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities. December 1973, No 12. Luxembourg: Office for official publications of the European Communities., p. 118-122, https://www.cvce.eu/obj/declaration_sur_l_identite_europeenne_copenhague_https:/www.cvce.eu/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html.

[12] Romainville, Céline. *The Multidimensionnality of Cultural Policies Tested By EU Law*, p. 23.

[13] Eurostat (Guide to Eurostat culture statistics — 2018 edition), https://ec.europa.eu/eurostat/en/web/products-manuals-and-guidelines/-/KS-GQ-18-011.

[14] Eurostat, "Culture Statistics- International Trade in Cultural Goods - Statistics Explained, Accessed Aprilie 2021. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Culture_statistics_-_international_trade_in_cultural_goods&oldid=428457.

games. The cultural goods heading is very heterogeneous: while some of these goods are products of mass consumption, others are much-specialised items where demand or supply may be small.[15]

The UN Former Special Rapporteur in the field of cultural rights expressed the view that `Cultural rights have three essential and interdependent dimensions: the first relates to free creativity, including promoting and protecting the freedom indispensable for artistic creativity and scientific inquiry; the second to people's right to access cultural heritage along with new thinking and developments; the third is diversity. All three are vital to developing sustainable and inclusive policies`[16].

2.2. Culture in EU legal framework

In the EU Law the concept of *culture* underlies, more specifically, *the diversity of cultures* of the member states.

The preamble of the Treaty on European Union states that one of the reasons the Union was created was `to deepen the *solidarity* between their peoples *while respecting* their history, *their culture* and their traditions`. One of the objectives of the European Union, recognized in Art. 3 TEU is to `respect its *rich cultural* and linguistic *diversity*, and ensure that Europe's cultural heritage is safeguarded and enhanced`[17].

Consequently, the *diversity* of culture in the European Union law has a constitutional significance.

Article 167(1) TFEU states that `the Union shall contribute to the *flowering of the cultures* of the Member States, while respecting their national and regional *diversity* and at the same time bringing the *common cultural* heritage to the fore`.

Therefore, the European Union competencies in the field of culture are articulated in the treaty with a substantial accent on their *subsidiary* nature. According to Article 6 TFEU, in the area of culture, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas[18]. The Treaty states that legally binding acts of the Union adopted relating to these kind of areas shall not entail harmonisation of Member States' laws or regulations[19]. This provision is reaffirmed in Art. 167 (5)TFEU. In order to contribute to the achievement of the cultural objectives, `the European Parliament and the Council acting in accordance with the ordinary legislative procedure, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States`.

A legal area for actions regarding culture at Community level was absent from the wording of the initial treaties. Moreover, culture was mentioned in the former art. 30 EC Treaty as *an exception admissible* from the free movement of goods, based on the need "to protect *national treasures* possessing artistic, historic or archaeological value".

It is widely accepted that, as early as *Commission v Italian Republic*[20], CJEU included cultural goods under the internal market rules. Recently, The CJEU stated in *Fachverband der Buch* that `the protection of books as cultural objects, cannot constitute a justification for measures restricting imports within the meaning of Article 30 EC`. The protection of cultural diversity in general cannot be considered to come within the 'protection of national treasures possessing artistic, historic or archaeological value' within the meaning of Article 30 EC`[21].

`*Culture*` was a later comer in the European Community discourse. At the Copenhagen European Summit of 14 and 15 December 1973, the Heads of State or Government of the nine Member States of the enlarged European Community affirm their determination to introduce the concept of *European identity* into their common foreign relations. The Declaration on European Identity (Copenhagen, 14 December 1973) focused on `common heritage` and on the will `to preserve the rich variety of their national cultures`[22].

Culture was expressly included in the EC Treaty by the amendments of Maastricht Treaty. Thus, the activities of the Community included the contribution to „the flowering of the cultures of the Member States" (art. 3 EC Treaty). Regarding the common rules on competition, it was inserted the `aid to promote culture and heritage conservation`(Article 92(3) EC Treaty). Art. 107 (3) TFEU uphold that it may be considered to be compatible with the internal market `the aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest`.

The Maastricht Treaty inserted Title IX- Culture, Article 128 EC Treaty. The wording of that article it is almost unchanged in the present art. 167 TFEU.

The relevance of culture in EU law must be seen in interaction with other areas of EU competence.

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[15] Vadi, V. and Brunno de Witte (Eds.), (2015). Culture and International Economic Law, Routledge. https://doi.org/10.4324/9781315849737.

[16] Shaheed, Farida, "Reflections on Culture, Sustainable Development and Cultural Rights, 2014, http://agenda21culture.net/sites/default/files/files/pages/award-pages/art_FS2_ENG.pdf.

[17] Fuerea, Augustin, *Dreptul Uniunii Europene- principii, acțiuni, libertăți*, Universul Juridic, 2016, pp. 23-37.

[18] Conea, Alina Mihaela, Politicile Uniunii Europene. Curs universitar, Editura Universul Juridic, București, 2019.

[19] Art. 2 (5), Treaty on the Functioning of the European Union (Consolidated version 2016), OJ C 202, 7.6.2016.

[20] CJEU, Judgment of the Court of 10 December 1968, *Commission of the European Communities v Italian Republic*, Case 7-68, EU:C:1968:51.

[21] CJEU, Judgment of the Court (Second Chamber) of 30 April 2009, *Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft mbH*, Case C-531/07, EU:C:2009:276, p. 32.

[22] Declaration on European Identity (Copenhagen, 14 December 1973).

According to Article 167(4) TFEU, `the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote *the diversity of its cultures*`. As such, the culture is influenced by the legal provision adopted, for example, on the internal market, completion, agriculture, information society, audio-visual services, intellectual property or common commercial policy.

The Charter of Fundamental Rights of the European Union states that `the Union contributes to the preservation and to the development of these common values while respecting *the diversity of the cultures* and traditions of the peoples of Europe as well as the national identities of the Member States`[23].

Article 22 (Cultural, religious and linguistic diversity) of the Charter indicates that `The Union shall respect *cultural, religious and linguistic diversity*`. Article 25 (The rights of the elderly) defines that `The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to *participate in social and cultural life*`. Freedom of the arts and sciences is stated in Article 13: `The arts and scientific research shall be free of constraint. Academic freedom shall be respected`.

The CJEU endorses in *Pelham* [24] that `freedom of the arts, enshrined in Article 13 of the Charter, falls within the scope of freedom of expression, enshrined in Article 11 of the Charter`.

At the international level, the creative economy is specifically addressed through two of UNESCO's normative instruments, the *Universal Declaration on Cultural Diversity* (2001) and the *Convention for the Protection and Promotion of the Diversity of Cultural Expressions* (2005)[25]. The latter was the only international legal instrument to be adopted unanimously by the European Union[26].

The right to participate in cultural life has obtained recognition under international human rights law, initially through Article 27 of the *Universal Declaration of Human Rights*. The *Covenant on Economic, Social and Cultural Rights* drawn up by the United Nations and opened for signature in New York on 10 December 1996 stated in Article 15:`the States parties to the present Covenant recognise the right of everyone (a) *to take part* in cultural life; (b) to *enjoy* the benefits of scientific progress and its applications; (c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'

Council of Europe *Framework Convention on the Value of Cultural Heritage for Society* (Faro Convention) of 27 October 2005, a "framework convention" which defines general objectives and possible fields of intervention for member State, introduces a key idea: rights to cultural heritage.

3. Access to culture/cultural heritage

Not explicitly stated in primary law of EU, the *access*[27] to culture is mentioned in the secondary legislation (for example: access to culture for all[28] , access to electronic communications networks[29], access to culture as a means of combating social exclusion[30], access to and promotion of culture, and the access to cultural heritage[31], access to the cultural heritage[32]) and in (limited) acts of CJEU (`popular support for the idea of free access to culture`[33], `promotion of linguistic diversity as access to culture`[34]).

The CJEU states that` freedom of the arts, enshrined in Article 13 of the Charter, which, in so far as it falls within the scope of freedom of expression, enshrined in Article 11 of the Charter and in Article 10(1) of the European Convention for the Protection of

[23] Salomia, Oana-Mihaela. Instrumente juridice de protecție a drepturilor fundamentale la nivelul Uniunii Europene. București: C.H. Beck, 2019.

[24] Judgment of the Court (Grand Chamber) of 29 July 2019, Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben, Case C-476/17, EU:C:2019:624, parg. 34.

[25] https://en.unesco.org/news/cutting-edge-creative-economy-moving-sidelines.

[26] Popescu, Roxana-Mariana, `Place of International Agreements to Which the European Union is Part within the EU Legal Order`, Challenges of the Knowledge Society; Bucharest (2015): 489-494.

[27] The concept of access has been specifically developed by the Human Rights Council, Committee on Economic, Social and Cultural Rights. `Applied to cultural heritage, the following must be ensured: (a) physical access to cultural heritage, which may be complemented by access through information technologies; (b) economic access, which means that access should be affordable to all; (c). information access, which refers to the right to seek, receive and impart information on cultural heritage, without borders; and (d) access to decision making and monitoring procedures, including administrative and judicial procedures and remedies, Human Rights Council, Report of the independent expert in the field of cultural rights, Farida Shaheed "The right to access and enjoy cultural heritage (2011)" https://doi.org/10.1163/2210-7975_HRD-9970-2016149.

[28] Council Resolution of 25 July 1996 on access to culture for all, OJ C 242, 21.8.1996.

[29] Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (Text with EEA relevance) OJ L 337, 18.12.2009, pp. 37–69.

[30] Decision No 1903/2006/EC of the European Parliament and of the Council of 12 December 2006 establishing the Culture Programme (2007-2013), OJ L 378, 27.12.2006.

[31] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), OJ L 130, 17.5.2019, p. 92–125.

[32] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, pp. 56–83.

[33] Opinion of Advocate General Szpunar delivered on 17 December 2020, EU:C:2020:1063.

[34] Judgment of the Court of 23 February 1999, *European Parliament v Council of the European Union*, Case C-42/97, EU:C:1999:81.

Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, affords *the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds*`[35].

The term '*heritage*' is generally defined as all cultural goods associated with a 'heritage value', meaning that it is believed that they must be transmitted to future generations[36]. According to Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, [37] the scope of the term '*national treasure*' should be determined, in the framework of Article 36 TFEU[38].

`Facing challenges…The heritage sector is at a crossroads. Digitisation and online accessibility of cultural content shake up traditional models, transform value chains and call for new approaches to our cultural and artistic heritage`[39].

The Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU) , is the Commission's main policy tool for digital cultural heritage. The launch of *Europeana* in 2008, Europe's digital platform for cultural heritage, was one of the most important stepping stones for digital cultural heritage[40].

The European Commission upholds that digitisation is an important means of ensuring greater *access to cultural* material[41]. Digitisation multiplies opportunities to *access* heritage and *engage* audiences[42].

The most invoked reason for making it accessible is economic. `Those cultural heritage collections and related metadata are a potential base for digital content products and services and have a huge potential for innovative re-use in sectors such as learning and tourism`[43]. Digitised cultural heritage resources are long-term economic assets.

It is also believed that the development of digital technologies such as artificial intelligence (AI), computer vision, deep learning, machine learning, cloud computing, Big Data has brought unprecedented opportunities for digitisation, online access and preservation. Digital technologies can empower and encourage people to participate in culture in a more active and creative way[44]. Digitisation of cultural heritage and the reuse of such content can generate new jobs not only in the cultural heritage sector, but also in other key areas such as the creative industries.

Moreover, due to a rapidly evolving technology, *born-digital cultural heritage* needs to be properly collected, managed and preserved to be accessible and usable in the long run[45].

A key legal document addressing the open access to heritage is Directive 2019/1024 on open data and the re-use of public sector information. `Libraries, including university libraries, museums and archives hold a significant amount of valuable public sector information resources, in particular since digitisation projects have multiplied the amount of digital public domain material. Those cultural heritage collections and related metadata are a potential base for digital content products and services and have a huge potential for innovative re-use in sectors such as learning and tourism`[46].

`Despite recent EU developments, the risk remains that a combination of property, contract, and (improper) Intellectual property claims can be used to exclude the public from accessing and using both material and digital cultural heritage in the public domain`[47]. Herein lies the long-standing international legal and ethical debate: are heritage institutions justified in claiming copyright in reproductions of public domain works to generate much needed revenue, or do such restrictive measures conflict with

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[35] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624, parag. 34.

[36] Jakubowski, Andrzej, Kristin Hausler, and Francesca Fiorentini, eds. Cultural Heritage in the European Union, (Leiden, The Netherlands: Brill | Nijhoff, 15 May. 2019) doi: https://doi.org/10.1163/9789004365346.

[37] Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast), OJ L 159, 28.5.2014.

[38] Ferrazzi, Sabrina. "EU National Treasures and the Quest for a Definition." *Santander Art and Culture Law Review* 5, no. 2 (2019): 57–76.

[39] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[40] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions *2030 Digital Compass: the European way for the Digital Decade*, COM/2021/118 final/2.

[41] Commission *Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation*, OJ L 236, 31.8.2006, p. 28–30.

[42] Communication from the Commission - *Towards an integrated approach to cultural heritage for Europe*, COM/2014/0477 final.

[43] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, p. 56–83, recital 65.

[44] Commission staff working document evaluation of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, SWD/2021/0015 final, 29/01/2021.

[45] Idem.

[46] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information, PE/28/2019/REV/1, OJ L 172, 26.6.2019, p. 56–83, recital 69.

[47] Wallace, Andrea, and Ellen Euler. "*Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments*." IIC - International Review of Intellectual Property and Competition Law 51, no. 7 (September 1, 2020): 823–55. https://doi.org/10.1007/s40319-020-00961-8.

educational missions and the rationale supporting a robust public domain?[48]

The national reports pointed to a positive trend among Member States[49] to ensure that *public domain status is maintained after digitisation.*

Important challenges related to copyright are expected to be addressed by the transposition and implementation of the Directive on copyright and related rights in the Digital Single Market (2019/790/EU)

4. (Open) access and (too much ?) IP rights

`We are not entering a time when copyright is more threatened than it is in real space. We are instead entering a time when copyright is more effectively protected than at any time since Gutenberg. The power to regulate access to and use of copyrighted material is about to be perfected. Whatever the mavens of the mid-1990s may have thought, cyberspace is about to give holders of copyrighted property the biggest gift of protection they have ever known. But the lesson in the future will be that copyright is protected far too well. The problem will center not on copy-right but on copy-duty—the duty of owners of protected property to make that property accessible`[50].

The Court is thus one of the promoters and creators[51] of the system of protection of intellectual property rights in the European Union.

Despite the apparent lack of EU competence, through a constitutional approach, the Court of Justice of the European Union has opened up the possibility of the emergence of a European intellectual property system. The case law of the Court of Justice has provided the basis for bringing intellectual property rights into the sphere of legislation at the level of the European Union. It was possible the harmonization of national legislation on intellectual property rights, and more, creating unitary[52] protected intellectual property rights at European level.

In the recent case-law, the Court consider that, in particular in the electronic environment, a fair balance must be found between, `on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights now guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of the public interest`[53].

In the search for a fair balance between various conflicting interests, it is essential to observe what values the Court protects. The relevance of the Court's judgments is no more limited to the internal market, being significant for the private life of each of us and for the way in which law builds social relations in cyberspace.

The (strict) protection of intellectual property rights in the online environment can bring significant risks to the protection of private life as well to the open features of the Internet. The Court thus seems inclined to tip the balance in favour of the protection of other fundamental rights.

Moreover, the CJEU has consistently recalled that `the protection of the right to intellectual property is indeed enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union. There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected`[54]

One of the rights considered by the Court is the right to freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights of the European Union.

In Scarlet Extended v. SABAM (C-70/10) [55], the Court concluded that the establishment of a filtering system did not ensure a fair balance between, on the one hand, the protection of intellectual property rights and, on the other, the protection of freedom to carry out a commercial activity and the protection of personal data, as well as their freedom to receive and transmit information. The Court noted that a filtering system `could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications`.

By its judgment of 29 July 2019, Pelham and Others (C-476/17), CJEU recalled that a balance must be struck between intellectual property rights, enshrined in the Charter, and the other fundamental rights also protected by the Charter, including freedom of the arts, which, falls within the scope of freedom of expression. Accordingly, the Court held that `using the sample for the purposes of creating a new work, constitutes a form of artistic expression which is covered by freedom of the arts, as protected in Article 13 of the Charter`.

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[48] Idem.

[49] Ștefan, Elena Emilia. "The Administrative Responsibility in the Light of the New Legislative Changes." *LESIJ - Lex ET Scientia International Journal* XXVII, no. 2 (2020): 135–42.

[50] Lessig, Lawrence, Code: And Other Laws of Cyberspace,Version 2.0, 2006.

[51] Anghel, Elena. "Judicial Precedent, a Law Source." LESIJ - Lex ET Scientia International Journal XXIV, no. 2 (2017): 68–76.

[52] Ros, Viorel, Ciprian Raul Romițan, Andreea Livădariu, Protecția noilor soiuri de plante Plante și hrană umană (I), 2/2020, Revista Română de Dreptul Proprietății Intelectuale, pp.42-86.

[53] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, EU:C:2019:624.

[54] Judgment of the Court (Third Chamber), 16 February 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, C-360/10 , EU:C:2012:85, prag.41.

[55] Judgment of the Court (Third Chamber) of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, EU:C:2011:771.

The Pelham decision can be seen in relation with the doctrine of fair use, from the United States system. On 5th April 2021, the Supreme Court of Justice of the United States of America used the `fair use` doctrine in the case Google vs. Oracle. The Court declare that Google use of the code was covered by the doctrine of "fair use". Google purpose was consistent with that `creative progress that is the basic constitutional objective of copyright itself`[56].

In Telenor (C-807/18 and C-39/19) [57] the Court interprets, for the first time, the EU regulation enshrining 'internet neutrality'. The Court held that, where measures blocking or slowing down traffic are based not on objectively different technical quality of service requirements for specific categories of traffic, but on commercial considerations, those measures must in themselves be regarded as incompatible with Regulation 2015/2120[58].

In the judgment in Ulmer (C-117/13), the Court of Justice stretched the provision that allows libraries to make available works on their terminals[59] in order to grant them also the possibility of digitally reproducing their collections when digitisation was necessary to exercise the exception. The European Court of Justice excluded that this possibility could be ruled out by rightholders' offer to conclude licensing agreements on digitised copies, since this would mean subordinating the fulfillment of the purpose of the exception (to promote the public interest in promoting research and private study, through the dissemination of knowledge) to unilateral discretionary action on the part of copyright owners[60].

The Court observes in Vereniging Openbare Bibliotheken (Case C-174/15)[61] the balance between the interests of authors, on the one hand, and cultural promotion — which is an objective of general interest underlying the public lending exception— on the other hand.

CJEU concludes that `lending carried out digitally indisputably forms part of those new forms of exploitation and, accordingly, makes necessary an adaptation of copyright to new economic developments`[62].

Advocate General Szpunar consider that `books are not regarded as an ordinary commodity and that literary creation is not a simple economic activity`[63]. `Today, in the digital age, libraries must be able to continue to fulfil the task of cultural preservation and dissemination that they performed when books existed only in paper format. That, however, is not necessarily possible in an environment that is governed solely by the laws of the market`[64].

In a recent judgment, in Case C-392/19 VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, the Court concluded that where the copyright holder has adopted or imposed measures to restrict framing, the embedding of a work in a website page of a third party, by means of that technique, constitutes making available that work to a new public. That communication to the public must, consequently, be authorised by the copyright holder.

The Court makes clear that a copyright holder may not limit his or her consent to framing by means other than effective technological measures. In the absence of such measures, it might prove difficult to ascertain whether that right holder intended to oppose the framing of his or her works.

`But something fundamental has changed: the role that code plays in the protection of intellectual property. Code can, and increasingly will, displace law as the primary defense of intellectual property in cyberspace. Private fences, not public law. (…) Since the intent of the "owner" is so crucial here, and since the fences of cyberspace can be made to reflect that intent cheaply, it is best to put all the incentive on the owner to define access as he wishes. The right to browse should be the norm, and the burden to lock doors should be placed on the owner[65].

5. Conclusions

In the EU law, the concept of *culture* underlies, more precisely, *the diversity of* cultures of the member states. This concept is, actually, at the heart of European integration and European law. Consequently, the diversity of culture in the European Union law has a constitutional significance. Article 167(1) TFEU states that `the Union shall contribute to the *flowering of the cultures* of the Member States, while respecting their national and regional diversity and at the same

[56] Supreme Court of the United States, *Google LLC v. Oracle America*, Inc., 5th April 2021, 18-956, 593 U.S.

[57] Judgment of the Court (Grand Chamber) of 15 September 2020, *Telenor Magyarország Zrt. v Nemzeti Média- és Hírközlési Hatóság Elnöke*. Joined Cases C-807/18 and C-39/19, EU:C:2020:708.

[58] Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (Text with EEA relevance), OJ L 310, 26.11.2015, p. 1–18.

[59] under Article 5(3)(n) of the InfoSoc Directive.

[60] Sganga, Caterina, *A New Era for EU Copyright Exceptions and Limitations? Judicial Flexibility and Legislative Discretion in the Aftermath of the CDSM Directive and the Trio of the Grand Chamber of the CJEU* (October 1, 2020). ERA Forum, vol.21, 2020, pp.311-339 , Available at SSRN: https://ssrn.com/abstract=3804228, pp.11-12.

[61] CJEU, Judgment of the Court (Third Chamber) of 10 November 2016, *Vereniging Openbare Bibliotheken v Stichting Leenrecht*, Case C-174/15, EU:C:2016:856, parag.60.

[62] Idem, parag.45.

[63] Opinion of Advocate General Szpunar delivered on 16 June 2016, EU:C:2016:459.

[64] Idem.

[65] Lessig, Lawrence, Code: And Other Laws of Cyberspace,Version 2.0, 2006.

time bringing the *common cultural heritage* to the fore`.

Digitisation, endorsed by EU institutions, multiplies opportunities to access heritage and *engage* audiences. Although, not *explicitly* stated in primary law of EU, the *access* to culture is mentioned in the secondary legislation and in (limited) acts of CJEU.

Various obstacles when accessing and reusing cultural heritage online, such as a lack of sufficient content, insufficient quality, the copyright and reuse status pose significant legal questions. In recent case-law, CJEU consider that, in particular in the electronic environment, a *fair balance* must be found between, `on the one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property rights *now* guaranteed by Article 17(2) of the Charter and, on the other hand, the protection of the interests and fundamental rights of the public interest`.

Thus, a balance between a high level of intellectual protection and measures to promote learning, culture and knowledge about the European heritage should reconsider the role of museums, archives and libraries in the digital era and propose solutions to ensure that the values they defend (heritage, equity of access) are transposed to networked cultures.

The current debate about open internet has strong implications for fundamental freedoms…and everywhere in the world *the courts* are searching for balance.

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REFORM OF THE INSTITUTIONAL SYSTEM OF THE EUROPEAN UNION AFTER THE LISBON TREATY

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Abstract

Over time, what we can define today as the European Union has gone through historical moments that marked nations, united and divided, destroyed and built, but each time the Union has managed to contribute to the fulfilment of the ideals which define it. From Paris to Lisbon it passed through Rome, Maastricht, Amsterdam and Nice - each of these places marking the emergence of a Treaty in the context of the need for a process of adaptation of Member States to the new changes that were taking place.

The entry into force of the Treaty of Lisbon imposed a change not only in terms of the vision on the future of the Union made of 28 states, but also a change of the legal and functional framework of its institutions - composition, competences, role, method of operation are aspects that needed changes in the context of the occurrence of situations such as the last wave of enlargement, not foreseen by other previous Treaties. This means that more than a decade after the entry into force of the Treaty of Lisbon, we will carry out a comparative analysis of the European Union's institutional system with a focus on those changes that mark the reform of each of the seven EU institutions.

Keywords: *Treaty of Lisbon, EU institutional system, European Parliament, European Commission, Council of the European Union.*

1. Introduction

1.1. Treaty of Lisbon

The Treaty of Lisbon, which entered into force on December 1, 2009, gives the Union the necessary attributes in the face of new challenges arising as a result of the fifth wave of enlargement and of the evolution of transformations in areas such as democracy, European protection of human rights, migration, cross-border crime, etc.

There are many divergent views on the origin of this Treaty. Some authors support its emergence following the failure of the Constitutional Treaty draft of 2005, which received a negative vote for ratification from France and the Netherlands. We believe that there are similarities between the provisions of the Treaty of Lisbon and the Constitutional Treaty, in particular as regards the acquisition of legal personality by the European Union, the position of High Representative of the Union for Foreign Affairs and common Security Policy and the possibility created for Member States to leave the Union; but the main distinguishing feature is the way the effects are produced - the Treaty of Lisbon does not replace the existing treaties, but amends the Treaty on European Union and the Treaty establishing the European Community. The need to design a European constitution was argued[1] as a solution for a predictable future for the European Union; This claim was based on the EU's "democratic deficit" manifested by the lack of loyal support of the political community, but one of the aims of the Treaty of Lisbon is to support a deeper Union between its peoples and its focus is on the values inherent in the human being[2]: respect for and promotion of citizens' rights, democracy, the rule of law, equality, etc[3]. The Treaty emphasizes the field of defence and security through the articles introduced in its content, which impose an obligation on states to provide military support to another Member State, if necessary[4].

Therefore, the intergovernmental structure of the European Union seems to be more predictable than the

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[1] Nam-Kook Kim, Sa-Rang Jung, Democratic Deficit, European Constitution, and a Vision of the Federal Europe: The EU`s Path after the Lisbon Treaty, Journal of International and Area Studies, vol. 17, nr.2, 2010, Institute of International Affairs, Graduate School of International Studies, Seoul National University, Seoul, p. 53.

[2] Moise Bojincă, Gheorghe Marian Bojincă, The European Construction according to the Treaty of Lisbon, Annals of the "Constantin Brâncuși" University of Târgu Jiu, Seria Științe Juridice, issue no. 3/2010, "Academica Brâncuși" Publishing House, pp. 176-177.

[3] These values are established by art.3 of the Treaty on European Union (consolidated version), Official Journal of the European Union C 326/13 of 26.10.2012.

The Union shall offer its citizens an area of freedom, security and justice, without internal frontiers within which the free movement of persons is ensured, in conjunction with appropriate measures on external border control, the right to asylum, immigration and the prevention and combating of crime.

[4] Art.42 (7) TEU: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States."

federal structure in a democracy the virtue of which is the motto "United in diversity".

The Lisbon 2009 moment was the answer to the Union's need to prepare for the increase in the number of Member States[5] from the perspective of the operation of the European institutions. Due to its role in many areas of the world market, the Union has sought to adapt to the needs of its citizens – which is why the Treaty of Lisbon has been in favour of promoting and defending the rights of citizens of the Union.

Prior to the Treaty of Lisbon, the legal personality belonged to the European Communities, entitled to a separate patrimony and institutions. The European Union becomes a subject of international law after the Treaty of Lisbon, as a result of which it has acquired legal personality[6]. The same Treaty establishes the jurisdiction of the authority between the EU institutions and the national institutions of the Member States and thus establishes three categories:

- exclusive competences[7];
- shared competences[8] and
- complementary competences[9].

Article 4 of the Treaty on European Union defines the equality of Member States before the Treaties, as well as the prohibition of the Union from engaging in matters concerning the national identity, local and regional autonomy of the Member States. National security remains an area assigned exclusively to each Member State.

The Treaty acknowledges the rights, freedoms and principles of the Charter of Fundamental Rights of the European Union and it considers that it has an equal legal value as that of the Treaties[10], the compliance with these provisions becoming mandatory for all areas in which the European Union acts. The Charter does not fall within the scope of the Treaty, as provided for in the Treaty establishing a Constitution for Europe[11].

It should be noted that all the novelties and changes brought about by the Treaty of Lisbon with implications for the Union's democracy have a long-term impact on its functioning. And the influence of the Member States will be manifested by means of their contribution to the composition of the European Parliament in order to maintain the principle of representation.

The Reform Treaty waived the symbolic acquis provided by the Maastricht Treaty, which contained the Union's anthem, flag and motto, precisely in order to uphold and promote national values within the Union, to the detriment of the European federalist spirit.

The same text introduces, as a novelty, the right of legislative initiative granted to citizens. By virtue of this, at the request of at least one million citizens from a significant number of states, the European Commission may submit a draft in an area[12]. This process aims to ensure coherence and balance in decision-making, depending on the different interests expressed.

We conclude that the Treaty of Lisbon represents a step forward in completing the construction of Europe through the objectives and instruments used, as well as through the introduction of social aspects. To these we can add the need for institutional progress for the functioning thereof for a larger number of Member States[13].

2.The European Parliament[14]

The European Parliament has its primary origin in Article 14 TEU. Each Treaty has contributed to

[5] The last wave of enlargements before the Treaty of Lisbon took place in 2007 (Bulgaria and Romania), after the Treaty, in 2013, Croatia became an EU Member State and the number of Member States reached 28. Currently, the number has decreased to 27 Member States following the withdrawal of the United Kingdom on January 31, 2020.

[6] In accordance with Article 47 of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 326/47 of 26.10.2012.

[7] See Article 3 TFEU.

[8] See Article 4 TFEU.

[9] See Article 6 TFEU.

[10] The Charter of Fundamental Rights of the European Union was established at the initiative of the European Council in 1999 and was officially declared in 2000. It contains 54 articles and a series of civil, political, personal, economic and social rights for both citizens of the European Union and for its residents.

[11] Andrei Popescu, Tratatul de la Lisabona – un tratat modificator și reformator al Uniunii Europene (The Treaty of Lisbon - a treaty amending and reforming the European Union), in Buletinul de informare legislativă, no. 1/2018, p. 7.

[12] Article 11 (4) TEU: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."

[13] Iordan Gheorghe Bărbulescu, Alice Iancu, Oana Andreea Ion, Nicolae Toderaș, Tratatul de la Lisabona. Implicații asupra instituțiilor și politicilor românești, (Treaty of Lisbon. Implications on Romanian institutions and policies), European Institut of România, București, 2010, p. 34.

[14] According to Section 13 (1) TEU: 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, save its interests, those of its citizens and those of Member States, and ensure the consistency, effectiveness and continuity of its policies and actions. The institutions of the Union are:

- European Parliament;
- European Council;
- The Council;
- European Commission (hereinafter referred to as "the Commission");
- Court of Justice of the European Union;
- European Central Bank;
- Court of Auditors."

increasing or strengthening the powers conferred on the European Parliament, but the completion thereof had taken place with the entry into force of the Treaty of Lisbon, which has had a major impact[15].

Since 2009, the legislative power in budgetary and political control matters has been strengthened[16] through the legislative procedure of co-decision, under which the Parliament acquires the status of co-legislator along with the Council[17]. By increasing its legislative powers through the ordinary legislative procedure, the Parliament contributes to the adoption of legislation together with the Council in 73 areas[18]. According to the Treaty, the European Parliament is made up of representatives of the citizens of the European Union, forming a close link between voters and elected officials[19]. The maximum number of MEPs is 751, and the seats of each state are allocated based on a proportionally decreasing basis. The withdrawal of the United Kingdom from the European Union could not fail to bring about changes in the composition of the Parliament, so that from February 1, 2020 the number of MEPs was reduced to 705; of the 73 mandates held by the United Kingdom, 27 were distributed to the other Member States[20], and 46 are retained for the completion of the composition of the Parliament in the context of potential accessions of some states to the Union[21]. The Parliament also elects the President of the European Commission.

However, there are also more restricted situations when the European Parliament itself can adopt legislative acts, with the approval of the Council, under the special legislative procedure[22].

Some opinions[23] support the hypothesis of the European imbalance, following the increase of the European Parliament's powers and the weakening of the role of the member states, contrary to the theory of intergovernmentalism, according to which the actions belong to the states, depending on the interest of each of them.

Therefore, the Treaty of Lisbon has increased the powers of the European Parliament, both the legislative and budgetary ones, and has continued the reforms of citizens' legitimacy[24].

3. The European Council

The meetings of the Heads of State and Government of the Member States, organized at the initiative of French President Charles de Gaulle, determined President Valery Giscard d'Estaing to create the European Council as a permanent informal structure, bringing together the Heads of State or Government of the Member States[25].

The Maastricht Treaty included the organization of a meeting of the European Council in the state holding the six-month presidency and set out how it would function.

The European Council is governed by Article 15 of the TEU. The first paragraph excludes the possibility for this institution to enforce legislative functions and outlines the main directions it follows, namely:

- provides support to the Union for its development and
- defines general policy guidelines and priorities.

The role of the European Council in the process of institutional reform was deeply manifested in December 2001 at the European Council meeting in Laeken, where they laid the foundations for the Treaty establishing a Constitution for Europe, a draft which failed and led to the signing on December 13, 2007 of the Treaty of Lisbon.

As a rule[26], the European Council shall act by consensus, a feature assigned as a result of the intended purpose by granting it a stable, well-defined form of EU institution. However, the compromise made to reach consensus may lead to situations that will negatively

[15] Dusan Sidjanski, Viitorul federalist al Europei (The Federalist Future of Europe), Polirom Publishing House, Iași, 2010, p. 396 apud Maria Popescu, Lisbon Treaty – the architect of a nes European institutional structure, Juridical Tribune Journal, vol. 3, no. 1, București, 2013, p. 108

[16] Moise Bojincă, Gheorghe Marian Bojincă, op. cit., p. 180.

[17] Article 14 (1) TEU: "The European Parliament shall jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission"

[18] *https://eur-lex.europa.eu/legal-content/RO/TXT/HTML/?uri=LEGISSUM:ai0033, accessed on 14.03.2021.*

[19] Article 14 (2) TUE: "The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats".

[20] No state has suffered changes in terms of losing seats in the Parliament. Among the countries that have benefited from changes in the number of seats allocated to the European Parliament are: Denmark (1), Estonia (1), Ireland (2), Spain (5), France (5), Croatia (1), Italy (3)), The Netherlands (3), Austria (1), Poland (1), Romania (1), Slovakia (1), Finland (1) and Sweden (1). The distribution of offices took into account the under-representation of states that have undergone significant demographic changes, as well as the size of the population and the need for a minimum level of representation for small countries.

[21] *https://www.europarl.europa.eu/news/ro/press-room/20200130IPR71407/redistribuirea-mandatelor-in-parlamentul-european-dupa-brexit, accessed on 15.03.2021.*

[22] Augustin Fuerea, Legislativul Uniunii Europene – între unicameralism și bicameralism (European Union Legislature - between unicameralism and bicameralism), Dreptul Journal, no. 7, Lex Expert Publishing House, București, 2017, p. 194.

[23] Baider Al Tal, Explaining the strengthening role of the European Parliament after the Lisbon Treaty: a liberal intergovernmental perspective, Journal of International Relations, Faculty of International Relations, University of Economics in Bratislava, vol. XIII, issue 3, Bratislava, 2015, p. 225.

[24] Iordan Gheorghe Bărbulescu, Alice Iancu, Oana Andreea Ion, Nicolae Toderaș, op. cit., p. 38.

[25] Gheorghe Ciascai, Consiliul European încotro? Reforme și contrareforme instituționale în UE (The European Council Where to? Institutional reforms and counter-reforms in the EU), Sfera politicii, no. 6 (172), Fundația Societatea Civilă Publishing House, 2012, p. 170.

[26] Article 15 para. (4) TEU.

answer to the question *is the role of the European Council that of reforming or counter-reforming the Union after Lisbon?*

The office of President of the European Council was officially established by the Treaty of Lisbon, becoming permanent. Prior to 2009, the unofficial position of President of the European Council was held by the representative of the Member State holding the Presidency of the EU Council. The President is currently elected by the European Council by a qualified majority for a term of two and a half years[27]. Starting from December 1, 2019, the current president is Charles Michel, preceded by Donald Tusk and Herman Van Rompuy, both holders of two terms each[28].

The Treaty establishes the following duties for the President of the European Council[29]:

- *chairs and promotes the works of the European Council;*
- *ensures the development and continuity of the works of the European Council, in cooperation with the President of the Commission and on the basis of the works of the General Affairs Council;*
- *acts to facilitate cohesion and consensus in the European Council;*
- *submits a report to the European Parliament after each meeting of the European Council.*

With regard to the enlargement of the European Union, the European Council has played a leading role ever since 1993[30], continuing to actively participate in the accession stages to the Union. Its most recent action took place in March 2020, culminating in the opening of accession negotiations with Albania and the Republic of Northern Macedonia[31].

In conclusion, together with the European Parliament, the European Council is among the privileged of the Lisbon Treaty, in particular in terms of institutionalization and the prerogatives conferred.

4. Council of the European Union[32]

The novelties brought to the Council by the Reform Treaty were aimed at improving efficiency, given the preparation of the institutions for new waves of states to join the Union.

An element of novelty was represented by the need to change the rotating system of EU Council Presidencies, as a result of the above reason. Following the debates, the presidencies will operate based on a three-state system for a period of eighteen months, with each Member State being allocated six months. The responsibility of EU Council Presidencies lies in setting the agenda for European summits[33].

The Council shall cooperate with the President of the European Council, but also with the Commission, when a Member State takes over the Presidency.

The bicameral character of the European Union legislature[34] places the European Parliament in a secondary role, with the Council playing a leading role.

The method of calculating the qualified majority is set out in Article 16 (4) of the TEU "*As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union*[35]". Thus, qualified majority voting became necessary for another 21 areas[36], of which we specify: justice and foreign affairs, the union budget, intellectual property, Economic and Monetary Union, etc. Areas such as taxation, security, social protection remained subject to unanimous voting[37].

In accordance with Article 16 (8), the Council *shall meet in public when it deliberates and votes on a draft legislative act.*

5. European Commission[38]

By virtue of Article 11 (3) TEU, the Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent[39].

The Commission has competence in the field of taxation, materialized by the monitoring of Member States' deficits and by the issue of warnings when required.

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[27] Article 15 para. (5) TEU.

[28] *https://www.consilium.europa.eu/ro/history/?filters=2031, accessed on 15.03.2021.*

[29] Article 15 para. (6) TEU.

[30] In 1993, the Copenhagen European Council established a set of democratic, economic and political criteria for states wishing to join the EU, known as the "Copenhagen criteria", materialized through stable institutions, a functioning market economy, etc.

[31] *https://www.consilium.europa.eu/ro/policies/enlargement/, accessed on 14.03.2021.*

[32] The legal basis can be found in Article 16 TEU.

[33] Cristian Sorin Dumitrescu, Marcela Monica Stoica, Marian Popa, European Institutional Developments and Evolutions Post -Lisbon Treaty, Sfera politicii, no. 4-5 (180-181), Fundația Societate Civilă Publishing House, 2014, p. 132.

[34] Augustin Fuerea, op. cit., p. 196.

[35] Iordan Gheorghe Bărbulescu, Alice Iancu, Oana Andreea Ion, Nicolae Toderaș, op. cit., p. 41

[36] Iordan Gheorghe Bărculescu, Alice Iancu, Oana Andreea Ion, Nicolae Toderaș, op. cit., p. 28.

[37] Moise Bojincă, Gheorghe Marian Bojincă, op. cit., p. 184.

[38] The regulation is contained in Article 17 TEU.

[39] Francesco Maiani, Citizen participation and the Lisbon Treaty: a legal perspective, Studies in Public Policy, Centre for the Study of Public Policy, Aberdeen, 2011, p. 3, available at: https://core.ac.uk/download/pdf/77157077.pdf.

The legislative initiative remains the sole responsibility of the European Commission and is accountable to the European Parliament.

The establishment of the Commission is carried out by virtue of the principle of representativeness, namely one commissioner from each Member State[40]. The Commission is composed, in addition to the European Commissioners, of the President and the High Representative of the Union for Foreign Affairs and Security Policy, a position introduced in 1999 by the Treaty of Amsterdam.

Under Article 18 (2) and (3), the High Representative of the Union for Foreign Affairs and Security Policy "shall contribute by proposals to the development of that policy which he/she shall carry out as mandated by the Council. It shall act in a similar manner with regard to the common security and defence policy" and shall chair the Foreign Affairs Council. He/she shall act as Vice-President of the Commission and shall be responsible for foreign affairs. The appointment shall be made by the European Council by a qualified majority vote, following a vote of approval granted by the European Parliament.

In the performance of his/her duties, the High Representative shall be assisted by the European External Action Service. The EEAS is under the authority of the High Representative and supports his/her actions. The role of the EEAS shall be to assist the President of the European Council, the Commission and its members in matters relating to foreign affairs.

It should be noted that the formation of the Commission takes place after the election of the European Parliament every five years.

6. The Court of Justice of the European Union[41]

The first jurisdiction body appeared in 1952, two years after Robert Schuman's Statement, it was called the Court of Justice of the European Coal and Steel Community and was composed of seven lawyers and two Advocates-General. The Court provided the remedy against decisions issued by the High Authority and was based in Luxembourg.

In 1957, following the entry into force of the Treaty establishing the European Atomic Energy Community and the Treaty establishing the European Economic Community, the Court of Justice of the European Communities was established.

Over time, the only jurisdictional institution at EU level has become the Court of Justice of the European Union (CJEU), and according to Article 19 (1) TEU "*it shall ensure that in the interpretation and application of the Treaties the law is observed*".

The Treaty of Lisbon provides that the CJEU shall comprise:

- Court of Justice;
- The County Court and
- Specialized courts[42].

In terms of composition, the Treaty intervened, establishing the existence of one judge for each Member State at the level of the Court of Justice and of at least one judge from each Member State for the County Court[43]. In addition to the Court of Justice, Advocates-General are also included.

Pursuant to Article 19 (3) TEU, the CJEU decides in accordance with the Treaties:

a) on actions brought by a Member State, an institution or a natural or legal person;

b) as a preliminary action, at the request of national courts, on the interpretation of Union law or the validity of acts adopted by the institutions, and

c) in the other cases provided for in the Treaties.

Although it has increased the powers of the CJEU, the Treaty does not confer powers on the provisions on the common foreign and security policy[44].

The Court of Justice of the European Union has promoted European integration by creating relevant case law, insofar as it ensures due observance of the national and constitutional rules of the Member States.

Therefore, in carrying out its duties of interpreting and protecting the uniform application of Union law, the Luxembourg Court is the highest judicial institution in the European Union[45].

7. European Central Bank

Following the Treaty of Lisbon, the European Central Bank has become an official and independent institution with extended jurisdiction over all Member States[46] and with legal personality. Along with the national central banks, the ECB forms the European System of Central Banks, and together with the central

[40] This principle worked until 2014, and in the event of a Union of 27 states, the Commission would consist of 18 members.

[41] The Court of Justice of the European Union is governed by Article 19 TEU.

[42] The Treaty of Nice uses the name of courts, not of specialized county courts. Set up by the Treaty of Nice, this substructure of the CJEU functioned until 2016, after the transfer of disputes to the County Court in 2015; its powers have been integrated into the County Court.

[43] From September 1, 2019, the County Court shall operate with two judges from each Member State.

[44] Maria Popescu, Lisbon Treaty – the arhitect of a nes European institutional structure, Juridical Tribune Journal, vol. 3, nr. 1, București, 2013, p. 111.

[45] Ben Smulders, Katharina Eisele, Reflections on the Institutional Balance, the Community Method and the Interplay between Jurisdictions after Lisbon, European Legal Studies, Brugge, 2012, p. 6, available at: *https://www.coleurope.eu/system/files_force/research-paper/researchpaper_4_2012_smulderseisele_final.pdf?download=1*.

[46] Nam Kook Kim, Sa-Rang Jung, op. cit., p. 54.

banks of the euro area countries, forms the Eurosystem[47].

The monetary jurisdiction of the European Central Bank also extends to non-euro area countries, even if the monetary policy towards these states has been postponed until they adopt the euro currency.

Decisions are taken in a qualified majority voting system, which ensures efficiency in solving the identified problems[48].

The European Central Bank shall be consulted by the European Council with a view to adopting a decision amending the banking rules laid down in the TFEU, as well as on any act falling within its area of competence[49].

The European Central Bank acts for the security of monetary policy at Union level through multiple actions the role of which is either of prevention or of financial stability, namely the possibility of adapting the financial system to disruptive situations - in this situation, the ECB monitors financial system fluctuations with the aim to identify dangers and uncertainty in order to identify the measures needed to prevent certain risks.

The ECB supports the financial infrastructure, in particular that of the euro area Member States, by developing systems capable of ensuring the safe and rapid transfer of cash, securities and guarantees[50].

Article 127 TFEU defines the role of the European System of Central Banks and assigns it the duty of maintaining price stability. The role of the Governing Council of the European Central Bank is to maintain the inflation rate, set at 1.2% in 2019, for the Eurozone countries[51].

8. European Court of Auditors[52]

In order to protect the financial interests of the Union, the European Court of Auditors has been established as an institution.

The Court of Auditors of the EU has no decision-making power, and its duties concern the detection and prevention of fraud by communicating the information to the bodies empowered to act.

The European Court of Auditors shall report annually to the parliaments of the Member States, the European Parliament and the Council. It shall consist of one national from each Member State, who pursues activities in the general interest of the Union.

Although it is not part of the decision-making body of the Union, it is an important institution, and its contribution is materialized by the characteristic autonomy, which guarantees it the fulfilment in good conditions of the duties conferred[53].

In its latest annual report[54], the Court concludes that acts affecting EU spending are at 2.7% level, while high-risk spending accounts for more than half of spending made. As a result of the effects of the COVID-19 epidemic, EU spending will be much higher in the future, which is why the European Council has combined the Union's 2021-2027 budget with an instrument called the Next Generation EU[55], in order to restore the social and economic effects which will appear.

We conclude that the role of the Court of Auditors is necessary in a Union in which financial actions have developed considerably and are indestructible; on the contrary, the Union's financial and fiscal control would be affected.

9. Conclusions

Reforms of the Union's institutional system have been taking shape since the middle of the twentieth century, when the initiatives of the founders of the European Union began to materialize in concrete forms.

History supports the evolution of man through the way of adapting to what is to happen, based on the experience gained. The Treaty of Lisbon determines the evolution of the institutional framework according to the present time, with a greater predictability, unlike the previous Treaties, but insufficiently current for the times to come. A first Treaty that gives priority to the principles of democracy, to social values and to the rights of European citizens, proven over a decade to be the necessary tool for the strengthening of peace and social order.

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[47] The Eurosystem mission, according to the official website,, https://www.ecb.europa.eu/ecb/orga/escb/eurosystem-mission/html/index.ro.html, accessed on 15. 03.2021: "The Eurosystem, composed of the European Central Bank and the national central banks of the Member States that have adopted the euro, is the monetary authority of the euro area. The main objective of the Eurosystem is to maintain price stability for the general interest. As we also act as the main financial authority, we aim at maintaining financial stability and promoting financial integration at European level.

[48] *Ibidem*.

[49] Eduard Dragomir, Dan Niță, Tratatul de la Lisabona (The Treaty of Lisbon), Nomina Lex Publishing House, București, 2009, p. 51 apud Maria Popescu, op. cit., p. 113.

[50] *https://www.ecb.europa.eu/paym/html/index.ro.html, accessed on 16.03.2021*.

[51] *https://www.ecb.europa.eu/pub/annual/html/ar2019~c199d3633e.ro.html, accessed on 16.03.2021*.

[52] Its own regulations can be found in Articles 285-287 TFEU.

[53] Maria Popescu, op. cit., p. 112.

[54] See https://www.eca.europa.eu/ro/Pages/AR2019.aspx, accessed on 16.03.2021.

[55] The EU's long-term budget and the Next Generation EU are the largest incentive package in history and will help rebuild a green and digitalized Europe out of a € 1.8 trillion fund. From the fund allocated to the recovery and resilience mechanism, Romania will receive 14.2 billion euro.

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THE REVOLUTION OF TUDOR VLADIMIRESCU – 200 YEARS OF NATIONAL REBIRTH

Cornelia Beatrice Gabriela ENE-DINU*

Abstract

With the Revolution led by Tudor Vladimirescu, the Romanian nation joined the European nations' movement to affirm their sovereign rights. By their sustained actions and by adhering to the novel ideas emerging across Europe at that time, a generation of Romanian patriots coming from all Romanian territories contributed to the ascent of the Romanian nation and the fulfillment of its political, cultural, social and economic aspirations. The period of national rebirth helped prepare the internal changes in the Danubian Principalities that were brought about by the events in the second half of the 19th century. It was the period when the domestic forces in the principalities determined the goals of their actions and how to fulfill those goals. The Romanian national movement was therefore gradually defining its own way of affirmation and the purpose thereof: achieving national unity.

Keywords: *revolution, rights, Romanian nation, principalities, national movement, Phanariote regime, domestic rule, oppression, taxation obligations, Ottoman Empire, Phanariotes, privileges, political aspirations*.

1. Introduction

The early 19th century saw Wallachia and Moldavia undergoing a severe political, economic, social and cultural crisis. The Phanariote regime, which had been established more than a century before, proved to be so burdensome and disconnected from the interests of its subjects that it had to ever increasingly cope with their hostility. The benefits that came with the appointment on the throne gave rise to fierce competition among the Greek aristocratic families in the district of Phanar. The rivalries for the throne continued even after the Porte fixed the term of rulers at seven years and the number of families entitled to rulership at four. Those matters were governed by the edicts of 1802 and 1819. Taking office with huge debts incurred with the very efforts to obtain the appointment, the Phanariotes were first and foremost concerned with paying off those debts. Then, they had to satisfy the Porte's pecuniary claims and pursue the enrichment of their relatives, who offered them support with the Sultan and the Ottoman dignitaries. For example, Alexandru Sutu came to Wallachia in 1818 with a debt of 4-to-5 million piasters and an 820-strong entourage, including nine children and about 80 relatives, each wanting to get rich[1]. The means to make money were as varied as they were harmful for the country. Office peddling, income leasing, awarding trade licenses, aristocratic titles or other favors were among the most common and resulted in the diminishing of the authority of the ruler and the other Government institutions. According to some assessments, the same Alexandru Sutu earned almost 29 million piasters in his two years of rule (1818 - 1820); his predecessor, Ioan Caragea, had left the office in September 1818 after having made an immense fortune through the methods listed above. Besides the obedience of the Phanariote regime to the Porte, which would allow such systematic despoiling by the rulers through new taxes and levies, there were also the abuses by the pashas governing the Danube forts, who would often carry out raids in Wallachia, looting and setting everything on fire. For instance, in December 1800, the troops of the Pasha of Vidin, Pasvan-Oglu, plundered Oltenia and burned the city of Craiova almost entirely; the ransacking raids repeated in the winter of 1801 - 1802, when Craiova was again set on fire, and the towns of Targu Jiu and Targu Ocna were pillaged by the Pasha's aide, Manaf Ibrahim. As if those were not enough, a major earthquake occurred in October 1802, when the Coltea Tower collapsed in Bucharest, and, in September 1804, a fire burned down the Princely Court and much of Bucharest; more destruction was brought about by the Russo-Turkish War from 1806 until 1812, while in 1813 "Caragea's Plague" took 70,000 lives in just one year. The multitude of direct and indirect levies (which increased following their lease) and the abuses in collecting such levies were causing a constant state of uncertainty in regard to the people's wealth and property; the taxpayers fleeing would result in the so called "dismemberment of villages"[2], as inhabitants left them and settled elsewhere. The country's treasury, which in most of the cases would be similar to the ruler's treasury, would barely cope with the Porte's ever increasing demands.

On the eve of the Revolution of 1821, of Wallachia's total budget of 5,910,000 thalers, 2,083,000 thalers were earmarked for the Sultan and

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[1] Pascu Vasile, *Istoria modernă a românilor (1821-1918) (The Modern History of Romanians (1821-1918))*, Clio Nova Publishing House, Bucharest, 1996, page 9.

[2] Neagu Djuvara, *O scurtă istorie ilustrată a românilor* (*A Brief Illustrated History of Romanians*), Humanitas Publishing House, Bucharest, 2013, page 223.

Ottoman dignitaries, 1,394,000 thalers were allocated to the Prince, and the remaining amount accounted for wages of the state officials or payments for various services. So, the cost of rulership and Ottoman suzerainty amounted to 60% of the country's treasury. The culture of the Danubian Principalities was undergoing a marked process of "greecification". Most of the writings were printed in Greek. Many Romanian boyars endeavored to learn the Greek language, adopted Greek customs and dressed according to the Greek fashion. Greek would be used in the official documents, in higher education and in the printed law codices. During the Phanariote regime, there were attempts to introduce Greek as a second language besides Romanian. A number of Greek and Turkish words entered the vocabulary. Political intrigue, favoritism and corruption, servility were practiced in the Romanian principalities the same as in Constantinople. It is equally true that, through the Greeks, the Danubian Principalities also came into contact with the French ideas and culture, but that happened through the agency of their language, and not through the filter of our own Romanian language and spirit.

The Revolution of Tudor Vladimirescu happened to put an end to this sort of a regime and to reinstate the principalities' old rights. This is why this event is thought to be the beginning of the Romanians' National Rebirth. The immediate effect of the revolution in terms of national revival was the return to domestic rulership and the ousting of foreign (Greek) elements from the internal matters of the principalities. The involvement of the local aristocracy in the revolutionary surged over the next decades by conceiving domestic institutional reorganization projects based on new principles: separation of powers, accountability of state officials, rule of law, removal of economic barriers, greater role for education in the national language. This renewing process had to face and overcome a number of conservative positions, both domestic and foreign, but was permanent in nature and became prevalent, culminating with the Revolution of 1848[3].

2. The European Context of the Revolution

The Revolution led by Tudor Vladimirescu unfolded against a historical European background dominated by the clash between the monarchic legitimism and conservatism on the one hand, and the new liberal ideas generated by the French Revolution on the other hand. Napoleon's attempts to establish a new European order, based on the constitutional sovereignty of nations, led to a coalition between the monarchic powers (Austria, Prussia, Russia, England) against him, giving rise to the long series of wars throughout 1805 – 1815.

After the defeat and exile of Napoleon on the Island of St. Helena, the victorious European powers met at the Congress of Vienna (1814-1815) and, with the decisions made there, they reinstated the former absolute monarchic order on the continent. In September 1815, Austria, Prussia and Russia signed in Paris the document giving birth to the "Holy Alliance", an agreement directed against any political movement that could jeopardize the principle of "monarchic legitimacy". It underlined its conservative purpose to maintain the political status quo that had been in place before the French Revolution. The liberal & constitutional movement continued to act against the resolutions of the Congress of Vienna and the "Holy Alliance", condemning the absolute power of monarchs and advocating for the separation of the branches of government[4]. This movement's main purpose was to restrict the power of rulers by adopting constitutional acts to secure civil rights and freedoms. To that effect, the revolutionary movement led by Rafael Riego started on January 1, 1820 in Spain (where the Bourbon dynasty had been restored in 1814), following which King Ferdinand VII was forced to reinstate the Constitution of Cadiz of 1812. Following the intervention of French troops in 1823, the movement was defeated, the Constitution was repealed and absolute monarchy was restored.

Similar revolutionary movements also took place in the Italian states (Piedmont, Naples) in 1820 – 1827, as well as in Portugal (1820 – 1821), with the latter introducing constitutional monarchy in 1822. As Spain and Portugal were facing liberal & constitutional movements domestically, their colonies in Latin America started declaring their independence from their parent states (1815 – 1830), giving rise to the independent national states in South America.

Concurrently with the events in Western and Southern Europe in the early 19th century, in the Balkans, the Ottoman Empire was barely coping with Russia's expansionist tendencies and with the national emancipation movements among the peoples in this region. The rebellion of the Serbs started in 1804 (initially against the janissaries who held vast domains), which subsequently turned into a national movement for liberation from the Ottoman rule. Russia, which dubbed itself as the protector of the Balkan Slavs, stepped in and, by supporting the war of 1806 – 1812, determined the Porte to sign the Treaty of Bucharest, which granted Serbia domestic autonomy and a general pardon for all those who had fought against the Ottoman Empire. However, the Turks occupied Belgrade the next year and established a

[3] Ioan Ceterchi, coord., *Istoria dreptului românesc (History of Romanian Law)*, vol. II, part I, Academy's Publishing House, Bucharest, 1984, page 41.

[4] For a detailed analysis of the legal concepts, please see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar (General Theory of Law. Seminar Notes)*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

regime of fierce retaliations. The Serbs took up arms once again in 1815, and, upon Russia's intervention (which was at the time one of the victorious powers against Napoleon), the sultan recognized Milos Obrenovici as Prince of Serbia, which became an Ottoman province with limited autonomy.

The Greek also started organizing their national movement in the same period by founding a secret (Freemason-like) society called the "Eteria." Established in Odessa in 1814, this society created a vast network of branches (*ephories*) in Russia, in the Danubian Principalities and, of course, in Greece. In its endeavor to call upon the Greeks to take up arms against the Ottoman regime, the Eteria hoped for the support of Russia, which was also interested in weakening the Porte's power. The main advisor to Tsar Alexander I was Greek national Kapodistrias, whom the eterists intended to elect as leader of the society. However, the potential complications of such an appointment determined them to choose Alexander Ypsilanti as Ephor General of the Eteria, who was the son of former ruler of Wallachia Constantine Ypsilanti.[5]

The eterists placed great importance on the Danubian Principalities in their action plan, as indicated by numerous Greek boyars in the Principalities joining the movement. There were *ephories* in the cities of Iasi, Galati and Bucharest, also including some Romanian boyars. However, the purposes of the Eteria were not the same as those of the Revolution of Tudor Vladimirescu, as we shall see. The Phanariote regime, represented by the Greek aristocracy, had stirred much resentment in the Principalities, where it had been the cause of institutional degradation for more than one century. Those circumstances of revolutionary political, social and national turmoil among the European peoples constituted the background of the Romanian Revolution of 1821, led by Tudor Vladimirescu.

3. Domestic Political and Social & Economic Background

The Revolution of 1821 started under the circumstances of a severe crisis seen by the Romanian society in the Principalities as a consequence of the Phanariote regime. Throughout their rule, the Phanariote princes had instituted practices such as office peddling, political instability, servility and corruption, economic monopoly and property uncertainty, greed and abuse by the state officials. In spite of all the reforms initiated throughout the second half of the 18th century and in the first two decades of the next century, the Phanariote regime proved to be increasingly burdensome and contrary to the country's best interests. When they received their appointment decrees, Phanariote rulers would arrive in the principalities accompanied by hosts of relatives and creditors, to whom they granted the most lucrative positions. Titles and offices would be sold, heavy and abusive taxes would be levied, with severe consequences to the taxpayers. The Phanariote rulers would thusly gather and leave the country with vast fortunes, thereby stripping the principalities of significant financial resources. Displeased with the Phanariotes' policies, the local aristocracy submitted memoranda with the Porte citing all wrongdoings and asking for the reinstatement of the Principalities' former entitlements. For example, in the memorandum sent to the sultan in 1818, the boyars demanded that they be granted right to make the appointments for the vacant church positions, that the official positions in the principalities only be taken by natives, and that the Phanariote rulers be compelled to take with them all Greeks they had brought along, upon the completion of their terms.

The Phanariote regime had created a general state of discontent in Wallachia and Moldavia. The Porte was still hesitant to permanently remove Phanariotes from rulership. However, their disrepute and abuses did determine the sultan to issue the edict of 1819, whereby the right to take the throne of the Principalities was restricted to four Phanar families: Skarlatos Kallimahis, Alexandros Soutzos, Michael Soutzos and Demetrius Mourouzi.

The economic state of the Principalities had been worsened by the excessive taxation policies, with ever increasing taxes and levies. Boyar Dinicu Golescu wrote that "Wallachian tributaries living on that beautiful land are so poor and miserable that any foreigner could not possibly believe their misfortune[6]." A regulation on tax obligations was enacted in 1783, introducing a taxation unit called "*lude*". The "*lude*" consisted of a variable number of taxpayers (4, 6, 8 families), who were held jointly liable to pay the tax, which curtailed individual drive and discouraged entrepreneurship. Although the state treasury saw significant income from levies collected from taxpayers, most of it was used to meet the payment obligations towards the Porte and the Ottoman dignitaries, to sustain the forts on the Danube and the troops stationed there, to maintain the Princely Court and to pay the wages of the state officials. On the other hand, expenditure for public works (roads, bridges, urban buildings), constructing cultural, healthcare or manufacturing venues were minimal.

Economic growth was very slow, although the conditions were met for its development. This was prevented not only by the abuse and greed particular to

[5] Constantin C. Giurescu, *Istoria românilor* (*History of Romanians*), Encyclopedic Publishing House, Bucharest, 2011, page 331.

[6] Bogdan Bucur, *Devălmăşia valahă (1716-1828). O istorie anarhică a spaţiului românesc (Wallachian Anomie (1716-1828): an Anarchical History of the Romanian Areal)*, Paralela 45 Publishing House, Pitesti, 2008, page 177, apud Golescu, Dinicu. Însemnare a călătoriii mele, Constantin Radovici din Goleşti, făcută în anul 1824, 1825, 1826 (An Account of My Travels, Constantin Radovici of Golesti, in the Years of 1824, 1825, 1826), Minerva Publishing House, Bucharest, 1977, pages 75-78.

the Phanariote system, but also by the obligations and contributions to the Porte, both monetary and in agricultural products. Wallachian boyars indicated that, from 1812 through 1821, Wallachia had to make cash or in-kind payments amounting to approximately 63 million lei to the Porte, with Moldavia contributing a similar amount. The Romanian Principalities also saw significant loss because of the Ottoman monopoly on their foreign trade. The agricultural products purchased from the Principalities at ridiculously low prices would suffice to supply Constantinople for 4 months a year. Furthermore, this obligation to supply the Porte would double when it was engaged in wars with Russia or the Habsburg Empire.

The Phanariote regime was also in stark contrast to the novel elements emerging in the Danubian Principalities. First of all, it is worth mentioning the expanding contacts between the Principalities and the Western civilization, particularly the French one. The establishing of Russian, Austrian and French consulates in Iasi and Bucharest made it possible for closer ties to appear between the Romanian and European worlds. News travelled faster and more extensively from one side to another, there was a greater interest in the events on the continent on the part of the Romanian boyars, writings in French appeared in and about the Principalities. After one such paper – the first one, in fact – was published in 1777, thanks to Jean Louis Carra (a Jacobin, who was executed in 1793), and republished in 1789 and 1793, more writings containing information about the Danubian Principalities are printed in the early 19th century. The French publications brought to Iasi or Bucharest in various ways disseminated the ideas of the French Revolution, and the Romanian boyars would closely follow the unfolding of Napoleon's wars with Europe's monarchs. Many sons of native boyars studied in the major Western cultural hotspots and came in contact with the novel liberal ideas. The cities in the Principalities grew particularly important, as they became the main cultural and economic venues. Schools, printing works, workshops, manufactory shops represented drivers for the modernization of society. Cities were also important commercial centers, with markets becoming stimulators of economic activities.

The limitation of the Ottoman monopoly (by the Treaty of Kuchuk-Kainarji of 1774) facilitated the circulation of agricultural products from the Principalities to the European markets. In order to increase the volume of marketed products, landowners started introducing work quotas for the corvée laborers – the "*nart*"[7] – therefore better harnessing their labor day obligations. Consequently, the role of agricultural land began changing from representing a means of subsistence to becoming a driver for the circulation of goods (agricultural products).

Furthermore, the Caragea Law of 1818 strengthened the boyars' authority to arable land, substituting the feudal type of possession (granted by the will of the lord) with full ownership.

However, those reforms occurred under a failing political regime that was less conducive to more profound changes in line with the modern era. The general discontent in the Principalities favored the start of the revolution and provided it with the required social support. In his proclamations, Tudor Vladimirescu called upon all social ranks, all inhabitants, "kinsfolk of whatever ancestry", to take part in his endeavor.

While it was first and foremost caused by the poor domestic situation of Wallachia, the Revolution of 1821 was also facilitated by external drivers: the spread of the ideas of the French Revolution, the European liberal movements, the national liberation movements in the Balkans, the decay of the Ottoman Empire. This latter element was considered by Tudor Vladimirescu during the Revolution in determining the boundaries of its agenda.

4. Program of the Revolution of 1821

The agenda of the revolution was reflected in the many papers and documents that were developed at its various phases: proclamations, letters, calls to action, agreements made with and demands addressed to the local boyars.

The first manifesto of the revolution was the Proclamation of Pades (which was in fact conceived at Tismana), which was presented to the crowd that had gathered there and which was a call to all inhabitants of Wallachia to join the movement against the evil "bestowed onto us by our masters, both political and churchly." That document of January 23, 1821 merely showed the reasons for Tudor's actions, as well as one of the methods to rectify the country's situation: "let it be that those that can do good be chosen from among our leaders," who should work "with us all for the good of all" ("in the benefit of the community"). Furthermore, the crowd and the rest of the country's inhabitants were asked to "sacrifice the ill-gathered fortunes of the tyrant boyars," but do no harm to the estates of those joining the cause of the revolution.

Chronologically speaking, another document was the letter sent to the sultan through the agency of the Pasha of Vidin, which indicated that the movement was not against the Ottoman Empire, but only for the good of the people and the country. It also presented the poor condition of the country, the complaints of which could not have reached the sultan's ears. In order to prevent a military intervention by the Porte, the letter asked that "a trustworthy man be dispatched" to "do us justice and order." Letters with similar contents were also sent by Tudor Vladimirescu to the tsar and to the emperor at

[7] Cornelia Ene-Dinu, *Istoria statului şi dreptului românesc* (*History of the Romanian State and Law*), Universul Juridic Publishing House, Bucharest, 2020, page 182.

Vienna, indicating the reasons for his actions. In doing so, Tudor showed caution, as well as proper knowledge of the then-current realities of Europe, where the Habsburgs and Russia set the political tone.

Other ideas related to the revolutionary movement can be inferred from Tudor's correspondence with the boyars in Bucharest throughout February 1821. In one of his letters, he urged the boyars "to become true patriots, and not the foes to the motherland that you have been so far." In a reply to *Vornic* Nicolae Vacarescu on February 11, 1821, he stated that "the Motherland is the people, and not the league of spoliators."

The most important manifesto of the revolution was that entitled "Demands of the Romanian People" and was developed in February – March 1821. The document had three versions (containing 20, 33 and 48 items, respectively) and was the most comprehensive program of the revolution. It included modern principles for the internal organization of Wallachia. The fundamental idea that can be derived from its text was the removal of the Phanariote regime and could therefore be applied to Moldavia as well. In fact, the document demanded the enforcement of the principle of the sovereignty of the people, who sustained the ruler's authority. According to the document, the ruler had executive powers, while the "People's Assembly" represented the legislative power. The ruler was bound to comply with the will of the people ("the people's bidding") and "to take an oath to safeguard it to the letter." Another principle was the abolishment of privileges based on family origins. The program stated that the appointments to state offices "should not be made for money and should be based not on lineage, but on worthiness." It also stipulated the abolishment of the classes of peasant servants known as "*poslușnic*" and "*scutelnic*". The manifesto further included significant reforms in the areas of justice, administration, taxation, trade, public education, army and public order. As regards the legal system, it called for the enforcement of legal codes mandatory to all, therefore allowing for the removal of arbitrary decisions and the establishment of domestic stability. The administrative reforms targeted the simplification of the administrative system by abolishing positions that increased treasury expenditure. In the taxation area, the document spoke of using a portion of the Church's income to fund the schools and the army, and covering the cost of enhancing the streets of Bucharest from customs duties. The taxes were to be levied in four installments, and any tax increases were to be made by resolutions of the People's Assembly. The document further required the expansion of the network of schools, which were to be maintained by the church authorities and provide education to children of poor families. Another major item of the manifesto was the organization of the army, which was to consist of 4,000 *pandurs* and 200 *arnauts*, who would be hired on pay and exempted from paying taxes. In order to enhance trade, the document asked for the abolishment of internal customs duties and the lowering of those on the borders, therefore facilitating the export of products from the Principalities.

As to the legal status of the Principalities, the program of the Revolution of 1821 demanded that their autonomy be observed and guaranteed by international documents adopted by Russia and the Habsburg monarchy. This had been an older demand by the Wallachian and Moldavian boyars, which had been presented to the same powers as far back as in 1772, at the Congress of Focsani.

Other documents containing items of the revolution's program were the proclamations given by Tudor Vladimirescu to the people of Bucharest. One first proclamation was probably delivered on March 8, 1821, but its contents is unknown. The ideas contained therein were however reiterated in the second proclamation to the people of Bucharest, issued at Bolintin on March 16, 1821. It urged the inhabitants of Bucharest to join him "in gaining the rights benefiting the entire community." The third proclamation was more comprehensive, and was addressed to the people of Bucharest on March 20, 1821, out of Cotroceni. It restated the causes for his actions – "the loss of our privileges" and "the loathsome despoliations" – and also included a call to join the revolution for "the gaining and rebirth of our rights."

So, the programmatic documents of the Revolution of 1821 included a whole range of demands regarding the reorganization and modernization of the political, social and economic structures. A constant presence was the demand regarding the redeeming of "the country's entitlements", which – together with the other items on the agenda – meant not just a return to a national political regime, but also a change in its substance, a third, more comprehensive version of which was made known to the people of Wallachia in early April 1821.

We can therefore conclude that it was the attempt to start making some changes in the internal organization of the principality, in the spirit of the revolution's programs. However, those changes did not gain amplitude due to the conservative ideological and political limitations of both the domestic and external legal status of Wallachia.

It is worth noting that one of Tudor Vladimirescu's advisors during the revolution was Gheorghe Lazar, a well-known scholar and founder of the education system in the Romanian language. He urged the leader of the movement to continue negotiations with the Porte and not let himself be deluded by Russia's promises to intervene, as made by Alexander Ypsilanti.

5. End of the Revolution and Its Significance

The revolution unfolded under adverse domestic and international circumstances.

Domestically, the political aristocratic and ecclesiastic classes were not in favor of such profound changes as those included in the revolution's agenda. Although many Wallachian boyars were displeased with the Phanariote regime, the fear of an intervention by the suzerain power made them hostile to an overt action against the Greeks and the Phanariote rulers. That was why some of the boyars took refuge in Brasov in an act to show their lack of support for Tudor's endeavor.

However, the end of the Revolution of 1821 was not caused by the lack of support from the local aristocracy, but by the Porte's decision to send troops in the Principalities and by the eterists' attitude towards the leader of the Romanian revolution. The Porte's decision was greatly expedited by the position adopted by Russia, which, as we have seen, manifested its disproval of both movements. As early as the start of April, the Ottomans had taken positions on the left bank of the Danube, opposite of the Silistra, Ruschuk and Vidin forts. One month later, in early May, the Ottoman troops advanced in Wallachia in large numbers. Three columns headed for Craiova, with two more dispatched to Bucharest and one towards Moldavia. They were under the command of Cara Ahmed Efendi, lieutenant to the Pasha of Silistra.[8]

The failed negotiations with the pashas along the Danube, the superiority of the Ottoman forces and the positions in the capital, which were inadequate for armed resistance, made Tudor Vladimirescu withdraw from Bucharest. Since the post road through Slatina was threatened by the Turks, the retreat was made via the road to Pitesti (May 15, 1821). The Eterist act of suppressing Tudor Vladimirescu occurred during this phase of the events. Taking advantage of the discontent of some of his captains (including Dimitrie Macedonski and Hagi Prodan) with his excessive disciplining of the *pandurs*, Tudor Vladimirescu was arrested at Golesti by a band of eterists under the command of Giorgakis Olympios. Accused of having made a deal with and, therefore, betraying the fight against the Ottomans, he was taken to Targoviste and assassinated by Vasilis Caravias and several other eterists during the night of May 26/27, 1821. His mangled body was thrown in an abandoned water well. The assassination of Tudor Vladimirescu – a despicable act of revenge – was entirely unwarranted, as the accusations against him were a misinterpretation of his negotiations with the pashas along the Danube.

As indicated by the documentary evidence, those negotiations had an entirely different purpose: getting the Porte to replace the Phanariote rulers, which only the sultan could decide at the time. The eterists chose the worst way to settle their report with Vladimirescu. Given the Ottoman invasion, the most appropriate solution would have been to work with the *pandur* forces under his command. Left without a leader, the *pandur* army fought one initial battle at Zavideni, on the Olt river, on May 26, 1821. Under the Ottoman pressure, the *pandurs* retreated to Dragasani, where they fought another battle on May 29, 1821, suffering major losses. The eterists fought the decisive battle also at Dragasani, on June 7, 1821, but were defeated. Ypsilanti and some of his close associates retreated to Transylvania and then to Austria (aided by Russia in obtaining the approval of the Austrian authorities). The remaining eterist troops, under the command of Yiannis Pharmakis and Giorgakis Olympios, withdrew to Moldavia in an attempt to reach Russia through Bessarabia. A battle was fought at the Secu monastery, where Olympios resisted the Ottoman attacks for a while, then, not being able to carry on fighting, he set the gunpowder on fire and was blown up together with his few remaining troops. One last fight took place at Sculeni, on the Prut river, where the eterists were definitively defeated; Yiannis Pharmakis was taken prisoner and executed at Constantinople. The *pandur* bands led by Dimitrie Macedonski and Hagi Prodan took refuge at the monasteries in Northern Oltenia, whence they organized attacks against the Ottoman troops. In the battle at Slobozia, on July 17, the *pandurs* were however defeated, and Papa Vladimirescu and Ghita Haiducu were taken prisoners. After being taken across the Danube, nothing else was heard of them. Macedonski and Prodan managed to take refuge in Transylvania. By August, the Ottoman forces were in control of the situation in the Principalities. Their presence there extended until 1822.

Thus ended the first major Romanian action of the 19th century, which was intended to put an end to a political regime that was strange to the national interest and contrary to progress. With his proclamations, Tudor Vladimirescu voiced the aspirations of national rebirth and openness to progress in the two Romanian principalities. In April 1821, he urged the Wallachian boyars to get in touch with the Moldavian ones, so that "we can equally gain the rights for these principalities, by helping each other." The Revolution of Tudor Vladimirescu had a clear anti-Phanariote nature, as the regime enforced by the Porte was held accountable for the loss of the "country's just rights." Throughout the events that unfolded, Tudor Vladimirescu also spoke in multiple instances against the native boyars who accepted the Phanariote regime, urging them to "become patriots" and support him in his actions. The agenda of the Revolution of 1821 was comprehensive, stipulating reforms in all areas of society, with some of them applied while Tudor Vladimirescu and the Council (the "*Divan*") ruled the country. It is worth noting that some items in the programmatic documents were also included in the boyars' memoranda submitted to the Christian powers or the Porte on the occasions of their conferences, starting the Peace Congress of Focsani.

[8] Pascu Vasile, Istoria modernă a românilor (1821-1918) (The Modern History of Romanians (1821-1918)), Clio Nova Publishing House, Bucharest, 1996, page 21.

Furthermore, demands of the Revolution of 1821 continued to be supported by the native aristocracy after the removal of the Phanariotes, with the enlightened boyars establishing a "national party." The main consequence of the revolution was the return to native rulership. Tudor Vladimirescu's sacrifice led to the abolishment of a regime that had become unbearable due to its consequences on the principalities. As early as in February 1821, the Porte had appointed the new ruler of Wallachia, Skarlatos Kallimahis, who was also a Phanariote, but, after the revolution, neither him, nor other Phanariotes were ever appointed as rulers. The return to the national political regime meant not merely a return to the appointment (and then election) of princes from among the native boyars, but also the beginning of Romanians integrating in the modern European world. Historian Alexandru D. Xenopol wrote of the year 1821: "... indeed, the start of a new age in the history of the Romanian people dates back to that time."

6. Conclusions

The Revolution of 1821 led by Tudor Vladimirescu represents the starting point of our modern history, a time when the Romanians spoke up and took action for the affirmation of their national rights and the modernization of domestic institutions. Originating in the political, social, cultural and economic crisis of the Phanariote regime, the revolution was the beginning of our national rebirth, proving the Romanians' aspirations for modernity and progress. The agenda of the revolution, the application of which was limited by the domestic and foreign conditions in which it unfolded, aimed at turning deem transformations in the Romanian society into reality: abolishment of personal privileges and servitudes, equality before the law, affirmation of the nation's sovereignty, political, administrative and taxation reorganization, true domestic autonomy. Based on those programmatic principles, we can safely conclude that the Revolution of Tudor Vladimirescu was a comprehensive act, akin to the European revolutionary movements in the first quarter of the 19th century.[9]

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[9] For a detailed analysis of the general principles of law, see Elena Anghel, *Principiile generale ale dreptului*, in Challenges of the Knowledge Society 2016, pag. 332-337.

EU-UK BREXIT AGREEMENT AND ITS MAIN LEGAL EFFECTS

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Abstract

The United Kingdom withdrew from the European Union on 31 January 2020. On 29 March 2017, the UK practically initiated formally the withdrawal procedure, in accordance with Article 50 TEU, informing the European Council of its intention to leave the European Union. In less than three years, the UK ratified the Withdrawal Agreement, with the purpose that the Agreement would enter into force on 31 January 2020 and, implicitly, produce legal effects. Of all the consequences of this withdrawal, naturally, we will focus on those which have legal implications, being however closely related to all the other effects, about which a lot has been written, and it certainly will be written in the years to come.

Keywords: *Withdrawal Agreement; UK; EU; legal dimension; free movement of persons.*

1. General considerations

Reflecting on my personal concerns in the matter, I found that, for the first time, I was put in the position to define the concept of "Brexit" for the drafting of a paper[1], published in 2018, which placed the notion among the specific terms of EU law. The definition that I proposed[2], has been partly adopted. This study is a prolongation of my demarches[3] in the field. The debut was immediately after the United Kingdom of Great Britain and Northern Ireland[4] "activated" Article 50 of the Treaty on European Union which had been introduced by the Treaty of Lisbon[5]. This particular article stipulates the possibility of a state to withdraw from the EU. The United Kingdom announced such an intention, initially at a declaratory level, subsequently initiating the actual procedure established by the Treaty. The proposed definition highlighted, even in anticipation, some possible legal consequences given the novelty, but also the courage of such an approach. It was of pronounced technical nature, if we consider the limitations set immediately after the announcement of such an intention by the United Kingdom. However, over time, the boundaries of the negotiations have alternated between flexibility and rigidity, with the parties being aware of the consequences, in particular, of the negative consequences caused by the "success" of achieving the goal of withdrawing the United Kingdom from the EU. Most of them refer to the capitalization of benefits obtained with consistent efforts from the part of the decision makers, but also of all the citizens of the European Union, namely the freedoms of movement by affecting, at the same time, people, services, goods, capitals and payments.

2. Withdrawal of the United Kingdom from the European Union. A first legal consequence: the Withdrawal Agreement

It is well known that the withdrawal of the UK was primarily aimed at the European Union as a subject

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[1] *Enciclopedia juridică (literele A-C)*, Universul Juridic Publishing House, Bucharest, 2018.

[2] Proposed definition: "Brexit" is a "pun" ("Br" - British and "exit" - exit) used to denote Britain's withdrawal from the European Union. In this regard, on 23 June 2016, a referendum was held, following which British citizens expressed their option for the United Kingdom to renounce at the status of Member State of the European Union. The result of the referendum leads to the first situation where Art. 50 of the Treaty on European Union is applied. By virtue of this article, any Member State may decide, in accordance with its constitutional rules, to withdraw from the Union. Following the stages involving the executive and the legislature (to which the supreme court was added), the United Kingdom notified its intention to the European Council (on 29 March 2017). The European Council, finding that the procedure was initiated, adopted the guidelines under which the Union negotiated and concluded an agreement with the United Kingdom laying down the conditions for the withdrawal. The Agreement is negotiated with the participation of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, concluded on behalf of the Union by a Council acting by a qualified majority, after obtaining the consent of the European Parliament. The cessation of the Treaties of the European Union with respect to the United Kingdom shall take effect on the date of entry into force of the withdrawal agreement, and if such an agreement does not take effect, the cessation of effects takes place two years later from the notification of the European Council on the withdrawal intention (i.e. on 29 March 2019). The exception is if the European Council, in agreement with the United Kingdom, decides unanimously to extend this period. The United Kingdom is not taking part in the debate or in the decisions of the European Council and the Council on its withdrawal from the European Union. In the event that the United Kingdom wishes to become a Member State of the European Union again, it is necessary to submit a new application for membership, following the entire procedure "(For the final definition, see, *Legal Encyclopedia (letters A-C .., op cit.*, pp. 481).

[3] See: Augustin Fuerea, *BREXIT - Limitele negocierilor dintre Uniunea Europeană şi Marea Britanie (libertăţile de circulaţie a persoanelor şi serviciilor - efecte juridice, şi nu numai)*, Revista de Drept Public, no. 4/2016, pp. 106-112; *Brexit - trecut, prezent, viitor - mai multe întrebări şi tot atâtea răspunsuri posibile*, Judicial Courier, no. 12/2016, pp. 631-633; *Actualitatea aplicării principiului liberei circulaţii a persoanelor, în contextul BREXIT*, in Ion M. Anghel, *Reglementări ale Uniunii Europene de un interes aparte - sui generis, pentru România*, Universul Juridic Publishing House, Bucharest, 2017, pp. 117-129.

[4] Hereinafter referred to as the United Kingdom/UK.

[5] On 1 December, 2009.

of international law of special nature, which, with the entry into force of the Treaty of Lisbon, acquired legal personality[6]. Paradoxically (or not!), three articles away from the one by which EU legal personality is conferred, the possibility for a Member State to withdraw from the EU[7] is enshrined, for the first time at this level, by an instrument of primary law[8] producing legal effects. Less well known is the simultaneous withdrawal of the UK also from the European Atomic Energy Community, another subject of international law, which, unlike the European Union, is the type of unequivocal international organization.

In this sense, by carefully, correctly and completely perusing the title of Withdrawal Agreement, we can easily ascertain the truth of the above, meaning that its name is as follows: "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community"[9]. Thus, the complexity of the issue is commensurate.

The rigour with which we proceed, in our analysis, is given by the overwhelming interest on this withdrawal process, and which is unprecedented in the history of the European Union. It represents a theoretical, doctrinal interest, on the one hand, but also a pragmatic and applied interest, on the other hand. We are talking about the withdrawal of a "big", strong state, with a history worthy of all admiration, which influenced the evolutionary course of the European Union, not only from a strictly economic perspective, but also from a pronounced cultural perspective, and more. That is why the consequences of such a withdrawal are multiple. We are talking about those, already stated, as being of economic nature, joined by others of political, legal, psychological, philosophical nature, to which many others can be added.

Regardless of what we might say, the EU does not seem to be the same without the UK as a Member State. It is something that we feel, not something that we just say.

Our interest is both general, meaning an interest expressed by all other EU Member States or non-members (located in Europe or on other continents), and particular resulting, without a doubt, from the large number of EU citizens of Romanian origin, but also of citizens who have the citizenship of origin of other EU Member States, who emphasized the principle of freedom of movement.

Of all the consequences of this withdrawal, we will naturally focus on those which have legal implications, being however closely related to all the other effects, about which a lot has been written, and it certainly will be written in the years to come.

Remaining on the technical field of our concerns in this part of the research, it is worth mentioning that, in addition to this Withdrawal Agreement, the European Union and the UK negotiated a second agreement, namely: the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, on the one hand, and the United Kingdom of Great Britain and Northern Ireland, on the other hand[10].

The solidarity, at EU level, between Member States ("large" or "small") materialized in the negotiation and conclusion of such general, and not individual agreements (with each and every state) or with groups of Member States, according to criteria more or less objective.

Such an event, with historical resonance brings inevitably together a series of lessons, conclusions which aim, among other things, from a strictly legal perspective, to substantiate procedures on the withdrawal of an EU Member State, perhaps symmetrical to those on the accession to the European Union, including a transition period which would reduce the multiple negative consequences for all parties involved.

The United Kingdom withdrew from the European Union on 31 January 2020. Without going into details, we would like however to draw your attention on the following aspects: on 23 June 2016, the UK held a referendum on its status as an EU Member State. The result of the vote[11] was quite tight, with 52% voting in favour and 48% against (the ratio between Eurosceptics and Euro-optimists), among British citizens who participated in the referendum; on 29 March 2017, the UK practically initiated the withdrawal procedure, in a formal sense, in accordance with Article 50 TEU, informing the European Council of its intention to leave the European Union; in less than three years (30 January 2020), the UK ratified in turn the Withdrawal Agreement so that, on 31 January 2020, the Agreement could enter into force and, implicitly, have legal effect; with the entry into force of the Withdrawal Agreement, the transitional period set to end on 31 December 2020 began.

[6] Art. 47 TEU: "The Union has legal personality".

[7] For details on EU primary law, see Augustina Dumitrașcu, Roxana-Mariana Popescu, *Dreptul Uniunii Europene. Sinteze și aplicații*, 2nd edition, revised and added, Universul Juridic Publishing House, Bucharest, 2015, pp. 117-119.

[8] There have been and still are many debates, in the doctrine and practice of the field, as to whether the non-existence of such a legal basis would not have given the UK the opportunity to withdraw from the EU.

[9] Published in OJ C 381, on 12 November 2019.

[10] Published in OJ L 444, on 31 December 2020.

[11] Regarding the result of the vote in Scotland and Northern Ireland, see Laura-Cristiana Spătaru-Negură, *Dreptul Uniunii Europene – o nouă tipologie juridică*, Hamangiu Publishing House, Bucharest, 2016, p. 253.

3. Agreement on the withdrawal of the United Kingdom from the European Union. Technical aspects

Given the rather long period of the United Kingdom's presence in the European Union (over 45 years), the above-mentioned procedural steps were accompanied by a series of legal instruments which were naturally followed by a political statement establishing the framework for future EU-UK relations[12].

Historically, we believe that an important role in resolving the UK's withdrawal from the EU lies in that "new agreement for the UK within the EU"[13] according to the extract from the European Council conclusions of 18 and 19 February 2016[14], in accordance with which the UK and the EU, at their December reunion, and the members of the European Council agreed to work closely together to identify mutually satisfactory (not beneficial) solutions in all four areas mentioned in the British Prime Minister's letter of 10 November 2015[15].

Thus, after a series of often difficult demarches and negotiations, the two involved parties concluded that "it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as for their family members, where they have exercised free movement rights before[16] the UK withdrew from the EU based on the principle of non-discrimination. At the same time, the conviction that "the rights deriving from periods in which those people have benefited from social security insurance"[17] must be protected, but also that "an orderly withdrawal through various separation provisions is necessary in order to prevent disruption and to provide legal certainty to citizens and economic operators, as well as to judicial and administrative authorities in the Union and in the United Kingdom" [18] was an important argument that laid the groundwork for the adoption of the Withdrawal Agreement[19].

A quantitative analysis of the Withdrawal Agreement highlights that the Agreement includes: a preamble; 21 titles (which are incorporated, according to the rules of legislative technique at EU level in 6 parts, as follows: none in Part I; 4 in Part II; 13 in Part III, none in Part IV and Part V; 4 in Part VI); 18 chapters, as subdivisions of some of the 21 titles[20] and 185 articles. It should be noted that Part I and Part V do not know the subdivisions of "titles" and "chapters", Parts II and III being complete parts that bring together both "titles" and "chapters". Part V consists exclusively of "chapters" and Part VI of "titles" only.

Therefore, and from this perspective, we consider the Withdrawal Agreement as being equally complex and diverse. The basic element of the Agreement is the "article". The 185 articles are distributed, depending on the previously mentioned complexity of such an approach, within the parts, as follows: Part I: 8 articles; Part II: 29 articles; Part III: 88 articles; Part IV: 7 articles; Part V: 25 articles and Part VI: 28 articles. In descending order, we find that the largest number of articles belong to Part III (88), followed by Part II (29), Part VI (28), Part V (25), Part I (8) and Part IV (7). We have carried out this more than necessary quantitative analysis, in this first stage of the implementation of the Withdrawal Agreement, precisely because, starting from it, we can arrive at the substantive analysis of the issues, a qualitative analysis, which can allow us, by using including mathematical criteria, to identify the main priorities of the EU and, implicitly, of the Member States for the continuation of the dialogue with the United Kingdom as a former important Member State, from all possible perspectives. Only such a continued dialogue, within the legal parameters offered by the Agreement is likely to lead, for the parties involved, at the maximization of possible advantages, but also at the minimization of the inevitable disadvantages (not possible, this time) for the parties.

The structural elements, previously mentioned, are completed by 3 Protocols[21], of which 2 have no less than 16 annexes, and the aspects of legislative technique are also interesting.

4. Some legal aspects of the Withdrawal Agreement

From legal perspective, it is very important the extent to which European Union law will be still enforceable after the Withdrawal Agreement starts producing its effects. According to its preamble, and not only[22], but also subject to the conditions laid down

[12] Available at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:12019W/DCL(01)&from=MT.

[13] Published in OJ C 69, on 23 February 2016.

[14] Idem.

[15] The four areas are: economic governance; competitiveness; sovereignty and immigration. The letter can be accessed at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf

[16] Preamble to the Withdrawal Agreement.

[17] Idem.

[18] Idem.

[19] We appreciate that this approach was responsibly undertaken, considering the fact that, in law, "liability has more meanings (..): political liability, criminal liability, disciplinary liability" (according to Elena Emilia Ştefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p. 13.

[20] We used the expression "of some of the titles" because the 18 chapters are distributed only in 4 titles. Most of them (17) do not benefit from the chapter structure. In the same direction, it should be noted, by way of exception, that Part IV does not know the subdivision of "titles", but knows directly that of "chapters", counting 7 chapters.

[21] Protocol on Ireland / Northern Ireland, Protocol on areas of sovereignty in Cyprus, Protocol on Gibraltar. A material error should be noted in OJ C 384 I, on 12 November 2019, in the numbering of titles, in the sense that instead of Title IX of Part III (Art. 79-85) Title IV is entered.

[22] We consider Art. 50 TEU and Art. 106 TEURATOM.

in the very content of the Agreement, both Union and Euratom law cease in its entirety "to apply to the United Kingdom starting with the date of its entry into force". The "orderly withdrawal" of the United Kingdom from the Union and Euratom has been and still is the main objective of the Withdrawal Agreement. Such an objective concerns, in particular, the area directly and immediately affected, with medium and long-term consequences, namely that of the freedoms of movement.

The intention stated and pursued in practice is to ensure a natural legislative framework, in such an exceptional situation for the reciprocal protection of Union citizens, but also of United Kingdom nationals, to which are inevitably added family members of those who have benefited from a right deriving from the status of citizen of the European Union, along with many other rights, namely the right to free movement. For the sake of clarity, we mention that we are referring to those beneficiaries who exercised their right before the date set by the Agreement. The aim is to create all the guarantees that their rights under the Agreement are enforceable and based on the principle of non-discrimination. Correlatively, it is recognized, after intense negotiations, that it is necessary to protect the rights deriving from periods when those people have benefited from social security insurance. In this sense, the specialized doctrine[23] refers to the issues that are, naturally, generated by the free movement of workers aiming, including, the scope of application of Art. 45 TFEU[24]. Among these, the following are noticeable: "the meaning given to the notion of worker; the rights of intermediate categories (e.g. jobseekers); the types of restrictions that states may justifiably impose on workers and their families, as well as the social or other rights that family members enjoy under EU law"[25].

The Withdrawal Agreement aims, inter alia: at avoiding disruption while ensuring the legal security of citizens and economic operators or judicial and administrative authorities in the Union and in the United Kingdom; establishing a transition or implementation period; preparing and concluding new international agreements of its own, including in areas of Union exclusive competence[26]; fulfilling mutual commitments undertaken while the United Kingdom was a member of the Union through a single financial settlement; establishing provisions ensuring overall governance, in particular binding dispute-settlement and enforcement rules that fully respect the autonomy of respective legal orders of the Union and of the United Kingdom, as well as the United Kingdom's status as a third party, in relation to the Union, but also to each of its Member States; concluding separate protocols[27] to the Withdrawal Agreement, etc.

We consider that a particular aspect of the Withdrawal Agreement, in the context of the developments that take place in the field of personal data protection, is given by Art. 71 which, in the three paragraphs, regulates precisely this field. Data subjects outside the United Kingdom benefit from such protection, with the application of the European Union law in the matter, according to para. (1), subject to two conditions, namely: the data had to have been processed in the United Kingdom in accordance with EU law prior to the transitional period (point (a)) and the data had to have been processed in the United Kingdom under the [Agreement] after the end of the transitional period (point (b)).

There is of course an exception from the rules presented above provided in the second paragraph of Art. 71. Thus, the provisions of para. (1) "do not apply to the extent that the processing of personal data (..) benefits from an adequate level of protection". Decisions made by an implementing act concerning a third country, a territory or one or more specified sectors of a third country or an international organization[28] are referred to hereby.

The equivalence between the levels of personal data protection in the EU and the UK is a principle that is ensured in the application of the Agreement in this field[29].

Regarding the transition period for the application of the Withdrawal Agreement, it is clear from the provisions of Art. 126 that it was a relatively short period (1 year), having already been concluded on 31 December 2020. Part V of the Withdrawal Agreement, which contains transitional provisions, refers, next to the transitional period, to the following aspects: the scope of the transitional provisions (Article 127); institutional provisions (Article 128); specific provisions on the Union's external action (Article 129); special provisions on fishing opportunities (Article 130); monitoring and ensuring compliance (Article

[23] Paul Craig, Gráinne de Búrca, *Dreptul Uniunii Europene. Comentarii, jurisprudență și doctrină*, 6th edition, Hamangiu Publishing House, Bucharest, 2017.

[24] Article 45 TFEU: '1. Freedom of movement for workers shall be guaranteed within the Union. 2. Free movement shall entail the elimination of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. Subject to restrictions justified on grounds of public policy, public security or public health, freedom of movement for workers shall entail the right: (a) to accept actual employment offers; (b) to move freely within the territory of the Member States for that purpose; (c) to stay in a Member State in pursuit of gainful employment in accordance with the laws, regulations and administrative provisions governing the employment of workers of that State; (d) to remain in the territory of a Member State after having been employed in that State, under conditions which shall be the subject of regulations adopted by the Commission. 4. The provisions of this Article shall not apply to employment in the public administration.'

[25] Paul Craig, Gráinne de Búrca, *op. cit*., p. 829.

[26] Article 3 TFEU.

[27] *Pre-cited*.

[28] Article 45 para. (3) of Regulation (EU) 2016/679. To these are added the provisions of Directive (EU) 2016/680, Article 36 para. (3).

[29] Article 71 para. (3).

131) and the extending of the transition period (Article 132).

The most debated issue has been and will continue to be the issue of the place of the Withdrawal Agreement in the legal order of the European Union, respectively among the European Union's own legal instruments. Being the first of this kind, the Withdrawal Agreement came after the EU acquired legal personality, becoming implicitly a subject of international law. In order to correctly identify its legal nature, it is necessary to briefly analyze the parties of the Agreement (the UK, on the one hand, and the EU, on the other), but also the steps taken to negotiate, sign, approve, conclude and ratify by the EU institutions empowered through the Lisbon Treaty, by the Member States. Only then can we draw conclusions about the place of the Withdrawal Agreement in the hierarchy of European Union rules within or outside the "five main levels"[30].

5. Conclusions

The present research is only the beginning of similar, subsequent demarches, which will increase their consistency as time passes, which will bring to light many of the difficulties of multiple nature, including legal difficulties that, at the moment, we can only intuit or perhaps anticipate. Particular attention will continue to be paid, from the point of view of the analysis we will carry out, to all those "issues" concerning the regulations that make up the substantive law of the European Union, to which the Withdrawal Agreement makes numerous references, to which new meanings or interpretations of habits that occurred, regarding the freedoms of movement or even the external action of the European Union which the UK also referred to, have been over time added.

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[30] Paul Craig, Gráinne de Búrca, op. cit., p. 116.

CJEU'S JURISDICTION AFTER BREXIT

Iuliana-Mădălina LARION *

Abstract

The study explores the main provisions included in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community regarding the Court of Justice of the European Union's Jurisdiction after Brexit, with emphasis on the preliminary ruling procedure. The scope of the analysis is to determine the nature and the limits of CJEU's jurisdiction to decide matters of EU law involving the United Kingdom and the effects of such decisions, pronounced after the end of the transition period.

Keywords: *Court of Justice of the European Union; jurisdiction; preliminary ruling procedure; withdrawal from the European Union; Brexit.*

1. Brexit

The United Kingdom of Great Britain and Northern Ireland (UK) is the first and only Member State of the European Union (EU) to exercise its right to withdraw from this international integration organisation, a choice commonly known as Brexit.

Following a referendum held on 23 June 2016, UK notified its intention to leave the EU to the European Council on 29 March 2017[1], as required by Article 50 of the Treaty on European Union[2]. This marked the beginning of negotiations for the conclusion of an agreement setting out the arrangements for UK's withdrawal. The treaty was necessary in order to facilitate UK's transition to the non-Member State status in an orderly manner, to safeguard the important interests of the other Members States, to protect the rights of the EU citizens residing and working in the UK and of the UK citizens residing and working in the EU[3].

The negotiations lasted approximately one and a half years. The process was sometimes very complicated, a no-deal withdrawal remaining always as an alternative. It was doubled by the need to establish a framework for UK's future relationship with the EU, a political engagement for further negotiations on subject matters not covered by the agreement.

Despite the difficulties, on 17 October 2019, the parties succeeded in concluding the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement), a detailed treaty on the legal, economic and social consequences of Brexit.

The Withdrawal Agreement included a transition period that started on the date of its entry into force, 1 February 2020, and ended on 31 December 2020[4]. The scope was to provide more time for the states' administrations and nationals to prepare and adapt.

During the transition period EU law continued to apply in and to the UK, but without UK's participation in EU institutions and governance structures[5].

Once the transition period ended, EU law ceased to apply in its entirety to the UK and the Withdrawal Agreement came into full effect, governing the legal relationship between UK and the EU.

The study shall analyse the main provisions of the Withdrawal Agreement that recognize a residual jurisdiction for the Court of Justice of the European Union (CJEU)[6] in matters involving the UK or its nationals after Brexit and that institute the means to enforce the CJEU's rulings.

Applying these new legal rules in good faith is important for both the UK and the EU, if the efforts to build a new and a better relationship are to be fruitful. Also, since these new rules impact both the public and the private sectors of the states involved, EU and UK nationals, state authorities and legal practitioners need to be aware of their content and of their legal effects, especially in cross-border litigation.

This synthetic analysis aims to facilitate the dissemination of information on the subject matter of CJEU's jurisdiction, to put in the spotlight recent developments, research of established authors and

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[1] For the possibility to revoke this notification unilaterally, by a notice addressed to the European Council in writing, see judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraphs 73-75.

[2] The Treaty on European Union (TEU) was signed at Maastricht on 7 February 1992 and entered into force on 1 November 1993. Article 50 was introduced in TEU by the Treaty of Lisbon, signed on 13 December 2007, in force since 1 December 2009. For the development of the withdrawal process in the UK, see Horspool, Humphreys, Wells-Greco, 2018, p. 10-11 and Foster, 2019, p. 11-13.

[3] See Fuerea, *Brexit – Limitele negocierilor…*, 2016, p. 106-112 și *Brexit – trecut, prezent …*, 2016, editorial.

[4] Art. 126 of the Withdrawal Agreement.

[5] Art. 127 of the Withdrawal Agreement.

[6] CJEU is composed at the present moment of the Court of Justice and the General Court. For further details, see Coutron, 2019, p. 130-138.

relevant case law, in order to contribute to doctrinal debate.

Effective withdrawal of a Member State from the EU is an unprecedented legal event and what happens in practice after the transition period represents a subject of great interest for EU legal literature.

2. The jurisdiction of the CJEU with respect to the UK after the entry into force of the Withdrawal Agreement

2.1. The CJEU's jurisdiction during the transition period

With the few exceptions provided in the Withdrawal Agreement, during the transition period the UK continued to be bound by EU law as any other of the Member States[7]. The EU's institutions, bodies, offices and agencies exercised the same powers with respect to the UK as before 1 February 2020. In particular, CJEU had full jurisdiction over UK, including with regard to the interpretation and application of the Withdrawal Agreement.

However, the effects of such competence reach beyond the end of the transition period, especially in what ongoing judicial cooperation in civil and commercial matters and pending cases before CJEU are concerned.

For example, the UK continues to apply Regulation Rome I[8] to contracts concluded before the end of the transition period and Regulation Rome II[9] to events giving rise to damage, if the events occurred before the end of the transition period.[10]

The provisions of several EU Regulations and Directives regarding jurisdiction of national courts, recognition and enforcement of judicial decisions, service of judicial and extrajudicial documents, taking of evidence, legal aid and mediation continue to apply after Brexit in respect of legal proceedings instituted and documents received before the end of the transition period.[11]

CJEU continues to have jurisdiction to rule on pending direct actions, including appeals, and preliminary references, a solution we envisaged and advocated for in a previous study.[12] Our main arguments supporting this view were that the UK was a EU Member State at the time the proceedings were registered, the facts of the cases occurred prior UK's effective withdrawal from the EU and the solution would be in agreement with the principle of legal certainty and with the principle of the protection of legitimate expectations, since the parties have little or no influence on the length of the procedure before the CJEU.

The case is considered to be pending if the proceedings were brought by or against the UK and if the requests from UK courts were made before the end of the transition period. The date of reference is the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or of the General Court, as the case may be.[13]

Thus, if the document was sent to the CJEU before 31 December 2020, but it arrives at the Court and it is registered after this date, the case cannot be considered pending. It shall fall under the category of new cases and it may be deemed inadmissible under the provisions of the Withdrawal Agreement on new cases brought before the CJEU.

The Court of Justice affirmed its jurisdiction in pending cases in a judgment pronounced during the transition period. The Court stated: "it follows from Article 86 of the Withdrawal Agreement, which came into force on 1 February 2020, that the Court of Justice is to continue to have jurisdiction in any proceedings brought against the United Kingdom before the end of the transition period, such as the present action for failure to fulfil obligations."[14]

The Court's position is based on the new treaty, but it is in alignment with its case law from the period between the official notification of UK's intention to leave the EU and the date of entry into force of the Withdrawal Agreement, a period in which the UK was, in principle, under the complete jurisdiction of the CJEU, in all its aspects and it had to give full effect to all of CJEU's rulings, just like any other EU Member State.[15] The Court decided that the UK's mere intention to leave the EU, communicated in accordance with Article 50 TEU, does not have the effect of suspending the application of EU law in UK until the time of actual withdrawal[16] and cannot justify, in itself, the refusal or

[7] Art. 127 paragraphs 1 and 3 of the Withdrawal Agreement.

[8] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ L 177, 4.7.2008, p. 6).

[9] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, 31.7.2007, p. 40).

[10] Art. 66 of the Withdrawal Agreement.

[11] Art. 67-69 of the Withdrawal Agreement.

[12] Larion, 2017, *A Brief Analysis…,* p. 85-94.

[13] Art. 86 of the Withdrawal Agreement.

[14] Judgment of 14 May 2020, *Commission v United Kingdom*, C-276/19, EU:C:2020:368, paragraph 28. The case concerned the common system of value added tax and the regime applicable to terminal markets.

[15] See Larion, 2016, *Brexit's Impact…*, p. 76-84.

[16] Judgment of 29 November 2018, *Alcohol Countermeasure Systems (International) v EUIPO*, C-370/17 P, EU:C:2018:965, paragraphs 115-118. The Court of Justice decided an appeal against the General Court's decision in an action for annulment pronounced in the matter of an EU trade mark. See also judgment of 23 January 2019, *M.A. and Others*, C-661/17, EU:C:2019:53, paragraph 54.

postponement of the execution of a European arrest warrant issued by the UK[17].

In conclusion, CJEU's jurisdiction in pending judicial proceedings shall extend after the end of the transition period, with no time limit stipulated in the Withdrawal Agreement. It is reasonable to presume, based on CJEU's existent case law with respect to the withdrawal process, that the Court shall continue to assess consistently all of the legal grounds for its judicial powers in order to ensure that EU law is observed in and by the UK, for as far as the UK is, in one way or another, still bound by EU law.

2.2. The CJEU's jurisdiction after the end of the transition period

The new cases CJEU may rule upon after Brexit are mainly infringement actions and preliminary references.[18]

Within four years after the end of the transition period, the European Commission or a Member State may bring an infringement action[19] against the UK. This may be the case if the UK has failed to fulfil an obligation under the EU treaties or under the Withdrawal Agreement before the end of the transition period and if the UK does not comply with decisions adopted by institutions, bodies, offices and agencies of the EU before the end of the transition period or in procedures initiated during the transition period, addressed to the UK or to natural and legal persons residing or established in the UK. The UK retains the right to bring infringement procedures against a Member State for the same period. The CJEU has jurisdiction over all such cases.[20]

For actions concerning UK and EU citizens rights[21] commenced at first instance before a court in the UK within eight years from the end of the transition period, the CJEU has jurisdiction to give a preliminary ruling, where the UK court considers that a decision on the question is necessary to enable it to give judgment in that case.

In what UK's participation to the EU's budget for the years 2019 and 2020 and UK's participation to EU's programmes, activities and previous financial perspectives are concerned, the CJEU retains jurisdiction to decide infringement actions and preliminary references in respect to the applicable EU law referring to this subject matter in the Withdrawal Agreement.[22]

Of course, the CJEU has jurisdiction to interpret the Withdrawal Agreement, where a court of a Member State refers for a preliminary ruling to the Court of Justice.[23]

The Withdrawal Agreement institutes a procedure of dispute settlement between the EU and the UK on its interpretation and application. If the parties cannot settle a dispute informally and in good faith, any party may require the establishment of an arbitration panel.[24] Where a dispute submitted to arbitration raises a question of interpretation of a concept of EU law or of a provision of EU law referred to in the Withdrawal Agreement or a question of whether the UK has complied with its obligation to respect the binding effects of CJEU's decisions, the arbitration panel must request the CJEU to give a ruling on that question. The CJEU has jurisdiction to give such a ruling, which shall be binding on the arbitration panel.[25]

The separate Protocol on Ireland/Northern Ireland, annexed to the Withdrawal Agreement, provides for CJEU's jurisdiction over its interpretation and application.[26]

The procedural rules to be followed in pending cases and in new cases are the ones governing the procedure before CJEU.[27]

The UK has the right to intervene, to participate and to be represented in all proceedings and requests for preliminary rulings which concern it until the last judgment or order rendered by CJEU has become final.[28]

It must be emphasized that the UK accepted CJEU's jurisdiction post Brexit for the specific matters indicated above for a nonspecific time-limit. Only the beginning of some proceedings is to take place within a certain period of time, but these proceedings may continue until the last decision becomes final.

2.3. Enforcement of the CJEU's decisions post Brexit

The UK is no longer a member of the EU and, unless otherwise provided by the Withdrawal Agreement, the CJEU lacks competence, *ratione personae*, to receive, hear and solve cases involving the UK and the UK in no longer under the obligation to observe the Court's rulings.

However, judgments and orders of the CJEU handed down before the end of the transition period, as well as those pronounced in proceedings referred to in

[17] Judgment of 19 September 2018, *RO*, C-327/18 PPU, EU:C:2018:733, paragraph 62.
[18] CJEU's jurisdiction to rule on the basis of art. 263 of the Treaty on the Functioning of the European Union (TFEU) is provided in art. 95 paragraph 3 of the Withdrawal Agreement.
[19] Art. 258-261 TFEU. For a synthesis of the main actions before the CJUE, see Fuerea, 2016, *Dreptul Uniunii Europene…*, p. 65-123. For further details, see Craig and De Búrca, 2017, p. 481-677.
[20] Art. 87 and art. 95 paragraph 1 of the Withdrawal Agreement.
[21] Part Two of the Withdrawal Agreement.
[22] Art. 160, art. 136 and art. 138 paragraphs 1 and 2 of the Withdrawal Agreement.
[23] Art. 161 of the Withdrawal Agreement.
[24] For a presentation of the dispute settlement procedure, see Chalmers, Davies and Monti, 2019, p. 417-419 and Larik, 2020, p. 7-16.
[25] Art. 174 paragraph 1 of the Withdrawal Agreement.
[26] Art. 12 paragraph 4 of the Protocol.
[27] Art. 88 and art. 161 of the Withdrawal Agreement.
[28] Art. 90, art. 91, art. 161 paragraph 3 and art. 174 paragraph 7 of the Withdrawal Agreement.

the Withdrawal Agreement, shall have binding force in their entirety on and in the UK, that is the UK is obliged to take the necessary measures to comply with that decision, which is enforceable under the UK's civil procedural rules.[29]

Article 158 paragraph 2 of the Withdrawal Agreement also stipulates that the legal effects in the UK of preliminary rulings on citizens' rights shall be the same as the legal effects given pursuant to Article 267 TFEU in the EU and its Member States.

The rule is that UK still has to respect CJEU's decisions that produce erga omnes effects and those concerning the UK or one of its nationals given before the end of the transition period and all the decisions pronounced after the end of the transition period as a result of CJEU's jurisdiction enshrined in the Withdrawal Agreement.

The main legal means of enforcement of CJEU's decisions given on the basis of the residual competence conferred upon it after Brexit include: infringement actions[30], preliminary ruling procedure[31], the use or arbitration[32] and the supervision of the UK by an independent Authority[33].

We consider that, because of its role as an instrument of dialogue between the Court of Justice and judicial bodies from EU Member States, the preliminary ruling procedure[34] might prove to be the most effective means of proper interpretation and application of the Withdrawal Agreement by its parties. Unlike the infringement procedure, which implies the idea of a sanction, preliminary rulings are meant to facilitate fulfilment of obligations and to prevent improper application of the law.

The EU, its Member States and the UK may decide to extend CJEU's jurisdiction further, by concluding a contract and empowering the CJEU to rule on direct actions based on contractual liability[35]. Another possibility would be for the UK to become a party to existing international treaties, such as the Agreement on the European Economic Area (EFTA), which authorizes courts of the EFTA Member States to refer questions to the Court of Justice on the interpretation of an Agreement rule[36].

At last, a new international treaty could be concluded to further develop UK's relationship with the EU[37], which could extend CJEU's jurisdiction over the UK to actions inspired by the CJEU's current powers or to innovative, outstanding competence. Such a new treaty could offer answers for the need to find better means of enforcement of the CJEU's decisions if the ones provided already prove to be insufficient.

Even if it appears unrealistic at this moment, the UK could even rejoin the EU on the basis of Article 50 paragraph 5 TEU, by starting over the process of accession[38].

3. Conclusions

The rather long and sinuous journey of the United Kingdom of Great Britain and Northern Ireland from declaring its intention to leave the European Union until the date of effective withdrawal has ended. Following the effort of all the parties involved, this unprecedented process has led to the conclusion and full entry into force of a Withdrawal Agreement.

Although it is no longer a part of the EU, the UK has chosen an orderly Brexit and it continues to be under the jurisdiction of the Court of Justice of the European Union in pending cases, as well as in a number of new cases that may be lodged with the Court after the end of the transition period, on 31 December 2020.

It is difficult to foresee all of the complex legal and practical issues which may arise out of the interpretation and application of the Withdrawal Agreement with respect to the CJEU's powers over the UK. The study has focused on the analysis of the main provisions regarding CJEU's jurisdiction after, as well as during the transition period, since the Court has kept, in principle, full jurisdiction in and to the UK until the end of the transition period, with the result that, depending on the length of the proceedings, pending cases may extend well beyond the loss of EU Member State status by the UK.

Also, the study has approached the issue of the means to enforce the CJEU's decisions stipulated in the Withdrawal Agreement, amongst which the preliminary ruling procedure continues to be an important instrument.

The research aims to contribute to the existing doctrinal works on this latest development of EU law, to be a synthetic source of information about CJEU's

[29] Art. 89 of the Withdrawal Agreement corroborated with art. 280 and art. 299 TFEU.

[30] Art. 87 and art. 160 of the Withdrawal Agreement. For example, the European Commission has started an infringement procedure against the UK on15 March 2021. The Commission sent a letter of formal notice to the UK for breaching the substantive provisions of the Protocol on Ireland and Northern Ireland, as well as the good faith obligation under the Withdrawal Agreement, according to: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1132 (last accessed on 20 March 2021).

[31] Art. 158 and art. 160 of the Withdrawal Agreement.

[32] Part Six Title III art. 167 and the following of the Withdrawal Agreement.

[33] Art. 158 paragraph 1 of the Withdrawal Agreement.

[34] Article 267 of TFEU.

[35] Article 272 of the TFEU.

[36] Article 107 of the Agreement on the European Economic Area and Protocol 34 annexed to it. For other options in defining the EU – UK relationship after Brexit, see Berry, Homewood, Bogusz, 2019, p. 308 and Schütze, 2018, p. 871-884.

[37] For example, the EU and UK concluded a Trade and Cooperation Agreement, provisionally applicable since 1 January 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2020:444:TOC (last accessed on 20 March 2021).

[38] Art. 50 paragraph 5 TEU: "If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49."

jurisdiction post Brexit, of use to legal practitioners, and to inspire further studies on this subject matter.

Further research works could be conducted on the specific rights of EU citizens living and working in the UK after the transition period and of UK citizens residing in the EU, on the detailed jurisdiction of the CJEU with respect to citizens' rights and on the future relationship between the EU and the UK in the areas not covered by the Withdrawal Agreement.

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DISINFORMATION - THE SECRET WEAPON OF MODERN TERRORISM

Sandra Sophie-Elise OLĂNESCU[*]

Abstract

This work has been prepared with the aim of carrying out a thorough analysis of one of the fundamental drivers of the impact of the terrorist phenomenon, without which its existence would have been purely conceptual, not material in objective reality as it has occurred in the last three decades, or, at most, there would have been a little significant international dimension, namely: misinformation. The subject of the work was chosen to make a comparative assessment of the purpose and effects of the disinformation, with reference to those of terrorism, so that, at the end of its reading, it can be concluded whether the two phenomena are complementary or, at least, that they can function symbiotically or that they are mutually exclusive, having no connection (not even hypothetical) with each other. To this end, the paper proposes an analysis of the current regulatory framework at international level on misinformation, in order to highlight a general perspective – by their similarities – as well as a specific one, shaped by the differences between these normative frameworks. Last but not least, the author believes that misinformation itself acts as a tool for the subliminal control of human thought, with real success in the contemporary world, which gives it, per se, a particular danger, easily similar to the phenomenon of terrorism, insofar as it is intended to spread fear for purposes contrary to the law and incompatible with a democratic society.

Keywords: *disinformation, international terrorism, control instrument, fear, purposes contrary to the law.*

1. Introduction

1.1. What matter does the paper cover?

This paper addresses the issue of disinformation, as a means of aggression used in contemporary terrorist actions, a fact which, according to the author, has escalated in recent years to alarming proportions, which cannot be ignored, especially from the perspective of analyzing and understanding the phenomenon of modern international terrorism.

1.2. Why is the studied matter important?

This study was developed for the purpose of making a thorough analysis in relation to one of the fundamental impact drivers of terrorism, in the absence of which its very existence would have been purely conceptual, not materialized in the objective reality as it happened in the last three decades, or at most would have had little significant dimension internationally, namely: disinformation.

Likewise, this paper focuses on the contemporaneity of disinformation, as a phenomenon of mass manipulation, in the current circumstances of spreading information and data with unprecedented speed, *via* social networks, news websites and online press publications, online television (including with broadcast live) and, last but not least, the "*Internet of things*", all of this disinformation becoming a true "*weapon*" in the hands of anyone who knows how to use it, especially if we talk about the phenomenon of international terrorism.

1.3. How does the author intend to answer to this matter?

The subject matter of the study was chosen to make a comparative assessment of the purpose and effects of disinformation, in relation to those of terrorism, so that, at the end of its reading, it can be concluded whether the two phenomena are complementary or at least work "*symbiotically*" or these notions are mutually exclusive, not presenting any connection (not even hypothetical) with each other.

In view of this approach, this paper proposes an analysis inclusive of the legal framework currently in force at international level regarding disinformation to highlight a general perspective - by the similarities of these rules - and a particular one, outlined by the differences of these regulatory frameworks, be it international or regional.

1.4. What is the relation between the paper and the already existent specialized literature?

This paper addresses specialist literature which has covered the various aspects considered in its contents by scrutinizing the conclusions of the authors referred to, by presenting the concepts defined and explained by the aforesaid, and finally presenting the point of view of the author of this work, either to give an opinion or to express a possible disagreement, not least by giving an opinion on the complex thematic spectrum addressed, in relation to the phenomenon of international terrorism.

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2. Disinformation: Definition and Concept

2.1. Preliminary

Information is the substance of an eminently human phenomenon, *i.e.*, communication, a process in which perception and assumption acquire the importance of the truth itself, if the recipient appreciates it and the transmitter transmits it with this value.

The key factor in the process of transmission of information is always its recipient or **receiver**. Why? Simply because that information is as important as the receiver thinks it is, regardless of the degree of significance the transmitter gives it. In this regard, we appreciate that a concept clarification is necessary and appropriate as it is related to several preliminary issues concerning the communication, its elements, human perceptions, faiths and last but not least, **misinformation**.

According to literature, "***human communication***" is the fundamental way of psychosocial interaction of people, achieved through symbols structured in an articulated language or by different codes, the purpose of which is the transmission of information targeted pragmatically at influencing the behavior of individuals or groups, in order to achieve the real communication goals[1].

"*To communicate*" is therefore "*transmission of information by means of the code called « language », arbitrarily defined by reference to context outside it and independent of the user"*[2].

At the same time, **language** is defined as "*a common, arbitrary code, without any connection with the elements of the primary reality, through which the multiple transmission of information is achieved*"[3].

From the perspective of examining how to set up the communication process through language (the notion of language including not only speech – as a code of communication - but also non-verbal language), input key was made of by John Austin, teacher of philosophy and ethics at Oxford University, former MI6 agent who introduced the notion of "*performative*" utterance in opposition to "*constative*" utterance as well and the speech act - discourse vs. utterance.

In Austin's theory, what is fundamental is the notion of "*illocutionary force*" or the ability of a statement to act on the environment in which it was generated, in other words the **connotation attached to the message**.

As a result, starting from Austin's theory, communication is defined as a "*Intersubjective relationship established between participants able to make statements and to act in accordance with the stated sentence content (perlocutionary act) on the condition of intelligibility of the illocutionary force*"[4].

The impact of a statement is determined, mainly by the illocutionary force, the key driver of the influencing mechanism of that message.

In consequence, we can state the fact that, as any act of communication involves, necessarily, a rational base (that is, it implies the willingness to dialogue, the effort to argue and thus that of recognizing the grounds of the interlocutor) it must be possible to base on these reasons, an ***ethical communication.***

In fact, Austin also refers to the "*condition of sincerity*"[5], in the case of an ordinary act of communication, a condition absent in the case of a communication process with a manipulative objective. In this respect, we consider that any communication process is a process of manipulation, if each individual participant in the process wishes to maximize the impact of the message sent.

An important definition of communication, from the perspective of the process seen as a **driver of manipulation**, is constructed by Charles E. Osgood: "*in the most general sense, we talk about communication every time a system, respectively a source, influences a system, meaning a recipient, by means of alternative signals that can be transmitted through the channel that connects them*."[6]

Communication, therefore, always has - explicitly or implicitly - a purpose of influencing, the act of communication being primarily oriented to cause effects. This is always accompanied by the will (intention, desire) to influence (motivate) others to manifest a behavior inspired by the information we transmit.

One of the "*Axioms of communication*"[7], respectively Axiom 5, states that the communication process is "*irreversible*" due to a particular effect caused on the person who receives the information, effect sought intentionally or not, by the transmitter of the information. We appreciate, in this respect, that the axiom mentioned above can be applied, not only regarding the irreversibility of the process because of the impact caused on the receiver, but also on the irreversibility of the communicative context, the space-temporal context being characterized by uniqueness.

Communication, in a general sense, takes place between two actors, participants in the process, conventionally called, **transmitter** (*i.e.*, the one who initiates the communication process) and **receiver** (*i.e.*, the recipient of the communication process).

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[1] John Langshaw Austin, Quand dire, c'est faire, La mise en stage de la communication dans des discours de vulgarisation sciantifique, Éditeur Seuil, Paris, 1971, pp. 34- 47.
[2] Émile Benveniste, Problemes de linguistique generale II, Éditeur Gallimard, Paris, 1974, pp. 48.
[3] Ferdinand de Saussure, Cours de linguistique generale, Éditeur Gallimard, Paris, 1960, p. 33.
[4] John Langshaw Austin, Quand dire, c`est faire, Éditeur Seuil, Paris, 1971, p. 53.
[5] John Langshaw Austin, Quand dire, c`est faire, Éditeur Seuil, Paris, 1971, p. 54.
[6] Flora Davis, La comunicacion no verbal, Alianza Editorial, Madrid, 1971, p. 115-153.
[7] Didier Boudineau; Nicole Catona, Manager avec PNL, Edition d`Organisation, Paris, 2006, p. 29-50.

Instead, the communication process is defined through six elements, namely[8]: transmitter, receiver, message (*i.e.* the content or the subject of the communication which can be transmitted in order to inform or influence, a person or a group), the transmission channel (*i.e.* the set of sensory means through which an information is transmitted from the transmitter to the receiver), the code (*i.e.* the kind of language usually used and understood, by the transmitter and by the receiver, a set of signs defined and known to the persons participating in the communication process).

To all these six elements of the communication process, we think that a seventh essential element should be added, namely, the communication **context**.

This is relevant when we talk about the transfer of information that has, as a final objective, influencing the receiver, manipulating and / or misinforming the receiver.

Communication thus becomes a circular process: the receiver's response has a direct impact on the transmitter's message. O'Rourke defines the response of the receiver as feedback, the circularity of the communication process being called "*strategic feedback*"[9].

The term "*information*" referring to a statement made in the communication process is due to the introduction of elements from the "*Information Theory*"[10] in communication, whose "*parent*" is the renowned mathematician and engineer Claude Shannon. According to her, given "*information*" was given a sense of diversity or indeterminacy, by the emergence of symbols that carry / convey meaning.

In the "*Information Theory*", the information is independent of the concrete meaning of the symbols considered as such, or of their value, for the receiver[11]. This theory appears as the mathematical theory of the general characteristics of information sources and information transmission channels by means of symbols for which only their statistical properties are considered.

The characteristics of the information transmission process, according to the "*Information Theory*" involve: "*translating the message into an intermediate electrical signal, encoding the intermediate signal, i.e., its biunivocal transformation into another signal with a structure suitable for channel transmission and modulation of a carrier signal by means of the previous signal*"[12].

From the perspective of the "*Information Theory*", the analysis of the message is done taking into account the following factors[13]: the amount of information contained in a message and length relative to the source; source-specific entropy, defined by the limit of the average amount of information contained in a symbol issued by the source, the speed of information of the source emitting elementary symbols per second, the redundancy of the source defined as the relative difference between the maximum specific entropy of an ideal source with the alphabet of the same number "*n*" of symbols and the specific entropy of the source .

In conclusion, we believe that the term "*information*", having the meaning of: communication, news, explanation, given in relation to: a subject, object, person, context, is in opposition to that defined by Claude Shannon in the "*Theory Information*"[14].

We emphasize that the taking over of the term information within the communication, with the meaning of the message bearer of significance was achieved in the emergence of modern media institutions, in relation to the impact produced in the receiver, which is why, in order to cause as high an impact as possible on the addressee, there have been many studies on how to increase the efficiency of the message, both at transmission, and at reception.

Thus, it was found[15] that the transmitters constantly change their messages depending on the reactions of the receiver and this adaptation is often not conscious.

To get a good communication efficiency, it was taken into consideration the passage from the unconscious to the conscious, by observing the interlocutor in order to gather as much data about his/her reactions as possible, so the transmitter can adapt his message as well as possible for maximized impact.

This type of communication - that takes into account the conscious reactions (*i.e.*, verbal) and unconscious (*i.e.*, para-verbal, non-verbal) of the transmitter and of the receiver is defined in the literature as "*interactive communicationi*"[16].

According to the interactive communication, the transmitter is responsible for the proper transmission of the message, and not the receiver, the transmitter being the one who must always adapt his message according to the possibilities of understanding of the receiver. In other words, the transmitter **encodes** the message, and the receiver tries, and sometimes failing, to decode the message. Often, people tend to worry that their interlocutors do not understand them, blaming the latter for the misunderstanding. Since the individual is accustomed to speaking, most of the time, it may have

[8] James O'Rourke, *Management communication - A case-analysis approach*, Pearson-Prentice Hall, New Jersey, 2004, p. 26.
[9] *Ibidem*, p. 26.
[10] Claude Shannon, *A Mathematical Theory of Communication*, Bell System Technical Journal, July-October, 1948, p. 26.
[11] *Ibidem*, p. 26.
[12] Claude Shannon, *A Mathematical Theory of Communication*, Bell System Technical Journal, July-October, 1948, p. 27.
[13] *Ibidem*, p. 28.
[14] *Ibidem*, p. 28.
[15] Marie-Claude Nivoix, Philippe Lebreton, CSP Formation, *L'art de convaincre: Du bon usage des techniques d'influence*, Eyrolles, 2011, p. 15.
[16] Flora Davis., *La comunicación no verbal*, Alianza Editorial, Madrid, 2003, p. 19.

the feeling that he has control over his speech. However, the clarity of the message sent can be affected by the use of "*parasite*" words (*i.e.*, words that come in succession in a speech).

American studies show that in a full conference room, a speech is remembered 10% for its meaning (*i.e.*, words), 30% for pace and tone of voice and 60% for gestures[17] .

The receiver should they focus all attention to effectively perceive the message transmitted by the transmitter. Very often, the recipients of the messages carry out several activities at the same time: they watch, listen to several discussions at the same time, think of something else, the process of attentive / active listening is difficult to achieve, requiring a lot of concentration. Precisely for these reasons, there have been developed "*techniques that capture the subconscious of individuals through «key» words, that cause a conscious impact*"[18] .

Renowned international sociologists Peter Berger and Thomas Luckmann describe the so-called "*reality*" perceived by the individuals as the number of physical means over which they exert their influence including personal "*individual capacity*", managing to faithfully capture, in our opinion, the human mechanism of external projection, emphasizing how it can be determined / controlled. In this sense, in the words of the famous authors mentioned above:

"*The world, as we see it, hear it and feel it, is a human world, by no means the real world. It is the world so how humans represent it with their physical means. Even this human representation is different, depending on our individual capability: a blind person or a person with disabilities of understanding will not have the same perception that an individual who has all his physical abilities*"*[19]*.

In other words, each individual has several filters used to extract from the multitude of information coming from outside, only a very small part. This selection is made, "*at subconscious level according to the accumulations of each individual*"[20]. Thus, physical filters condition the reception of external information, making a sort of selection of "*what we perceive from the environment*"[21].

Therefore, it is possible to conclude that the individual is the sum of all his accumulations up until a certain moment, the moment of communicational interaction. The more the accumulations of the individuals have a high joint average sum, the more their representations are closer, and the message has an increased impact/efficiency. In other words, the more both individuals have an amount of accumulation (*i.e.*, base) that is similar, the more efficient the process of influencing / manipulating is.

"*The interpretation that the individual operates on the reality is called faith*"[22]. This subjective interpretation, which is not based on facts, becomes for the individual the reality itself.

Faith is a partial assessment of situations that occurs either due to a lack of information (selection process), or by the transformation of a single answer into a valid universal truth (generalization process), or due to an incorrect interpretation (distortion process)[23].

In other words, faith starts from a unique experience, if it was an important one, or from the repetition of the same experience. In the process of forming a belief, it is essential the context in which it is formed, so that starting from the same experience, an individual may reach, in different contexts, beliefs that are diametrically opposed.

Based on experience, the individual will draw a conclusion that will translate into a behavior or an attitude. Then he will generalize this decision and turn it into universal truth.

As claimed by Nicole Aubert, "*the entirety of beliefs of a person is their reference and operational frame, their model about the world*"[24]. It can be said, therefore, that, in the center of representation of the individual are his beliefs and his convictions, the conviction being a strong faith.

Consequently, it can be stated that the process of influencing the individual is performed by inducing beliefs, subsequently converted into convictions, in accordance with the objectives either bad or declared, of he who coordinates the activity of reaching the manipulation targets.

Based on representation of the individual, seen as a sum of all accumulations, at the center of which are found the beliefs and convictions, we can envision the complexity of communication / influence /manipulation process:

1. at the level of the transmitter, it is performed the coding[25] of the relevant meaning (which is to be transmitted and which has not become, yet information), which undergoes a first change due to disturbances occurring on the transmission channel of the transmitter.
2. the meaning is transmitted on the channel, and it will arrive to the receiver.
3. once it reaches the receiver, the meaning goes through the decoding process26, depending on its

[17] Pierre Longin, *Agir en leader avec la PNL,* Édition Dunod, Paris, 2003, p. 62.
[18] Peter Berger, Thomas Luckmann, *La construction sociale de la réalité,* Armand Colin, Paris, 2006, p. 69.
[19] *Ibidem*, p. 71.
[20] Jerry Richardson, *Introduzione alla PNL*, NLP Italy, 2002, p. 48.
[21] Nicole Aubert, *Diriger et motiver*, Éditions d'Organisation, Paris, 2006, p. 45.
[22] *Ibidem*, p. 47.
[23] Nicole Aubert, *Diriger et motiver*, Éditions d'Organisation, Paris, 2006, p. 47.
[24] *Ibidem*, p. 48.
[25] Longin, Pierre, *Agir en leader avec la PNL*, Édition Dunod, Paris, 2003, p. 74.
[26] Longin, Pierre, *Agir en leader avec la PNL*, Édition Dunod, Paris, 2003, p. 74.

representation and on the interference encountered in this stage.

In this context, the response reaction of the receiver will be performed exclusively based on the way of decoding the received message. Only at the time of decoding does the relevant meaning transmitted acquire the value of information.

2.2. Information vs. disinformation, misinformation and "*fake news*"

In accordance with the definition and explanations of Explanatory Dictionary of the Romanian language (hereinafter, "*DEX*"), the word "*information*"[27] means "*act of informing and its outcome*", "*provision of new data*", "*notification of hidden items*", "*gathering of information about something*", "*to find out about someone*", "*communication*", "*news*", "*report*".

Therefore, construing the above-mentioned explanations by using the argument *per a contrario*, it can be concluded that the term "***misinformation***" means the provision of wrong data or information, disclosure of wrong " *hidden items* " and **wrong** "***news***", "***miscommunication***" or "***misinformation***".

The term "***misinformation***" is, according to the same source[28] , "*the fact of intentional, biased misinforming; mislead"*, "*to misinform and its result*", "*to inform (intentionally) wrong"* ,"*to biasedly misinform (through the media, radio, etc.)*".

At first glance, the concepts of misinformation and disinformation would be synonymous, however, as will be seen in the *infra* paragraphs, at doctrine level, it was established a clear distinction between the two concepts, related mainly to the subjective element that underlies such communication of information.

Thus, in literature[29] a distinction was made between the concepts of misinformation, disinformation and "*fake news*" so that they are considered to have the following meanings:

- **misinformation** – "*false information that is spread, whether it is intended to mislead or not*"[30];
- **disinformation** - "*deliberately misleading or biased information; manipulated narrative or facts; propaganda*"[31];
- **fake *news*** – "*intentionally crafted, sensational, emotionally charged, misleading or fabricated information that mimics the shape of the headlines*"[32].

From the interpretation of the definitions given *above*, between the first two notions / phrases (*i.e.*, misinformation and disinformation) there is a clear differentiation, by reference - mainly - to the subjective element that determines the dissemination of information.

Thus, in the case of misinformation the volitional factor is not important (there is either intention or fault), disinformation is directly intended and qualified by purpose, namely: misleading the recipients/readers, by publishing wrong information specially developed in this sense, with the purpose of creating/forming wrong and unfounded opinions, or erroneously substantiated , by forming a belief on a state of fact or situation (which is, in fact, false, untrue), inconsistent with the objective reality.

Therefore, it is can be said that the main difference between misinformation and disinformation lies in intention of the participants to the communication process: while, in the case of misinformation the intention is positive in the sense that the transmitter of the message is a descriptor of primary reality, in case of disinformation , the intention is negative, aimed at distorting reality in order to achieve objectives, generally of an economic, political, financial nature, etc. (not including in this analysis the disinformation as military tactic) .

Consequently, we emphasize that disinformation should not be confused with misinformation/wrong information, which is not deliberate. For example, if an individual or a media institution disseminates information that they consider to be true, even if, in reality, it is false, it cannot be considered that we are dealing with a process of disinformation, in the true sense of the word. For this reason (i.e. confusion /conceptual delimitation error), disinformation is often presented as misinformation / wrong information, when the broadcaster does not know that, in reality, the transmitter behind the message constructed it by deliberately distorting the primary reality.

As we mentioned *above*, we hold that the reason of disinformation (*i.e.*, the cause) can take different forms: from political, economic or social interests and to organized crime and terrorism. For these reasons, we consider that disinformation gets a high degree of danger, as a social phenomenon currently widespread, which hides obscure interests, contrary to authentic

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[27] See, in this respect, https://dexonline.ro/definitie/informare, accessed on 19 November 2020.

[28] See, in this respect, https://dexonline.ro/definitie/dezinformare, accessed on 19 November 2020.

[29] University of Washington Bothell & Cascadia College Campus Library, *News: Fake News, Misinformation & Disinformation*, updated on 26 October 2020, available at: https://guides.lib.uw.edu/c.php?g=345925&p=7772376, , accessed on 19 November 2020.

[30] According to https://www.dictionary.com/browse/misinformation, quoted by University of Washington Bothell & Cascadia College Campus Library, *News: Fake News, Misinformation & Disinformation*, updated on 26 October 2020, available at: https://guides.lib.uw.edu/c.php?g=345925&p=7772376, , accessed on 19 November 2020.

[31] Conform https://www.dictionary.com/browse/disinformation, quoted in University of Washington Bothell & Cascadia College Campus Library, *News: Fake News, Misinformation & Disinformation*, actualizat la 26 octombrie 2020, available at: https://guides.lib.uw.edu/c.php?g=345925&p=7772376, , accessed on 19 November 2020.

[32] Melissa Zimdars și Kembrew McLeod, *Fake news : understanding media and misinformation in the digital age*, 2020 Cambridge, Massachusetts: The MIT Press, available at: https://alliance-primo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?docid=CP71320523600001451&vid=UW&search_scope=all&tab=default_tab&lang=en_US&context=L, and quoted in University of Washington Bothell & Cascadia College Campus Library, *op. cit.*

democracy and genuine freedoms of thought, conscience and speech.

At the same time, we add that misinformation is preceded, as a premise, by the process of "*elaboration*"/creation/invention of information - as a means and / or instrument of it – to achieve illegal, unjustified, immoral, criticizable objectives or, at least, negative connotations objectives, likely to bring a profit, advantage or benefit to its authors, either directly or indirectly, or to one or more third parties.

According to the theory of Bruno Ballardini, disinformation is considered to be "*the act of transmitting misinformation, in deliberately so as to be obtain the intended attitudes and behaviors*"[33]. In other words, according to the analysis made in the previous section, disinformation is manipulating human perception, which results due to the transmission of information intended to distort reality.

Adrien Jaulmes, in the preface to "*Le Monde en 2035 vu par CIA – le report que Trump trouvé dans le bureau oval- The world in 2035 as seen by the CIA - the report that Trump found in the Oval Office*", explained the way in which was generated, worldwide, the mirage of high standard of living in Western Europe "*it did not matter that Western Europe was never as rich and prosperous, what was important was to create the image of a way of living of the middle class which the potential candidates aspired to*"[34].

There are many ways to produce and transmit information so that it meets the conditions for a disinformation, namely:

- denying the facts of the primary reality.
- reversal of the facts that determine, implicitly, the reversal of the roles of the actors participating in the fact (the perpetrator becomes a victim and *vice versa)*.
- the mixture truths and lies.
- distortion of the real reason.
- generalization of the fact, to be diminished in the generalized context.
- the process of selection and distortion when relating account, the fact (i.e., the introduction of the fact in a generalized context and its "*cut*" by the imbalance of the parties).

Among the disinformation techniques listed above, the literature[35] retains only four, namely: the denial of the fact, the reversal, the mixture of truth and lies and the distortion of the real reason.

The other techniques listed, respectively: generalization, selection and distortion[36] are specific to neuro-linguistic programming and we consider them effective in order to identify an action of disinformation.

The renowned professor of psychology, Don Fallis[37], argues about the disinformation that: "*in the same way that acts of terrorism tend to be more disturbing than natural disasters, disinformation is an especially problematic misinformation as fact that people are led into error is not accidental*"[38].

Embracing the same point of view, we add that the resemblance to the terrorist phenomenon reveals not only the problematic nature of disinformation, but the very " *coat* " it can wear, in the worst circumstances, namely: a real **threat to international peace and security**, insofar as disinformation seeks benefits or advantages by taking advantage of the emergence of crises, states of alert and/or emergency, armed conflicts, state of wars or siege and the like.

In these circumstances, a major problem arises as to the possibility of controlling or stopping this phenomenon, which is often masked by alleged free expression of opinions or thoughts, without prejudice to the fundamental right to free expression and without imposing a censorship that would give rise, in time, to abuses that are difficult to remedy, in this sense.

However, we consider that a legitimate question is worth asking: if necessary, who will implement the control of misinformation or disinformation? States, through the exercise of public authority or private entities that manage social networks and internet platforms?

If, where states are concerned, we can talk about legitimacy, to the extent of compliance *in integrum* with the fundamental human rights as an expression of sovereignty and hence of fulfillment of the state's obligations concerning the national safety, subject to judicial review of the competent courts, where private entities are concerned, that manage and control content shown on online platforms, is there legitimacy and possibility of a remedy in case of implementing an unjust censorship and removal of content ?

Moreover, we consider that we need to look carefully at new trends as far as " *use policies* " are concerned, implemented at industry and Internet platforms or networks level, in order to identify possible attempts of *manipulation* of information, under the pretext of removing false information or disinformation , to obtain the *noble* result of *purification* of the cyberspace of information that is harmful, which in reality is nothing but a **classic censorship** , meant to serve diverse groups of political

[33] Bruno Ballardini, Manuale di disinformazione - I media come arma impropria: metodi, tecniche, strumenti per la distruzione della realtà, Edizione Castelvecchi, Roma, 1995, p. 12.

[34] Adrien Jaulmes, Le Monde en 2035 vu par la CIA-Le paradoxe du progress-le raport que Trump a trouvé dans le boureau ovale (preface), National Intelligence Council (NIC), Équateurs Document, Paris, 2017, p. 12.

[35] Hans Smart, Désinformation, Édition Courteau, 2007, p. 112.

[36] Pierre Longin, Agir en leader avec la PNL, Éditions Dunod, Paris, 2003, p. 91.

[37] Don Fallis, Professor of Psychology, Department of Psychology and Religion of Northeastern University of Boston, Massachusetts, SUA, as per: https://www.researchgate.net/profile/Don_Fallis, accessed on 19 November 2020.

[38] Don Fallis, What is disinformation?, Library Trends, Vol. 63 No. 3, 2015, p. 402, quoted in Maroun El Rayess, Charla Chebl, Joseph Mhanna, Re-Mi Hage, Fake news judgement: The case of undergraduate students at Notre Dame University-Louaize, Lebanon, publicat la 12 febrarie 2018 în Reference Services Review, ISSN: 0090-7324, available at: https://www.emerald.com/insight/content/doi/10.1108/RSR-07-2017-0027/full/html, accessed on 19 November 2020.

, social, economic interests or otherwise , but we shall not go into details on this issue, given that it is not the subject of this research.

In conclusion, the extent of the phenomenon of disinformation, misinformation and / or *fake news*, is caused including by the fact there are no clear regulations to stop this phenomenon, perhaps because **information is a true weapon** extremely effective everywhere it is used. For the same reason, under the current conditions, our opinion is that it is exceedingly difficult to identify and separate a real disinformation from a so-called misinformation.

2.3. Disinformation vs. propaganda

From a historical view, the term "*propaganda*" was used for the first time, by the Congregation of the propagation of Faith (lat. *Congregatio de Propaganda Fide*), the Roman congregation for preaching the Catholic faith and the conduct of missionary activities in Central America, America South, Caribbean, Philippines, Japan, China and India, but not limited to these countries. It was founded in 1622 by the Catholic Church[39], its activity is still ongoing, and it is headquartered in Rome.

According to DEX[40], propaganda is an "*organized action of mass dissemination of ideas that present and support a political party, a theory, a conception, etc., in order to make them known and accepted, to gain followers, etc*.". "*An action carried out systematically in order to spread a political, religious doctrine, theories, opinions, to make them known and accepted, to gain followers*".

Propaganda is, therefore, the action of planned persuasive communication, with the finality of influencing and, even, changing attitudes and behaviors of target-groups, to achieve interim objectives or final objectives that are (or not) explicitly stated.

The specificity of the propaganda activity consists in "*the transmission of false information and arguments, in a systematic way, partially true, distorted and exclusive, together with the true ones and accompanied by various forms of coercion and censorship*"[41].

Analyzing the definition given by Noam Chomsky, we find that the key element is the word "*systematic*" i.e., the repetitiveness with which information is transmitted.

One other feature specific to propaganda is linked to the fact that it always presents a single point of view, unlike disinformation, where we are dealing with the propagation of several views presented in dispute, or in competition.

Examining by comparison the two notions of "*propaganda*" and "*disinformation*" we find that they both have in common, the absence of quoting the source, in other words, both the propagandist and the disinformer, never give the source of the information they spread.

Note, however, that the mere exhibit of an ideology, doctrine, idea, or a concept is not *per se* propaganda. To turn into propaganda, that ideology, doctrine or concept should be spread in a communication context that promotes attitudinal and behavioral change, favorable to doctrinal or ideological information, following a process of repetition and persuasion carried out during a long period of time.

The fundamental difference between propaganda and disinformation, although they use similar manipulation techniques, resides in the manner of action to the individual. Thus, while propaganda is addressed to the emotional and affective side of the individual (*i.e.,* the right hemisphere of the human subconscious), disinformation is aimed at manipulating the reason (*i.e.,* the left hemisphere of the human subconscious). We consider that this particularity is well expressed by Richard Bandler and John La Valle, who argue that "*a false idea, clearly and precisely expressed, will always have a greater power in the world than a true, but complex idea.*"[42].

One other method of distortion of the primary reality is censorship. When the information channels cannot be completely controlled or closed, they are rendered unusable by saturation with false information, thus decreasing the value of the "*signal-to-noise ratio*"[43].

Currently, the term "*propaganda*" has a pejorative connotation, essentially referring to the deliberate dissemination of manipulative information, rumors, ideas, concepts, directed against specific groups, movements, beliefs, institutions, or governments.

If, from the perspective of the comparative analysis of the terms "*propaganda*" and "*disinformation",* the delimitation is quite clear, the same cannot be said about the notion of "*public relations*", in relation to "*propaganda*" and "*disinformation*".

From the perspective of the meaning of the notion of "*public relations"*, they are the "*aspects of communication which involve relations between a subject entity, or which require the public's attention and the various public persons who are or may be interested in it*"[44].

Consequently, the relationship between the notions of "*propaganda*" and "*public relations*" is complex and, depending on current interests and the conception of primary reality, it can be structured in

[39] W. Phillips Davison, *Public opinion*, updated on 13 November 2020, Encyclopaedia Britannica, available at: https://www.britannica.com/topic/public-opinion/The-Middle-Ages-to-the-early-modern-period, , accessed on 20 November 2020.
[40] See, in this respect, https://dexonline.ro/definitie/propaganda, accessed on 20 November 2020.
[41] Noam Chomsky, *11 settembre dieci anni dopo*, editura Il Saggiatore, Milano, 2011, p. 28.
[42] Richard Bandler, John La Valle, *Persuasion Engineering*, Meta Publication, US, 2000, p. 72.
[43] *Ibidem*, p. 62.
[44] See, in this respect, https://www.britannica.com/topic/public-relations-communications, accessed on 20 November 2020.

different ways. Here, a key factor intervenes that can significantly determine public relations, namely: public opinion.

As the French historian Alexis de Tocqueville put it "*once an opinion has taken root among a democratic people and has settled in the minds of the largest community, it persists on its own and is maintained effortlessly, because no one attacks it.*"[45].

As for the components of the "*public opinion*", the doctrinaires emphasized the importance of two fundamental elements: *attitudes*[46] (*i.e.,* hypothetical constructions - they are deducted, not objectively observable – manifested by conscious experience, verbal reports, ostentatious behavior and physiological indicators) and *values* (*i.e.,* beliefs about religion - including belief in god or lack thereof - political perspectives, moral standards and other)[47].

Thus, we appreciate that public opinion is the sum of the attitudes and values of the majority, in each historical period, not in the sense that they are adopted by most individuals, but in the sense of factors that are more "*popularized*" in relation to other factors, of the same nature, but different in content.

It can be concluded that, following the latest events in the world, even the differences between propaganda and public relations are difficult to grasp. Depending on the view of the authors of the propaganda, it can be seen as the opposite of public relations, insofar as we accept that public relations "*inform*" (the sincerity of the message), while propaganda "*disinforms*" and "*manipulates*" (distorted message)[48].

3. Disinformation: International legal framework

3.1. International legal framework

Disinformation is a hotly debated topic in contemporary international society, but we believe that, it is not debated enough, not even at this time, given the seriousness of the possible effects of this phenomenon that is more widespread than ever.

In the context of the spread of terrorism, globally, we believe that it is imperative to adopt express regulations, as mandatory rules, to prevent and respond promptly and firmly to any terrorist manifestation, no matter what tools it uses to "*popularize*" or "*market*" (including disinformation).

Basically, at international level, there is no set of imperative norms like the ones we referred to, only communications at the level of international intergovernmental organizations, initiatives, recommendations, good practices, reports and the like.

The usefulness of these guidelines and /or recommendations is of course undeniable , but given the current circumstances (*i.e.*, including the COVID-19 pandemic) , the risk of spreading false information, including for the purpose of propaganda for war and terrorism have increased exponentially, thus adding to the fear of illness / disease , the fear of global terrorist manifestations which, as we detailed in the first part, manifests itself strongly at cyber level, with devastating consequences, especially at the level of essential services of a state (*e.g.* energy, health services, transport, etc.).

In the subsections *below,* we will analyze a series of regulations / guidelines or good practices adopted at international level, with a focus on the United Nations (hereinafter "*the UN*"), as well as doctrinal opinions expressed in specialized articles or in the most important international news publications.

3.2. Universal Declaration of Human Rights

At the onset, it should be noted that the phenomenon of disinformation requires a contextualized understanding, given that respecting the fundamental freedom of expression and opinion is guaranteed by the mandatory rules of public international law, of course within the limits of the applicable legal provisions.

In this respect, for a complete understanding of how disinformation violate these limits, set by the mandatory rules of public international law, the freedom of expression and opinion being therefore the expression of abusive exercise of this fundamental right, we refer to the provisions of art. 19 of the Universal Declaration of Human Rights (hereinafter, "*UDHR*"), adopted by the UN General Assembly on the 10th of December, 1948[49].

According to the mentioned text, "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*".

In other words, it recognizes and guarantees, inter alia, the freedom of "*everyone*" to publish information and ideas, regardless of means or "*frontiers*". However, the provisions of art. 19 of the UDHR involve a series of limitations, imposed by art. 29 of the same international document, as duties correlative to the proclaimed rights and freedoms that also reflect the **prevalence of collective "*good*"**, to the one belonging to the individual *ut singuli.* Thus:

[45] See, in this respect, W. Phillips Davison, *Public opinion*, actualizat la 13 noiembrie 2020, Encyclopaedia Britannica, available at: https://www.britannica.com/topic/public-opinion/The-Middle-Ages-to-the-early-modern-period, accessed on 20 November 2020.

[46] See, in this respect, https://www.britannica.com/science/attitude-psychology, accesed on 20 November 2020.

[47] W. Phillips Davison, *Public opinion*, updated on 13 November 2020, Encyclopaedia Britannica, available at: https://www.britannica.com/topic/public-opinion/The-Middle-Ages-to-the-early-modern-period, accessed on 20 November 2020.

[48] *Idem*.

[49] See, in this respect, https://lege5.ro/App/Document/g42doobx/declaratia-universala-a-drepturilor-omului-din-10121948?pid=8387872, accessed on 19 November 2020.

"*1. Everyone has duties to the community in which alone the free and full development of his personality is possible.*

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.".

From the analysis of the above text, one can identify the factors that limit the exercise of freedom of opinion and expression, according to UDHR, *i.e.*, respect for the rights and freedoms of others; observance of the rigors imposed by morality, public order and general welfare; compliance with UN purpose and principles.

Consequently, in considering the conceptual delimitation of the notion of disinformation as per Chapter I of this study, we can conclude that transmission of misleading or manipulation information intentionally, including for propaganda purposes, to gain advantages / benefits of a political, economic, or other similar nature, constitutes a violation of the obligations established in art. 29 of UDHR. In other words, we consider that such public manifestations amount to **exceeding the limits of freedom of expression and opinion** in the sense proclaimed and guaranteed by the UN, even being the expression of a behavior contrary to the aims and principles of the UN as laid down in Art. 1 and art. 2 of the Charter of the United Nations of June 26, 1945[50].

Below, we will relate the preliminary remarks previously detailed to disinformation, deciphering the UN view on this social phenomenon very widespread nowadays, especially due to the progress of information technology and communications and, not least, in the context an unprecedented global crisis.

3.3. UN and misinformation. Case study: "*the infodemic*"

2020 brought major changes internationally, strongly felt in every country, especially from the perspective of citizens under restrictions of movement, social distancing, mandatory use of health protective devices, controversial, caused by the health crisis resulting from the pandemic with the SARS-CoV-2 virus (*i.e.*, the COVID-19 pandemic).

In the context of the spread, globally, of a justified fear regarding the health and life of the population, with the emergence of a highly infectious virus, the remedies for which modern medicine has failed to promptly offer solutions, and when they appeared, they were unsatisfactory while the world didn't have time to waste in stopping the loss of human lives, it was expected that the less well – meaning would take advantage of this situation, as is perfectly true in any other crisis situation.

Thus, a new "*crisis*" was launched, this time, of an informational nature, by spreading, especially on social networks, false or distorted information, likely to endanger people's health and instigate non-compliance with the measures taken by the national authorities, as recommended by the World Health Organization (hereinafter "*WHO*").

The new "*crisis*" was named suggestively by the UN, "***infodemic***", with reference to the speed with which information is subject to widespread, and to the harmful effects of an authentic pandemic.

WHO has defined that concept in the *Joint Declaration of the WHO, UN, UNICEF, PNUD, UNESCO, UNAIDS, ITU, UN Global Pulse and IFRC*[51], in the sense that infodemia "*is an overabundance of information, both online and offline? It includes* ***deliberate attempts to disseminate misinformation*** *to undermine the response to public health and to advance alternative agendas of groups or individuals*".

Thus, the specialized agencies of the UN mentioned above concluded that *infodemia* employs several methods, respectively **misinformation** and **disinformation**, potentially leading to damage of human health and even loss of life, by misleading and encouraging non-compliance with the measures of public health.

In addition to the joint declaration of the UN agencies, we add that infodemia presents another negative effect reflected in the extensive protests[52] already shown internationally including: the growing mistrust of the population regarding the protection measures and restrictions imposed by national authorities, it's in the context of adopting regulations that do not enjoy popularity because they restrict the freedom of movement and of economic activities that present a potentially increased risk of facilitating the spread of the SARS-CoV-2 virus .

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[50] See, in this respect, the UN Chart, available at: https://lege5.ro/App/Document/g42diobv/articolul-2-scopuri-si-principii-carta?pid=8357939#p-8357939, accessed on 19 November 2020.

[51] Available at: https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation, accessed on 19 November 2020.

[52] See, in this respect , the international press regarding the protests in Italy, Germany, Great Britain, Spain, France, Portugal, etc. on the restrictive measures imposed by the second wave of the COVID-19 pandemic, of which : https://www.aljazeera.com/news/2020/11/18/thousands-of-germans-protest-against-merkels-coronavirus-plans; https://www.france24.com/en/europe/20201101-fresh-lockdowns-fuel-angry-protests-as-covid-cases-climb-across-europe, https://www.euronews.com/2020/10/27/coronavirus-protests-in-italy-over-new-pandemic-crackdown-turn-violent, https://www.garda.com/crisis24/news-alerts/399626/portugal-activists-plan-protest-against-covid-19-restrictions-in-lisbon-november-14, https://www.euronews.com/2020/10/03/authorities-are-using-covid-19-as-a-smokescreen-to-stifle-the-legitimate-right-to-protest-, accessed on 19 November 2020.

At the same time, the above-mentioned declaration also mentions the "endangerment" of the capacity of "*countries to stop the pandemic*", precisely for the reasons detailed above.

Therefore, we maintain that disinformation and misinformation plays a negative decisive role, especially in crisis situations such as the health crisis the world faces is facing now, with serious and very serious consequences, similar to those of terrorism, by the loss of human lives and the significant decrease of the response capacity of the state authorities, thus endangering national and, implicitly, international security - considering the current pandemic phenomenon.

Returning to UN position, as expressed in the Joint Declaration of its specialized agencies, it can be concluded that it was a warning about the so-called "*news*" or information circulating on social networks and, in general, in the cyberspace, on the hypothetical healing methods, the possible ineffectiveness of wearing protection masks or other measures imposed by national authorities.

Among the opinions expressed, it is notable the opinion of the Secretary- General of the UN, António Guterres, who, through a video message during the event organized by WHO at the same time (i.e., 23 September 2020), stated the following:

"*COVID-19 is not just a public health emergency - it is also a communications emergency.*

Once the virus has spread across the globe, inaccurate and even dangerous messages proliferated savagely on social networks, leaving people confused and misled and badly advised.

***The antidote** is to ensure that science-based facts and health guidelines circulate even faster and reach people wherever they access information.*"[53] .

Thus, there is already talk of " *infodemia management*"[54], by taking steps at national level by developing and implementing action plans for prompt communication of accurate scientific information, while implementing measures to prevent the spreading and to fight against them, while observing not affecting the freedom of expression.

It is worth mentioning that, in May of this year, the UN launched a project called suggestively "***Verified initiative***"[55] , through which the UN seeks to support and encourage people everywhere to serve as "*digital first responders*" sharing accurate and reliable information on their social media platforms.

In this regard, UN Under-Secretary-General for Global Communications Melissa Fleming said:

"*COVID-19 does not represent only the greatest health public emergency of this century, but, equally, a communication crisis... We must empower people to spread reliable information with their friends, families and social network*".

Basically, the message of the Under- Secretary General of the UN does not reflect merely the absence of a legal international framework the UN can count on to require member states to take measures at legislative level, in order to prevent and / or mitigate the spread of false, distorted or incorrect information in connection with the COVID-19 pandemic.

Likewise, the UN Secretary General, António Guterres, said that "*working with media partners, individuals, influencers and social platforms, the content we spread promotes science offers solutions and inspires solidarity"*, adding that "the *fight against disinformation is critical because the UN and its partners are working to build public confidence regarding the safety and efficacy of any developing COVID-19 vaccines*"[56].

Why, is there no such solution, internationally, at this time? It seems to me that a possible settlement of this would be rightly criticized, since it would violate the fundamental principle of sovereign equality of UN Members, as set in the content of art. 2 pt. 1 of the UN Chart. This principle does not allow any interference of a legal nature in the domestic law of the Member States or in the political, administrative, or judicial system of any UN Member.

Consequently, the only levers available to the UN to combat disinformation are, at this time, are the declarations of the type described above and finding solutions by the UN members, by agreement, without any obligation imposed directly by the UN in this regard.

Furthermore, it must not be overlooked that any action involving even a minimal degree of coercion, must be proportionate to the gravity of the coerced conduct and its possible effects, and must respect fundamental rights and freedoms, as they stand proclaimed and guaranteed by UDHR (in this case, mainly, freedom of opinion and expression is questioned).

Therefore, in view of the hypothetical effect that disinformation may have, we consider that a prohibitive obligation imposed directly by the UN on its Members would be disproportionate, especially given the specific nature of disinformation, namely: its serious effects are purely hypothetical, if there is no proof, beyond any doubt, that it is t linked to those consequences. For example, in case of the retransmission of misleading information regarding the hypothetical "*non-existence*" of the SARS-CoV-2 virus on a social network, the author of the disinformation might be guilty of a

[53] António Guterres, declaration of 23 September 2020, available at: https://www.un.org/sg/en/content/sg/statement/2020-09-23/secretary-generals-video-message-for-who-side-event-%E2%80%9Cinfodemic-management-promoting-healthy-behaviours-the-time-of-covid-19-and-mitigating-the-harm-misinformation-and, accessed on 19 November 2020.

[54] See, in this respect, https://news.un.org/en/story/2020/09/1073302, accessed on 19 November 2020.

[55] See, in this respect, the press release of the Departament of the United Nations for Global Communications (DGC), May 2020, available at: https://www.un.org/en/coronavirus/%E2%80%98verified%E2%80%99-initiative-aims-flood-digital-space-facts-amid-covid-19-crisis, accessed on 20 November 2020.

[56] See, in this respect: https://news.un.org/en/story/2020/09/1073302, accessed on 20 November 2020.

possible effect on the readers of the message only if it can be shown that the latter did not comply with the security measures as a result of the change of opinion caused by the post in question.

Also, in the same direction of fighting against "*infodemia*", UN Under- Secretary-General for Global Communications Melissa Fleming announced an initiative to respond to the spread of false information about the COVID-19 pandemic as early as April 2020, by defining five ways the UN fights the "*infodemia*"[57].

According to the UN official, "*fear, uncertainty and proliferation of false news has the potential to weaken the national and global response to the virus, to strengthen nativist narratives and to provide opportunities for those who might try to exploit this moment to deepen social divisions. [...] All this threatens to undermine the international cooperation urgently needed to deal with the impact of this crisis*".

In this respect, according to the press release on the draft reply to the spread of disinformation, it is noteworthy that it is based on science, solutions and solidarity, with the purpose to fight against the phenomenon of mass disinformation, which resulted in damage to the global effort to overcoming the global health crisis . As the UN claims, disinformation affects the fight against the pandemic by "*proliferating false information that the virus can spread through radio waves and mobile networks, unbelievable information affecting the global effort to defeat the COVID-19 pandemic.*

By dispelling rumors, false news and messages of hatred and division, the United Nations is working to spread accurate information and messages of hope and solidarity." [58].

UN therefore proposes the following solution for ensuring a rapid response to the actions of disinformation and spread of distrust among people about health protection measures, those relating to misinformation on the ways SARS-COV- 2 virus spreads and others alike:

- producing and disseminating facts and accurate information.
- partnerships with companies.
- collaboration with the media and journalists.
- mobilization of civil society.
- militate for rights.

Another reference document of the UN to fight against disinformation, is the report on combating disinformation, while observing the freedom of speech, entitled "*Balancing act: countering digital disinformation while respecting freedom of expression*" prepared by the Broadband Committee for Sustainable Development[59].

Among other things, it identifies active subjects in the spread of disinformation, classifying them depending on their role in the process of disinformation. Thus, the Report of the Broadband Commission for Sustainable Development refers to and, at the same time, defines[60]:

1. the ***instigator*** **-** as an indirect beneficiary of disinformation, acts with the intention of prejudicing or misleading, for political, financial, status improvement reasons, ideologically wrong altruism, etc.
2. the ***agent*** **-** is the one who operationalizes the creation and dissemination of disinformation; can have the " *appearance* " of an "*influencer*", group, company, official or private individual, etc., their identity can be real or false ;
3. the ***message*** **-** information that spreads (*e.g.* statements or false narratives, taken out of context or fraudulently forged images and videos, profound fakes etc., are messages that wish to deviate from and / or to discredit the truthful content and actors involved in the search for the truth (for example, journalists and scientists);
4. ***the intermediary*** **–** starts from the *"dark web*" and continues with online sites / services and news media that support the spread of disinformation; it must be analyzed whether the intermediary's mode of action can be held liable, by assessing the proportionality of the measures in relation to the effects and the causal link, if they can be proved.

In legal terms, the guidelines of the Report on combating disinformation, relate to alerting the bodies and institutions competent to enforce the law, at the level of the UN members, meaning that it is imperative to ensure freedom of expression and privacy of the data, including with respect to protecting journalists publishing verifiable information of public interest. It is also recommended to **avoid any arbitrary actions in connection with any legislation criminalizing disinformation.**

For judges and other judicial actors, the Report calls to pay particular attention to the interpretation of laws in cases involving the application of measures to combat disinformation, such as criminalization to help ensure the full respect for the international standards on freedom of expression and confidentiality, within these measures.

The report is comprehensive and detailed, providing answers to some of the most important questions about online disinformation tactics and techniques (i.e. from emotional narrative constructions; fraudulently modified, fabricated or de-contextualized images, videos, and audio synthetics to fabricated websites and altered data sets).

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[57] See, in this respect, https://www.un.org/en/un-coronavirus-communications-team/five-ways-united-nations-fighting-%E2%80%98infodemic%E2%80%99-misinformation, accesed on 20 November 2020.

[58] *Ibidem*.

[59] See, in this respect, the Raport on countering Digital Disinformation while Respecting Freedom of Expression, p. 13, available at: https://www.broadbandcommission.org/Documents/working-groups/FoE_Disinfo_Report.pdf, accessed on 21 November 2020.

[60] *Ibidem*, pp. 9-10.

At the same time, an express definition is given to the concepts of disinformation and misinformation, in the sense that:

- ***misinformation***: represents a series of false or inaccurate information, in particular that which deliberately seeks to mislead;
- ***disinformation***: false information that is intended to mislead, in particular propaganda issued by a government organization to a rival power or the press.

However, we cannot ignore the fact that it is not indicated (not even recommended) adopting coercive measures to punish perpetrators, instigators or any other participants in the proliferation of disinformation, precisely in view of avoiding even the lowest risk of violation of a fundamental human right and / or freedom, such a violation being equivalent to the very non-observance of the purpose and principles of the UN Charter, respectively to the violation of an imperative norm of public international law.

In conclusion, we consider that the above-mentioned Report provides a complex framework for assessing the problems imposed by the phenomenon of disinformation, as well as freedom of expression, which can serve as a real tool in establishing guidelines for states and institutions / authorities involved in formulating optimal answers to this social-media phenomenon. Concrete help offered by this paper is to outline some directions for formulating legislative, regulatory and policy answers to counteract disinformation in a way that supports and prevents the infringement in any way of the freedom of expression.

Staying on the "*land*" of the UN, UNESCO launched a broad public consultation on the phenomenon of disinformation at global level, initiative finalized by a series of proposals viable in the fight against disinformation and misinformation.

Specifically, two eloquent documents were drafted: two "*Brief Policies*"[61], by which 10 types of responses against disinformation on COVID-19 are drawn. It is noteworthy that the answers are classified rather according to their purposes, and not in relation to the actors from behind these responses (e.g., social platforms, Governments, media news, citizens), which by the directions they offered and by the proposals they made, aim at "*disinfodemize*".

The fact is that neither of these documents establishes rules criminalizing disinformation, instead they focus on non-punitive reactions which highlights, once again, the prevalence of fundamental human rights and freedoms by reference to a threat established rather conceptually, but very difficult to prove, in practice, for a possible prosecution, regardless of its nature thereof (*e.g.,* criminal, civil, administrative, etc.).

3.4. Disinformation from a NATO perspective

The last (but not the last) international intergovernmental organization under analysis in this paper, in terms of its position in the context of spreading disinformation about the COVID-19 pandemic, is the North Atlantic Treaty Organization (hereinafter referred to as "*NATO*").

Thus, on July 17, 2020, NATO published a detailed analysis[62] on how the organization counteracts disinformation in the current pandemic context. In this regard, NATO is sounding the alarm about the dangerousness of the disinformation phenomenon, by referring to the ongoing global health crisis, stressing that the source of the phenomenon can be both state and non-governmental, for various purposes, such as: "*dividing the allies, undermining the trust in the democratic institutions and the presentation of authoritarian regimes as being more effective in front of the health crisis*". The NATO study also highlights the risk to the public posed by the disinformation "*by undermining vital messages on the public health*"[63].

In the same way as the UN, the NATO press release emphasizes the role played by all the "*actors*" on the public information scene, from international organizations, national and local governments, to private companies, civil society and the free and independent media, each of which has a major importance in the fight against disinformation, especially in the current global vulnerable context.

NATO itself has become a "*victim*" of attacks of disinformation of public opinion, including in April of last year, the harmful action having as object a false "*NATO intention to withdraw troops*" from Latvia, by circulating a false interview alleging that Canadian troops in Latvia brought the virus into the country.

In its analysis, NATO refers to a series of techniques used to disinform that targeted this important international military alliance, namely **fakes** (*i.e.* medical letters of low quality, fake social media posting and false interviews); **individuals with false identities** (*i.e.* creating and using one time only accounts to share content, later abandoned); **false statements** (*i.e.* alleging false statements regarding NATO and the Allies unity and exercises during COVID-19 pandemic); **exaggeration** (*i.e.* "*beautifying*" hostile stories through news sites); **language** "***leap***" (*i.e. the* use of individuals to help fabricated content make the leap to English-language media from their original source); **mobilization** (*i.e.* forged emails sent to NATO or other media to provoke a response).

However, NATO believes that the best way to counter disinformation is by promoting credible news, based on facts and therefore on the fundamental values

[61] See, in this respect, Julie Posetti and Kalina Bontcheva, Policy brief 1, available at: https://www.sparkblue.org/system/files/2020-10/Disinfodemic%20Policy%20Brief%201.pdf, Julie Posetti and Kalina Bontcheva, Policy brief 2, available at: https://www.sparkblue.org/system/files/2020-10/Disinfodemic%20Policy%20Brief%202.pdf.

[62] See, in this respect, *NATO's approach to countering disinformation: a focus on COVID-19*, 17 iulie 2020, available at: https://www.nato.int/cps/en/natohq/177273.htm, accessed on 21 November 2020.

[63] *Ibidem.*

of the Alliance, namely: democracy, freedom of expression and the rule of law. It emphasizes the need to engage the public in the fight to counter and prevent the phenomenon of disinformation and / or misinformation.

Therefore, based on measures that NATO has taken to combat disinformation, we note the same non-punitive character as supported by the UN, in particular by exposing the disinformation "*through a wide range of media commitments, including statements rejection, corrections and briefings to inform a wide variety of audiences about disinformation and propaganda, as it did just before the pandemic*"[64].

Finally, NATO supports several actors whose work can supports its fight against disinformation, namely: independent NGOs, think tanks, academics, organizations that verify the facts and other civil society initiatives to promote debates and build resistance against this harmful phenomenon.

In conclusion, the same attitude adopted by the UN is embraced and affirmed by the most powerful international military alliance, NATO being a fast and fierce respondent to any attack, including informational attacks, thus highlighting the supremacy of fundamental rights and freedoms of human beings, as a conduct to the contrary is prohibited by the international legal framework.

4. Conclusions

In the international context of the worst health crisis of the last century, humanity has been faced with a struggle, perhaps unjust (at least at first glance), in which the causes have been less researched, being set aside in search of gaining any piece of time to establish a prompt response to this situation of extreme urgency. Thus, the "***antidote***" seems to be long overdue, despite technological advances in medicine and biochemical research, but the SARS-CoV-2 virus is not the only obstacle to a return to a well-known "*normality*" of humanity before 2020.

Simultaneously with the health crisis, an information crisis coexists, transposed into the rapid spread of misinformation, unsupported by evidence, disinformation, and the popularization of the phenomenon of "*fake news*" related to the pandemic. The outcome? The pandemic meets the "*infodemic*" and, as in an evil dance of death and suffering, despair sets the pace for a global crisis about which many pages will be written in modern history.

Thus, terrorism might be thought as the main threat to international peace and security, at least as it was made known in the first decades of the 21st century, and a legitimate question arises: can terrorism *wear the* "*coat*" of false, distorted, or misleading information that leads to deviant behavior among people, so that the expected result is achieved through minimal effort in crisis situations such as a pandemic?

It may be considered that the answer to this question must be nuanced, in the sense that "*disinformation*", by its determined purpose, is a real "*weapon*" in the hands of any representatives of a phenomenon or a malicious movement / group, so that nothing can make us exclude terrorists from the category of those "*with an interest*" to use mass manipulation, not only as a vehicle for popularizing ideas, beliefs and their expectations, but also as a factor of subliminal control, while using minimal effort and cost.

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[64] *NATO's approach to countering disinformation: a focus on COVID-19*, 17 iulie 2020, available at: https://www.nato.int/cps/en/natohq/177273.htm, accessed on 21 November 2020.

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JUSTIFICATION OF TAXATION

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Abstract

The development of taxation in the modern state is also related to the issue of justifying the payment of the tax by individuals. The legal obligation to pay taxes established by law must be justified. The tax forms as the main method for accumulating the necessary financial resources for the state. The present paper is focused on the historical appearance of the tax as a phenomenon, as a reality, as a form of accumulation of incomes and a method of insurance of the state, the justification of taxation and the types of tax incomes.

Keywords: *taxation, types of taxes, budget.*

1. Introduction

1.1. Introduction

There are many researchers of the tax who claim that modern tax theory has much in common with the Roman concept. The reason for this is that during the Roman Empire, the tax system reached a fairly high degree of perfection. Taxation is differentiated into direct and indirect. Direct taxation covers the property and fortune of citizens, which is determined on the basis of an assessment of their property. Indirect taxation in the Roman Empire is represented by the tax on crafts, customs duties, excise duties and the state monopol on salt. There was also a general tax on purchases and sales in the amount of 1%, which was later called the cumulative turnover tax.

2. Content

After the division of the Roman Empire into Eastern and Western, the well-developed tax system began to disintegrate. The kings gradually began to lose their tax rights, which they inherited from the institutions of the empire. Gradually, revenues began to decline at the expense of increasing relief. Large landowners are authorized to collect the tax at their own expense from the persons assigned to their possessions. In this way, the tax becomes a payment in favor of the owners and possessors of land and wealth, i.e. the tax acquires the character of a private deduction. In the thirteenth century there was an expansion of royal power, which led to a significant increase in monarchical spending. Hence appears the lack of resources.

From the 16th century a new concept of the tax began to emerge and forms, which was established in the 17th century and reached its apogee at the end of the reign of Louis XIV. This is the authoritarian concept of the tax.

At the base of this concept is the simplification and fairness of fiscal taxation. It is characterized by several features:

• The absolute right of the monarch to represent the state and to introduce and collect taxes is affirmed. However, this right of the monarch is exercised within the laws of the kingdom.

• Bringing to the forefront indirect taxes, which are easier to collect, they are fairer because they affect all consumers.

At the end of the 17th century and at the beginning of the 18th century, the ideas of limiting the power of the sovereign began to be perceived. In the work, “The Royal Tithing”, Woben sets out the basic principles of the tax, namely that it is a reality known to all citizens of the state who must provide funds in order for it to be supported. This gradually gave rise to the idea that the tax is inextricably linked to the security and stability of the nation, stems from the existence of the state and all citizens participate in covering its costs.

During the eighteenth and nineteenth centuries, a new concept of the tax was born and established - the exchange concept, whose main ideas are represented in the work of Charles de Montesquieu - "In the spirit of the laws." Achieving equality between the interests of society and entrepreneurs is important for Montesquieu.[1]

In determining the principles of taxation of the exchange concept of tax, an important place is occupied by the views and formulations of Adam Smith, laid down in his well-known work "The Wealth of Nations". Smith says that "government spending for the majority of the people must be paid through taxes in cash or otherwise. In this way, with part of their income, the people contribute to the collection at the sovereign or the state of what is called state revenues.[2]

There are numerous studies of the tax in historical aspect, which inevitably outline the main characteristics of the modern tax. Contemporary authors seek to define the tax by including more elements. For example, P.M. Godme defines the tax as

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[1] Монтескьо, Ш. За духа на законите, София, Наука и изкуство, 1984.

[2] Смит Адам, Богатството на народите изследване на неговата природа и причини, София, Пртиздат, 1983.

"a deduction made under duress by the public authorities and having the main purpose of covering public expenditures and redistributing them according to the ability of citizens to pay." According to J. Ducrot, "the tax is classically defined as a deduction on the wealth of taxpayers that the state makes in an attempt to take into account their ability to pay."[3]

2.1. Justification of taxation

The development of taxation in the modern state is also related to the issue of justifying the payment of the tax by individuals. The legal obligation to pay taxes introduced by law must be justified. The tax is formed as the main method for accumulating the necessary financial resources to provide the state.

It is logical to ask the question, what is the reason for the state to seize part of the income of its citizens through the tax? The answer to this question has been motivated in different ways. Separate ideological and theoretical concepts have been developed. Ideological are socio-psychological justifications of the tax liability. Theoretical concepts derive the organizational (state-organizational, political) basis. Both types of concepts explain taxes with the need of financial provision for the "needs" of the state.

In the early twentieth century, the American researcher Edwin Seligman, derived seven ideological views of the justification of the tax, such as: donation, support, assistance, sacrifice, debt, coercion, payment of tax by the taxpayer against his will.

In the first stage, the prevailing view was that the tax was a gift from individuals to the monarch. The second stage is characterized by a humble plea from the monarch to the people for support. The third stage meets us with the idea of assistance provided to the state by the people. The fourth stage is characterized by the idea of sacrifice, which the individual brings to the benefit of the state. The fifth stage reveals the sense of duty that forms in the individual payer, and the sixth stage introduces us to the idea of coercion by the state. The seventh and final stage is characterized by the determination of the amount by the government for payment by the individual payer, without respecting his will.[4]

The payment of the tax is essentially the deprivation of a certain part of the income of the persons. The modern legal basis of the tax is derived from the theory of the nation, as a modern form of social community, which alone and as a whole, determines its needs and provides them financially. As an equal member of the state organization, everyone is obliged to pay taxes that accumulate in the state budget. The tax claim is a subjective public right of the state to receive a certain amount. At the base of this right is the fiscal sovereignty of the state. This subjective right of the state corresponds to a certain obligation on the part of juridical and natural persons to pay taxes. This obligation is constitutionally established in Art. 60, para. 1 of the Constitution of the Republic of Bulgaria: „Citizens shall be obligated to pay taxes and fees established by a law in proportion to their income and property."

As the holder of this subjective right, the state may in some cases delegate it by determining taxes to go to the municipal budget.

2.2. Types of Sources of Revenue

The doctrine distinguishes two types of sources of revenue for the state.

- Domestic sources - Gross domestic product (GDP) and national wealth of a country;

- External sources - these are financial resources received from foreign national economies.[5]

Gross Domestic Product, better known as GDP, ranks first among domestic sources of funding. GDP is "... the total value of all goods and services (goods) produced in the national economy for one year, after deducting the so-called intermediate consumption, i.e. intended for final consumption".[6]

According to the International Glossary of Finance, Gross Domestic Product (GDP) is the monetary value (at market prices) of goods and services produced in the economy over a period of time, usually a year or a quarter. The cost of replacing fixed assets is not reported. Only final consumption goods or investments are included, as the value of intermediate goods, i.e. raw materials and supplies included in the prices of final consumer goods.[7]

We can conclude that GDP is one of the most important economic indicators. It is a comprehensive measurement of economic activity and signals the directions of all aggregates of economic activity.

Another source of domestic funding is the national wealth, which includes the natural resources belonging to the country.

External sources of finance represent the GDP of other countries. The accumulation of these sources happens through exports and investment of capital, loans, credits, aid and more. Usually, the funds received from external sources are uncertain, irregular, temporary.

In this regard, we can say that each country should rely primarily on its domestic sources and ultimately rely on the help of foreign national economies. Domestic sources of financial support for the state are accumulated in public funds through several methods of raising them:

1. Tax - the application of a system of taxes;

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[3] See Panteleeva V., Данъкът като компонент на фискалната политика на държавата, Conference proceedings of University of Ruse 2009, p. 107.

[4] Seligman, E.R., Essays in taxation, New York, 1895, p. 5-7.

[5] Стоянов, В., Теоретични и публични финанси, София, 2009, с.218.

[6] Стоянов, В., Теоретични и публични финанси, София, 2009, с.218.

[7] Bannock, G, Manser, W, The Penguin International Dictionary of Finance, Penguin UK, 1999.

2. Tax-like (quasi-tax) method - includes revenues from fees, fines, interest, confiscations, etc.;

3. Non-tax method - the state credit, the economic activity of the state and the revenues from it, sale (privatization) or renting of state property (concession), money issue, etc.[8]

The economic activity of the state is too old a non-tax form to provide the necessary funds for the state. The specific manifestations of this activity of the state take the form of fiscal or financial monopolies, state and joint ventures, concessions and others; they form the public sector, i.e., the so-called indivisible and non-transferable property owned by the state. It is characteristic of the public sector that it usually generates and reproduces clumsiness, bureaucracy and inefficiency, both within it and within the national economy as a whole. This requires in recent years, in accordance with the requirements of the new neoliberal concept, to be sharply reduced (the public sector in the economy) through its privatization. All Western countries, without exception, have taken similar steps since the early 1990s and are seeking to minimize the public sector in their economies through privatization. In this way, a double benefit is obtained in the sense that, firstly, unprofitable and inefficient state economic structures are liquidated and, secondly, budget revenues are provided, which are relied on to overcome chronic budget deficits and the huge state indebtedness caused by them.

The monetary issue is a special method for providing financial resources for the state, for the budget. It essentially comes down to the issuance of unsecured banknotes, i.e. the banknotes put into circulation are provided to the budget and cover government expenditures. Such a monetary issue, which is called fiscal, in any case leads to inflation and disruption of money circulation with all the ensuing negative consequences. That is why financial theory has never been favorable to fiscal money supply.

The tax-like (quasi-tax) method is similar to the tax method, but the main difference between them is that while taxes are compulsory payments to the state, tax-like forms of income are voluntary payments. They serve to pay for used public goods. Non-tax revenue forms are also a method of providing financial support for government, but they are also to some extent related to taxes, albeit at a later stage in their use.

Of the above methods for accumulation of financial resources, the tax method occupies the first place. A significant part of government revenues (40-50%) is accumulated by taxes. These are revenues that go to the state budget and are made available to the state for its functions and government.[9]

Therefore, as we have pointed out, the main method for accumulating and securing financial resources in the state is the tax method.

2.3. Types of Tax Revenues

1. The doctrine expresses different opinions on the classification of types of tax revenues. It is indisputable, however, that the classification of tax revenues is built in accordance with the socio-economic structure of the state, legal sources, the direction of revenues and other factors.

In theory, different classifications of taxes are proposed:

• depending on the source of income, they are divided into:

- income from economic activity;
- income from the population.

• According to the direction of revenues, they are:

- revenues to the republican budget;
- revenues to the municipal budget.

• Depending on whether they go directly to the budget or are redistributed, revenues are divided into:

- basic income;
- derivative revenues - such are the revenues that do not enter the budget for the first time, but represent internal redistributions in this system.[10]

• According to the method of their collection, the following are divided:

- mandatory - taxes;
- voluntary- donations.

• Depending on whether the income is pre-planned or due to extraordinary non-specific activity, the following are distinguished:

- regular - revenues that provide the reserve of funds needed by the state to perform its functions - mandatory contributions, taxes, duties, fees;
- extraordinary - income from tort, fines, confiscations.

Classification is also possible, depending on the way in which tax revenues are paid. In this case they are divided into:

- natural - today they are extremely rare;
- monetary.

• According to the object or subject of taxation, tax revenues are revenues from:

- Taxes on the person - the object is the individual. A typical representative of this type of tax is the per capita tax, determined per capita, without considering his property status or income.
- Taxes on property - real estate and movable;
- Taxes on a certain economic activity - their prototype is the natural tithe. Gradually, with the development of crafts, an occupation tax was introduced.
- Sales taxes - the realized trade turnovers from the sale of goods and services are subject to taxation;
- Income taxes - a relatively new type of tax, as income becomes subject to taxation under conditions of a high degree of development of commodity-money

[8] Стоянов, В., Теоретични и публични финанси, София, 2009, с.225.
[9] Стоянов, В., Теоретични и публични финанси, София, 2009, с.225.
[10] Стоянов, И, Финансово право, София 2010, с. 315.

relations, i.e. in parallel with the emergence and development of capitalism.[11]

Theoretical interest is the differentiation of tax revenues of:

- direct and
- indirect.

This distinction of taxes is not based on a single criterion. According to John Stuart Mill and Adolf Wagner, taxes are direct, in which the payer and the taxpayer are identical, and if they are different, the taxes are indirect.[12]

Another sign of the distinction between direct and indirect taxes is whether "permanent objects or accidental events“ are taxed. In the first case, taxes are direct, and in the second - indirect.

The division of taxes into direct and indirect can be deduced depending on the subject of their taxation. Thus, taxes with the object of taxation of property or income are direct, and indirect are those whose object is the production of goods and services, at the prices of which they are calculated in advance.

With the adoption of the Public Finance Act (promulgated SG No. 15 of 15 February 2013 in force from 01.01.2014), which repealed the then existing Law on the Structure of the State Budget (SG, issue 54 of 15.07 .2011 repealed by SG No. 15 of 15 February 2013), the regulation of the general structure and structure of the public finances with one general normative act became a fact. The adoption of this law is an expression of the desire to consolidate all aspects of the management and use of public resources, both at national and local level. Public finances are considered as a unified system for providing and financing public goods and services, redistribution and transfer of income and accumulation of resources from budgetary organizations. According to §1, item 29 of the Additional Provisions of the Public Finance Act, “revenues” of the state are “cash receipts for the relevant budget year generated from: taxes, insurance contributions, other contribution, fees, fines, sanctions and penalties, confiscated assets, interest, dividends and any other income generated by financial assets, as well as any other net cash proceeds of budgetary organizations resulting from the realization and use of non-financial assets and the provision of services."

2. We accept the theoretical view that tax revenues are classified into:

A. Revenue from direct taxes:

• Income tax revenues;

• Income from property taxes;

B. Revenues from indirect taxes.

• Revenues from value added tax;

• Revenues from excises duties.

3. Conclusions

From all that has been said so far, it can be concluded that the tax is a reality, a complex multifaceted phenomenon that is immanently related to all aspects of people's lives. Joseph E. Stiglitz, in his book “Economics of the Public Sector”, outlines the five desirable characteristics of any tax system. There are five properties that define the tax system as "good":

1. Economic efficiency - the tax system should not hinder the efficient allocation of resources.

2. Administrative simplicity - the tax system should be easy to apply and relatively inexpensive.

3. Flexibility - the tax system must react quickly (in some cases automatically) to changed economic circumstances.

4. Political responsibility - the tax system must be such that people can determine for themselves how much to pay, so that the political system can more accurately reflect people's preferences.

5. Fairness - the tax system must be fair in its relative treatment of different people.[13]

The above leads to the conclusion that the actual implementation of the five properties would be a way to establish a "good" and stable tax system, which would be proof and a sure way to a well-functioning modern state.

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ANALYSIS OF THE EU'S NEW PACT ON MIGRATION AND ASYLUM

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Abstract

This article analyses the New Pact on Migration and Asylum which was released by the European Commission on 23 September 2020. It seeks to find out which problems the New Pact aims to address, how it intends to do so, and whether its proposals are likely to succeed in this. It does so by first laying out the current system which is being targeted for legislative reform and putting it into a historical context to explain why change is called for. It then describes the scope of the policy proposals within the New Pact and identifies where the biggest and most important changes are found. Finally, it assesses the reactions from external actors and offers remarks into what challenges and potential necessary amendments lie ahead.

Keywords: *European Union, asylum, migration, policy reform, human rights.*

1. Introduction

On 23 September 2020, the European Commission revealed its new big ambition in the area of migration and asylum: the New Pact on Migration and Asylum.[1] This new package of legislative proposals announced that it aimed to be 'a fresh start on migration' as it set out to repair a system that has been described as 'broken' and 'not fit for purpose'.[2]

The New Pact comes after years of debate around asylum in Europe, propelled by an increase in boat crossings over the Mediterranean in 2015 and fuelled by various ad hoc attempts to 'fix problems' by the EU through an Agenda on Migration which 'intended to address immediate challenges', including through failed relocation plans and the controversial EU-Turkey deal.

In contrast, the New Pact 'seeks to build a complete system by providing essential new tools for faster and more integrated procedures, a better management of Schengen and borders and for flexibility and crisis resilience.'[3]

This article sets out to investigate the ways in which the New Pact imagines this to be achieved and looks at points of criticism, both in terms of its ability to protect rights and to be carried out in practice. It will do so by starting to understand what the current system is and what has led to the need for such overriding change. It will then seek to explain what it is that is being proposed and on what points it fundamentally differs from what is there already. Finally, it will assess the reactions from other actors and suggest what underlying aims and assumptions need reworking in order to achieve a common European asylum system that is both realistic and respectful of human rights.

It should be noted that, while the New Pact is namesakenly a revision of both migration and asylum policies, this article will focus solely on asylum. This has two reasons: first, it is the reform of the Common European Asylum System that provides the underlying base for discussion and secondly, the most important criticism of the New Pact in the area of legal migration so far is that a roadmap to this end is 'a glaringly absent element'.[4] As such, more substantial discussions on this topic will be saved for when there is more to discuss.

2. Background – what is being replaced and why?

The Common European Asylum System (CEAS) is the current frame for the set of policies relating to asylum and refugee protection in the European Union (EU). In the words of the European Commission itself, '[t]he Common European Asylum System sets out common standards and co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply.'[5]

The CEAS consists of the following six elements:

- The Asylum Procedures Directive which sets out the conditions for asylum decisions in EU member states
- The Reception Conditions Directive which sets out common standards for housing, health care, education and other basic needs
- The Qualifications Directive which sets out the grounds for international protection and provides

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[1] „A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity" (press release), European Commission, 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706.

[2] Dacian Ciolos, Malik Azmani, Fabiebbe Keller and Jan-Christoph Oetjen, „Time to fix Europe's broken migration and asylum system," *EUobserver*, 23 September 2020, https://euobserver.com/stakeholders/149504.

[3] Ibid.

[4] Donatienne Ruy and Erol Yayboke, „Deciphering the European Union's New Pact on Migration and Asylum," *Center for Strategic and International Studies*, 29 September 2020, https://www.csis.org/analysis/deciphering-european-unions-new-pact-migration-and-asylum.

[5] „Common European Asylum System," European Commission, accessed 16 March 2021, https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en.

access to rights for those who have been granted international protection

- The Dublin Regulation which places responsibility between EU member states as to where applications for asylum should be processed
- The EURODAC Regulation which managed the EU database of asylum seekers' biometric information
- The European Asylum Support Office which supports the implementation of the CEAS in the EU member states

The CEAS was born out of the continued EU integration during the 1990s, and a mutual need for migration management on the continent, and between 1999 and 2005 the first legal instruments were introduced with an overall aim to establish minimum standards for asylum in the EU and build on the 1990 Dublin Convention. After a period of reflection, it was decided in 2008 that the system was still not strong enough to ensure sufficient and comparable levels of protection in different member states, so a round of legal reforms saw the light of day between 2008 and 2013. Most noticeably, this is when the European Asylum Support Office (EASO) was created.

Since the so-called 'refugee crisis' in the EU in 2015, criticisms over both the CEAS' ability to protect refugees and manage migration flows into EU countries have been ongoing. Several of the Directives have already been recast several times, pointing to the need for a more thorough overhaul of the entire system, and critics have also pointed out that EU member states' treatment of refugees and asylum seekers are becoming less and less conforming to international standards, rather than more.[6]

Furthermore, the 2015 spike in arrivals made it clear that the Dublin system is not working, and that current legislation is not enough to secure the level of solidarity between countries which the CEAS originally intended. Indeed, with an increase in asylum applications, mainly the southern EU member states – those with an external border and, in particular, Greece – were hit. However, efforts to relocate individuals to other member states bore almost no fruit at all, even though court cases determined that asylum seekers who had themselves moved on to another country could not be sent back to certain EU member states as this would infringe on their right to protection and basic needs.[7]

As such, after ad hoc efforts to introduce solidarity measures and legislative change, the European Commission itself admitted defeat. In the press release of the New Pact on Migration and Asylum, it states:

'The current system no longer works. And for the past five years, the EU has not been able to fix it. The EU must overcome the current stalemate and rise up to the task. With the new Pact on Migration and Asylum, the Commission proposes common European solutions to a European challenge. The EU must move away from ad-hoc solutions and put in place a predictable and reliable migration management system.'[8]

3. The New Pact – what is being proposed?

Following on from the above, we understand that the New Pact on Migration and Asylum was a product of an existing broken system combined with a new-found sense of crisis. But what did it actually propose? What is the content of the solution envisioned?

On the EU Commission's own fact sheet,[9] the subtitle under 'The New Pact' reads: 'Building confidence: a new balance between responsibility and solidarity'. Below that, we learn that the areas of priority in the New Pact are: 'Stronger trust fostered by better and more effective procedures', 'Well-managed Schengen and external borders', 'Effective solidarity', 'Skills and talent', 'Deepening international partnerships' and 'Flexibility and resilience'.

Translated into actual legislative proposals, this means that the Commission is proposing five new Regulations:

1. Regulation on asylum and migration management
2. Regulation introducing a screening of third country nationals at the external borders
3. Regulation establishing a common procedure for international protection in the Union
4. Regulation on the establishment of 'Eurodac'
5. Regulation addressing situations of crisis and force majeure in the field of migration and asylum

Three recommendations:

1. Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint)
2. Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways
3. Recommendation on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities

[6] Antonella Giordano, „EU ASYLUM POLICY: THE PAST, THE PRESENT AND THE FUTURE," *The New Federalist*, 10 July 2019, https://www.thenewfederalist.eu/eu-asylum-policy-the-past-the-present-and-the-future?lang=fr.

[7] Valsamis Mitsilegas, „Solidarity and Trust in the Common European Asylum System," *Comparative Migration Studies* 2, no. 2 (2014): 186, https://doi.org/10.5117/CMS2014.2.MITS.

[8] European Commission, „A fresh start on migration."

[9] „The New Pact: Building confidence: new balance between responsibility and solidarity" (fact sheet), European Commission, September 2020, https://ec.europa.eu/info/sites/info/files/new-pact-on-migration-and-asylum-package_1.pdf.

And a 'Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence'.[10]

In particular, three different proposed changes to the current system deserve highlighting.

Firstly, the 'new balance between responsibility and solidarity' comes to life in an overhaul of the Dublin system, effectively retiring the old mechanism in favour of a new 'compulsory, flexible' form of solidarity which is still rooted in the idea of a first country of arrival, but which expands on the situations in which this principle gives way to another country in placing responsibility for processing an individual's asylum claim. For example, the definition of 'family' is broader, and other previous ties to a particular EU member state (e.g., work or studies) also count. This effectively means that the first country of arrival, as a criterion, has moved further down the ranks.[11]

In addition, the concrete features behind the 'compulsory and flexible solidarity' are seen in the shape of a new mechanism to be triggered in the situation where a country has reached its maximum capacity (to be calculated based on population size and GDP), which also diverts responsibility away from the first country of arrival and to another member state with a smaller proportion of asylum seekers. In this instance the 'compulsory solidarity' means that the new country does no longer have the right (such as it did before) just to reject the individual under the Dublin system scot-free, without assuming any kind of responsibility at all. The 'flexible solidarity' lies in the fact that the new country has a say in what its obligations to the first country are going to look like. Options available are to, simply, accept a relocation of the individual's asylum case and process the claim within its own system, send the case back to the first country along with a 'return sponsorship', meaning that the new country will facilitate the return of a rejected asylum seeker from the first country, or provide an undefined 'other assistance.'[12]

Secondly, the Commission proposes to transform the current European Asylum Support Office to a new 'fully-fledged EU Agency for Asylum' with the purpose to monitor and support national authorities in their implementation of, and compliance with, EU asylum legislation, 'ensuring convergence in the examination of applications for international protection and providing operational and technical assistance to Member States.'[13]

Thirdly, there is across the proposals a great emphasis on international partnerships and cooperation with third countries. This is particularly evident with respect to the overall focus on returns and readmissions, but also extends far into what typically goes under the term 'migration management', which roughly speaking concentrates itself on controlling the number of individuals who cross European borders to begin with. This includes things like 'border protection efforts' at external borders, counter-trafficking action and support to third country host communities, but 'should, according to the Commission, [also] be taken into account in all areas of the Union's external policy, such as in development aid and more precisely, in economic cooperation, the areas of science and education, digitisation and energy, etc.'[14]

4. The reactions – how has it been received?

In the lead-up to the unveiling of the New Pact on 23 September 2020, EU Home Affairs Commissioner, Ylva Johansson, predicted that '[n]o one will be satisfied' with the proposals.[15] However, as the Center for Strategic and International Studies has suggested, this may be a sign that it represents what the EU is most realistically currently able to offer.[16] Indeed, although countries like Hungary and Poland have criticised the New Pact for not going far enough in terms of aiming to stop migration altogether, and while Finland and Ireland would like to see an increased focus on human rights, no member state has rejected it blankly.[17]

Perhaps not surprisingly, among external commentators, such as scholars and non-governmental organisations, this expression of a 'lowest common denominator' has not been received with overwhelming applause. While many agree that lowering the period before refugees can apply for long-term status is good for integration, and that strengthening responsibility with more compulsory solidarity and a slight shift away from the first country of arrival principle are overall positive, they also question whether they are realistic. In a joint civil society statement, the European Council on Refugees and Exiles (ECRE), along with 88 other organisations, write that '[t]he complexity of what has been proposed raises doubts as to whether it is actually workable in practice.'[18]

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[10] „New Pact on Migration and Asylum: Questions and Answers" (questions and answers), European Commission, 23 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_1707#contains.

[11] Ramona Bloj and Stefanie Buzmaniuk, „Understanding the new pact on migration and asylum," *Robert Schuman Foundation*, 16 November 2020, https://www.robert-schuman.eu/en/european-issues/0577-understanding-the-new-pact-on-migration-and-asylum.

[12] Ruy and Yayboke, „Deciphering the European Union's New Pact on Migration and Asylum."

[13] Ibid.

[14] Ibid.

[15] Eszter Zalan, „Commissioner: No one will like new EU migration pact," *EUobserver*, 18 September 2020, https://euobserver.com/migration/149475.

[16] Ruy and Yayboke, „Deciphering the European Union's New Pact on Migration and Asylum."

[17] Ibid.

[18] „Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded" (statement), European Council on Refugees and Exiles (ECRE), 6 October 2020,

An element of the New Pact which has received criticism both in terms of its practicality and its ethical implications is the aforementioned 'return sponsorship' which critics have described as 'strange' and 'contradictory'.[19] Caritas Europa foresees that it 'will not lead to predictable solidarity and responsibility sharing among [member states] on the ground, and will come at the expense of people's rights and human dignity',[20] explaining that it 'could lead to tremendous suffering for migrants due to the unnecessary transfer to other [member states]' and that its 'practicality is called into question', adding that '[s]ubstantial solidarity through relocation should be privileged and encouraged.'[21] Judith Sunderland, Acting Deputy Director of the Europe and Central Asia Division of Human Rights Watch calls the proposed arrangement 'like asking the school bully to walk a kid home',[22] and ECRE asks who 'will monitor the treatment of rejected asylum-seekers when they arrive in countries whose governments do not accept relocation?'[23]

Following on from this, also in the words of ECRE, '[t]he overriding objective of the Pact is clear: an increase in the number of people who are returned or deported from Europe. The creation of the role of a Return Coordinator within the Commission and of a Frontex Deputy Executive Director on Returns without similar appointments on protection standards or relocation illustrate this point.'[24] The question of returns, then, also opens up a discussion regarding the external factor of the New Pact. As already mentioned, plans are for an increased focus on migration in the EU's general dealings with third countries, which has led to warnings that '[t]he Commission's plan for cooperation with third countries – encouraging them to host refugees and migrants, providing them with support to do that, and boosting their own enforcement against smuggling – means these relationships will continue to be shaped by the migration issue.'[25]

Civil society agrees, adding stark concerns over what this will mean for human rights and democratic development:

'Attempts to externalise responsibility for asylum, and to mis-use development assistance, visa schemes and other tools to pressure third countries to cooperate on migration control and readmission agreements will continue. This not only risks contradicting the EU's own commitment to development principles, but also undermining its international standing by generating mistrust and hostility from and among third countries. Furthermore, using informal agreements and security cooperation for migration control with countries such as Libya or Turkey risks enabling human rights abuses, emboldening repressive governments and creating greater instability.'[26]

Instead of relying on the unrealistic expectation that third countries can – and will – work readily towards keeping away migrants from risking their lives in the Mediterranean, the EU must assume its own responsibility and accept that 'an EU-coordinated [search and rescue] mission is urgently needed.'[27] In addition, 'cooperation with counties of origin and transit should be conditional on the respect of human rights and provide accountability mechanisms. Relationships with third countries should be based on genuine mutual interests, and should expand opportunities for regular migration.'[28]

In the words of Philippe De Bruycker, Professor at Université Libre de Bruxelles and Founder and Coordinator of the Odysseus Network; '[i]f the EU wants to develop authentic partnerships to ensure the cooperation of third states, it must stop pretending that the fight against irregular migration is the starting point as a shared concern. […] If the European Commission really wants a "fresh start", it should look for other elements of bargaining that it can really offer to third states in their own interest.'

5. Conclusions

So, what can we actually say about the New Pact on Migration and Asylum? The shortest answer would be that everybody agrees that it is needed but nobody agrees what it should be. In its essence, it is a continued attempt towards the same end as what was started with the Tampere conclusions in 1999, which laid the foundation for the Common European Asylum System that we have today.

Looking at the proposed changes and the reactions from different sides, it becomes clear that the difficulties in developing European asylum policies are embedded within two fundamental challenges:

https://www.ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/.

[19] Philippe De Bruycker, „The New Pact on Migration and Asylum: What it is not and what it could have been," *EU Immigration and Asylum Law and Policy*, 15 December 2020, https://eumigrationlawblog.eu/the-new-pact-on-migration-and-asylum-what-it-is-not-and-what-it-could-have-been/.

[20] „Caritas Europa's analysis and recommendations on the EU Pact on Migration and Asylum" (position paper), Caritas Europa, December 2020, https://www.caritas.eu/wordpress/wp-content/uploads/2021/02/210212_position_Paper_EU_Pact_migration_Caritas_Europa_Final.pdf.

[21] Ibid.

[22] Bloj and Buzmaniuk, „Understanding the new pact on migration and asylum."

[23] ECRE, „Joint Statement."

[24] Ibid.

[25] Ruy and Yayboke, „Deciphering the European Union's New Pact on Migration and Asylum."

[26] ECRE, „Joint Statement."

[27] Caritas Europa, „Caritas Europa's analysis and recommendations on the EU Pact on Migration and Asylum."

[28] Ibid.

1. Establishing a system of real functioning solidarity between 27 different countries, which is both compulsory and entered into voluntarily, while also securing rights and minimum standards around the treatment of refugees and asylum seekers.

2. Incorporating the topic of migration management into the EU's collaborations with third countries without striking deals that ignore human rights abuses or attaches speculative conditions onto separate areas such as development aid.

The first point permeates the New Pact through its central intention to create a 'new balance between responsibility and solidarity.' As we have seen, this is expressed through an envisioned solidarity which is both 'compulsory' and 'flexible'. And while some elements in the mechanism to replace the current Dublin system are welcomed by commentators (limiting slightly the default of the first country of arrival principle and introducing caps on individual countries' capacities), they have also been put under scrutiny for being too complicated to work well in practice and starved of important safeguards to secure migrants' rights.

The second point highlights the power dynamic between the EU and the wider region as it aims to introduce questions of migration into almost all interactions between European institutions and third countries. This has led to concerns over both accountability towards migrant populations in terms of human rights abuses and the risk of selling out core values of democracy and transparency – usually championed by the EU as non-negotiable – by supporting corrupt regimes in the interest of limiting the number of asylum seekers coming to Europe.

What the two points have in common is that they are both based on the same assumption that it is the minority of asylum seekers who are in actual need of protection and on two complementary objectives: one to decrease the number of people coming to Europe and the other to increase the number who are returned or deported. From an international law perspective, however, this ignores the elementary reason to have asylum legislation in the first place: to provide a system that offers protection. As such, if the New Pact is indeed the best the EU can realistically offer at the moment, yet fails to provide acceptable levels of protection, the question going forward is not only one of legislative character, but in large parts social and economic too: how can the EU halt the race to the bottom and lift the common denominator to a place where human rights are not compromised and where refugee protection is the most important goal of having an asylum system?

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NEGOTIATING OUR HEALTH: THE EU PUBLIC POLICIES ON COVID-19 VACCINATION AND THE ASTRA ZENECA ADVANCE PURCHASE AGREEMENT

Monica Florentina POPA *

Abstract

The ongoing covid-19 pandemic has taken us into unchartered territories in many a field: medical, legal, social and constitutional.

The EU has been actively pursuing, within its range of competencies, a broad policy to combat this unprecedented health crisis, which included negotiating and financing on behalf of its Member States the development of a viable vaccine by multiple pharmaceutical companies. These complex agreements and financing schemes have resulted in the purchase and distribution to the EU countries of vaccine doses according to a quota based on the size of the population. Given the novelty of the circumstances, the very short time in which these vaccines have been developed and tested, some vaccines have sparkled public controversies, such as the one produced by Astra Zeneca.

This article endeavors to offer a brief analysis of the Advance Purchase Agreement signed with Astra Zeneca, recently made public by the EU Commission, with special reference to the clauses which, in our opinion, might have offered the private contracting company too much discretion in compliance with its contractual obligations.

The analysis will be preceded by an outline of the legal framework for the APA agreements concluded by the European Commission and some considerations on the legal formants – the complex interplay of the legal, political and economic interests which affect the management of the covid crisis on European and international level. The conclusions of this article will set forth the necessity of more transparency in negotiating this kind of agreements with massive impact on our health and the need of a more realistic approach to the policy of vaccination, based on the specificity of each country.

Keywords: *EU public policies, Advance Purchase Agreement (APA), private company, pandemic, vaccination, legal formants, Astra Zeneca.*

1. Introductory considerations. Of Covid and law, of citizens and states.

A much quoted, apocryphal Chinese curse says "May you live in interesting times"[1], though the actual proverb is equally compelling "Better to be a dog in times of tranquility than a human in times of chaos." Both versions hold true today, when the whole planet grapples with the effects of the Covid pandemic, when governments scramble for economic solutions, employers for business, employees for employment, and everybody else for a semblance of normality, without sanitary masks, lockdowns and restrictions.

Since its beginning in the early 2020, the Covid pandemic has changed the paradigm of living and working in the Western world, exposing in the process the vulnerabilities of our healthcare systems, the shaky economic foundations of the post-industrial societies and the rigidity of the supposedly flexible legal framework when dealing with unexpected, disruptive factors. Many an adjustment have been made: the importance of artificial intelligence has increased exponentially, resulting in the famously infamous online school, for instance, or in longer working hours for the employees working from home during successive lockdowns, which in turn prompted calls for the regulation of remote work in Europe[2] etc. There has been a domino effect on almost every aspect of our life as we know it, such as our ability to interact with friends, to dine at our favorite restaurant, to go to the local gym or to travel abroad or inland.

If at the economic level, the measures taken by the states were geared towards taming the adverse effects on businesses and employees, with various degrees of success, at the societal level the response has been less cohesive and exposed the ideological differences between, on one hand, the American and the European approach to handling the Covid crisis and, on the other hand, the differences between the various EU Member States regarding the policy mix of containment, incentives or restrictions to be implemented during the pandemics.

All these factors have heavily influenced the legislation at national and EU level since 2020, again with mixt results: at the beginning of the pandemics, a few EU states have taken measures which encroached severely on key constitutional rights, such as the freedom of movement, the freedom of association or the freedom of speech and many a piece of legislation – either primary or secondary – has been struck down

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[1] Knatchbull-Hugessen, Hughe, „Diplomat in Peace and War", London, John Murray. 1940, p. ix.

[2] Rolf, Pamela, Birnbaum, Michael, „While covid-19 continues to force remote work, Europe looks to enforce a right to disconnect", September, the 7th, 2020, Washington Post online, available at: https://www.washingtonpost.com/world/europe/coronavirus-remote-work-europe/2020/09/04/6e4a19c6-e23e-11ea-82d8-5e55d47e90ca_story.html.

by the respective national ordinary[3] or Constitutional Courts[4].

The prolonged restrictions have taken a heavy toll on the EU citizens, confronted with a dramatic change in their lifestyles and expectations. It could be argued that the culture of rights in Europe – some critics might label it as a culture of entitlement – has significantly crippled the pragmatic efforts made by the governments to fight the pandemic. A weary population, naturally inclined to question the legitimacy and opportunity of the decisions made by those in power, even if democratically elected, have now additional reasons to criticize the political forces, in the context of the vaccination program now in full swing in the EU.

Given the extent of the crisis, the EU response to it has been adequate and varied, fully circumscribed within its range of competencies[5]. It included, *inter alia*, negotiating and financing on behalf of its Member States the development of a viable vaccine by multiple pharmaceutical companies, all of whom were, sadly, non-EU. These complex agreements and financing schemes have resulted in the purchase and distribution to the EU countries of vaccine doses according to a quota based on the size of the population.

Taking into account the very short time in which these vaccines have been developed and tested, and some deaths of inoculated persons which occurred after their vaccination with certain types of vaccines, there is no wonder that so many public controversies have surrounded the respective vaccines and the whole vaccination program. An ongoing controversy relates to the vaccine produced by Astra Zeneca. It gained such magnitude, that the EU Commission felt compelled to disclose at the end of January this year[6] the (edited) contract signed with the developing company, which did very little to quell the alarmed European public opinion.

The centralized, state-controlled way the vaccination program is run and the prominent role played by the European Commission have brought into the spotlight the EU institutions and the entire decision making process at European level.

We share the belief that it is necessary to combine both the black-letter approach – reflected in our brief analysis of the Advance Purchase Agreement signed with Astra Zeneca with special emphasis on the clauses pertaining to contractual liability, with the broader outline of the legal framework for the APA agreements at EU level. The complex interplay of the legal, political and economic interests which affect the management of the Covid crisis on European and international level will also be taken into account to formulate conclusions and recommendations in the final section of this paper.

2. Brief outline of the general legal framework for the Advance Purchase Agreements in the EU

The AP agreements negotiated by the EU Commission on behalf of EU Member States for the development, production and distribution of viable vaccines are based primarily on the so-called *ISI Regulation*, namely the Council Regulation (EU) 2016/369 of 15 March 2016 on the provision of emergency support within the Union, as amended by Council Regulation (EU) 2020/521 of 14 April 2020 activating the emergency support under Regulation (EU) 2016/369, and amending its provisions taking into account the COVID-19 outbreak. The amended ISI Regulation states at Article 4**,** paragraph 5, point (b) that[7]:

"Emergency support under this Regulation may be granted in any of the following forms:(…)

(b) procurement by the Commission on behalf of Member States based on an agreement between the Commission and Member States."

The procurement procedure is subject to the rules laid down in the same Article, paragraph 6, as follows:

"*6. In the event of a procurement procedure as referred to in point (b) of paragraph 5, the ensuing contracts shall be concluded by either of the following:*

(a) the Commission, whereby the services or goods are to be rendered or delivered to Member States or to partner organisations selected by the Commission;

(b) the participant Member States whereby they are to directly acquire, rent or lease the capacities procured for them by the Commission.

7. In the event of procurement procedures as referred to in points (b) and (c) of paragraph 5, the

[3] A recent example (March 31, 2020) comes from Belgium, where an ordinary court (*le tribunal de première instance de Bruxelles)* has ordered the government either to lift all restrictions pertaining the coronavirus situation or to translate them into proper primary legislation. See „Court orders Belgium to reframe virus restrictions as laws", available online at: https://apnews.com/article/travel-pandemics-coronavirus-pandemic-covid-19-pandemic-belgium-51dfbf0fd7becc97323f0b8d43480ce2. French source: https://www.lesoir.be/363910/article/2021-03-31/info-le-soir-letat-condamne-par-le-tribunal-de-bruxelles-qui-juge-les-mesures.

[4] For instance, in May 2020, the Romanian Constitutional Court struck down the Government Emergency Ordinance (OUG) no. 34/2020 regarding the amendment of OUG nr. 1/1999 concerning the state of emergency and the state of siege, as unconstitutional, on the grounds that it is the Parliament and not the President which has the competency to instate - by primary legislation only - restrictions on the basic freedoms and rights of the citizens. See CCR Decision no. 152/6.05.2020, http://www.ccr.ro/wp-content/uploads/2020/06/Decizie_152_2020.pdf.

[5] For an in-depth analysis on this subject, see Salomia, Oana-Mihaela, Dumitrașcu Augustina, "Eficacitatea măsurilor adoptate de Uniunea Europeană pentru sprijinirea statelor membre în perioada pandemiei de covid-19" *(The effectiveness of the measures taken by the EU to support Member States during the covid-19 pandemic)*, Revista "Analele Universității din București", seria Drept, 2020, Ed. C.H. Beck.

[6] „Covid: EU-AstraZeneca disputed vaccine contract made public", 29 January 2021, https://www.bbc.com/news/world-europe-55852698.

[7] Regulation (EU) 2016/369 of 15 March 2016, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0369-20200201.

Commission shall follow the rules set out in Regulation (EU, Euratom) 2018/1046 for its own procurement."

In addition to these general legal provisions, the EU Commission has adopted the Decision C(2020) 4192 final of 18 June 2020 approving the agreement with Member States on procuring covid-19 vaccines on behalf of the Member States and related procedure[8].

The complexity of the EU legislation regarding the public procurement, the involvement of both the EU Council and the Commission[9], the manifold aspects concerning the delegated powers, the shared or exclusive regulatory competencies have lead, in practice, to implementation problems related to the very structure of the split decision making process in the EU. It is beyond the scope of this paper to dwell on the technicalities of the public procurement in the EU, aspects which have been analysed at length by the academic doctrine[10].

Complexities notwithstanding, this legal structure enabled the EU Member States to act cohesively and to mitigate the humanitarian consequences of the Covid crisis, benefiting both in terms of priority and of choice of vaccines, as opposed to negotiating individual agreements with the pharmaceutical companies. EU has concluded AP agreements with a number of private companies, but to date only Pfizer, BioNTech, Moderna, Astra Zeneca and Johnson & Johnson have produced and delivered tested vaccines, while the Sanofi-GSK and CureVac vaccines are still in development stage.

But what do these advance purchase agreements mean and which role do they play in dealing with the Covid crisis?

In June 2020, the European Commission has issued the Communication on EU Strategy for COVID-19 vaccines, COM (2020) 245 final, stating its goals and strategy related to this stringent issue. Recognising that the development of a viable vaccine usually takes more than 10 years, the Commission sets forth its strategy on Covid-vaccine development and production within a timeframe of 12-18 months, based on 2 principles:

" - Securing sufficient production of vaccines in the EU and thereby sufficient supplies for its Member States through Advance Purchase Agreements (APAs) with vaccine producers via the Emergency Support Instrument (ESI 2). (…)

- Adapting the EU's regulatory framework to the current urgency and making use of existing regulatory flexibility to accelerate the development, authorisation and availability of vaccines while maintaining the standards for vaccine quality, safety and efficacy."[11]

The purpose served by the advance purchase agreements is explained clearly in Section 2.2., Paragraph 1:

"In order to support companies in the swift development and production of a vaccine, the Commission will enter into agreements with individual vaccine producers on behalf of Member States. In return for the right to buy a specified number of vaccine doses in a given timeframe and at a given price, part of the upfront costs faced by vaccines producers will be financed from the ESI. This will be done in the form of advance purchase agreements (APAs)."

This upfront part-financing scheme has already yielded results, as mentioned above, EU being able to secure an adequate share of vaccines at a given price, though – it is important to note – none of the working vaccines were developed in Europe. This mechanism seemed to work flawlessly until delays in delivery of Astra Zeneca vaccines angered the public opinion in Europe. The pressure on the EU Commission mounted, culminating in the disclosure of the significantly edited procurement agreement signed with Astra Zeneca.

3. The Astra Zeneca Advance Purchase Agreement – a case for limited liability?

What are the controversial clauses? What triggered so much resentment, what prompted so many headlines in online media?

The answer is not clear-cut and it involves, as stated in the introductory section, more than the legalistic analysis of the actual contract. Caving in to public pressure, the Commission has published not only the APA with Astra Zeneca, but also the edited agreements signed with Moderna and Pfizer, while the Johnson & Johnson contract is - to date - not available[12].

The headlines in the media focused initially on the delays in delivery of the vaccine doses, Astra Zeneca invoking production issues at the Belgium manufacturing plant. Instead of (presumably) 80 million vaccines, as initially scheduled, at the beginning of the year the company had delivered only

[8] Decision C(2020) 4192 final of 18 June 2020, available at https://ec.europa.eu/info/sites/info/files/decision_approving_the_agreement_with_member_states_on_procuring_covid-19_vaccines_on_behalf_of_the_member_states_and_related_procedures.pdf.

[9] For an interesting perspective on the complex role played by the EU Council and the Commission in relation to the EU Member States, see Bantaș, Dragoș-Adrian, "Considerations relating to the role of the Council in the institutional union of the European Union", p. 448-451, CKS 2019, Public Law Section, available online at: http://cks.univnt.ro/articles/14.html.

[10] Salomia, Oana-Mihaela, Bantaș, Dragoș-Adrian, "Aspecte generale privind competența Uniunii Europene în domeniul achizițiilor publice", (*General considerations on the EU competencies regarding the public procurement*), in Revista „Achizițiile publice. Idei noi, practici vechi", Ed. Universitară, 2020, p. 230-233.

[11] COM (2020) 245 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0245.

[12] See https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/public-health/eu-vaccines-strategy_en#authorised-vaccines, for the published redacted contract; consulted at 8th of April, 2021.

a quarter of the amount specified by the contract[13]. The questions that were starting to pop up concerned the contractual commitments undertaken by Astra, the extent of its liability and the means – if any – available to the Commission as signatory party on behalf of the EU Member States to enforce the contract and impose penalties for delays in delivery.

There are countless ways in which a company could benefit from the wording of a contract, ranging from the definitions of the terms used, to the warranties, rights and obligations and the choice of applicable substantial or procedural law. Some key points on the Astra Zeneca APA: the choice of law is Belgian law, pertaining to the civil law tradition, hence the interpretation of contract is made according to the principles of interpretation that stem from the tradition of the Napoleonic code, which emphasizes the contextual, systematic interpretation of the contract. Like the Romanian law, the Belgium law recognises the difference between an obligation of means (endeavours clause) and an obligation of result, a difference which reflects directly in the way the liability and the burden of proof are distributed in case of breach of contract.

The wording of the contract clearly states that the company is under an obligation of means, and not of result, with respect to the manufacturing and supply of the initial doses allocated to Europe, as per Article 5.1:

"5.1. Initial Europe Doses. AstraZeneca shall use its Best Reasonable Efforts to manufacture the Initial Europe Doses within the EU for distribution, and to deliver to the Distribution Hubs, following the EU marketing authorisation, as set forth more fully in Section 7.1, approximately [*edited*], Q 1 2021, and (iii) the remainder of the Initial Europe Doses by the end of [*edited*]".

Though familiar to the Anglo-Saxon lawyers, the "Best Reasonable Efforts" is by no means a very clear concept that could be separated by the extensive case law in US or UK courts and, in our opinion, does not have an equally extensive case law equivalent in the civil legal systems. The endeavour clauses (*Best efforts/ endeavours, Reasonable efforts, Best reasonable efforts* etc.) express various degrees of commitment and efforts required from the party undertaking an obligation of means[14]. In case of the Astra Zeneca contract, the term used implies a heightened - but not a maximal, nor unmitigated - obligation and is defined in Article 1.9 as follows:

1.9. "Best Reasonable Efforts" means

(a) in the case of AstraZeneca, the activities and degree of effort that a company of similar size with a similarly-sized infrastructure and similar resources as AstraZeneca would undertake or use in the development and manufacture of a Vaccine at the relevant stage of development or commercialization having regard to the urgent need for a Vaccine to end a global pandemic which is resulting in serious public health issues, restrictions on personal freedoms and economic impact, across the world but taking into account efficacy and safety; and

(b) in the case of the Commission and the Participating Member States, the activities and degree of effort that governments would undertake or use in supporting their contractor in the development of the Vaccine having regard to the urgent need for a Vaccine to end a global pandemic which is resulting in serious public health issues, restrictions on personal freedoms and economic impact, across the world."[15]

The Commission alleged that the delays in the supply of the Initial EU Doses were caused, *inter alia*, by the parallel commitments undertaken by Astra Zeneca to deliver vaccines to other countries, mainly to the UK. Following the statements made by Pascal Sariot, the chief executive of the company, during an interview for the Italian newspaper La Repubblica[16], that the pharmaceutical company was under an obligation to make its best reasonable efforts to deliver and not under an obligation to actually deliver the vaccines, the Commission accused the British-Swedish company that it was not making its best reasonable efforts to compensate the shortages in the manufacturing site in Belgium, by using the capabilities of the UK manufacturing sites, assimilated as per Article 5.4 ("Manufacturing Sites") to the manufacturing sites located within the EU. It also invoked the warranty made by Astra Zeneca in Article 13.1. (e) that "it is not under any obligation, contractual or otherwise, to any Person or third party in respect of the Initial Europe Doses or that conflicts with or is inconsistent in any material respect with the terms of this Agreement or that would impede the complete fulfilment of its obligations under this Agreement". The means available to the Commission in case of breach of contract by the company are set out in Article 12.3. ("Termination for cause"), with a strong emphasis on pre-termination measures and negotiation.

The company undertook the necessary steps to remedy the shortages in production. The manufacturing and delivery of Astra Zeneca vaccines continue, despite new controversies which appeared, this time, in relation to the safety and efficiency of the vaccine itself.

The public interest and alarm, fuelled by the acrimonious statements on both the European and the British side, led to an intense pressure on the Commission to disclose the Advance Purchase Agreement and raised the question of where the balance

[13] Tensions rise as AstraZeneca, EU spar over vaccine delays", by Raf Casert, Samuel Petrequin and Danica Kirka, January 28, 2021, available at: https://apnews.com/article/europe-europe-coronavirus-pandemic-coronavirus-vaccine-ba107e05dec2653f91555ff88033ade9

[14] For an analysis of the way the US courts are likely to interpret these terms, see Kenneth A. Adams "Understanding *Best Efforts* And Its Variants (Including Drafting Recommendations)", available at: https://adamsdrafting.com/downloads/Best-Efforts-Practical-Lawyer.pdf.

[15] The edited Astra Zeneca APA is available at: https://ec.europa.eu/info/files/redacted-advance-purchase-agreement-astrazeneca_en.

[16] Antonello Guerrera, Stefanie Bolzen, Rafa de Miguel, *Pascal Soriot: 'There are a lot of emotions on vaccines in EU. But it's complicated', 2*6.01.2021, at: https://www.repubblica.it/cronaca/2021/01/26/news/interview_pascal_soriot_ceo_astrazeneca_coronavirus_covid_vaccines-284349628/.

of contractual power actually lies. As mentioned at the beginning of this section, the Commission also disclosed the edited versions of the APAs signed with Pfizer and with Moderna. How different are these two contracts from the Astra Zeneca agreement?

The contract signed with Moderna, a company incorporated in Switzerland, is not illuminating in any respect, given the fact that the section referring to the company's liability has been edited, so was the section setting out the applicable law and the dispute resolution (section I.11.2.) or the section detailing the schedule for the delivery of the vaccines[17]. Moreover, Article 1.2 of the contract also uses the term of *Best reasonable efforts* to circumscribe the obligation of the company "to establish sufficient manufacturing capacities to enable the manufacturing and supply of the contractually agreed volumes of the Product".

The APA signed with Pfizer and BioNTech (an American-German joint venture) is disclosed on the site of the Commission along the same lines[18]. Article 1.2 ("Definitions") has the definition of *Best Reasonable Efforts* edited in full, and that of what constitutes *Force Majeure* almost in full. Other sensitive clauses, of legitimate interest for the public opinion, such as the product supply mechanism, the schedule, indemnification are extensively or fully edited. The agreement is governed by the Belgium law, as in the case of Astra Zeneca.

Even when analysing the heavily edited versions of the contracts, it can be easily ascertained that all the disclosed APAs contain similar clauses, that all of them place the manufacturing companies under an enhanced obligation of best reasonable efforts and not under an obligation of result, and that the wording of the contracts reflects the style of contractual drafting specific to common law lawyers, in spite of the Belgium law chosen as governing law of the agreements.

This brief presentation purported to show that the legalistic approach to the Astra Zeneca contract is not sufficient by itself when attempting to analyse the possible implications of the agreement on the EU management of the pandemic and the future decisions regarding our health.

4. Vaccination today: beyond the medical side-effects

Are there any other factors to affect the EU vaccination policy, besides the somewhat too liberal wording of the contracts concluded with the pharmaceutical companies?

Borrowing loosely from the field of comparative law the concept of legal formants, defined as "the different components that concur to build any given legal system"[19], I will endeavour to show how the EU health policies and health related regulations are shaped by the complex interplay of the legal, political and economic interests on European and international level. I would like to put forth the idea that vaccines have citizenships just as people do and that they are not ideological-neutral.

This aspect has been openly acknowledged by some British commentators[20] when considering the patchwork picture of the Astra Zeneca vaccine rollout in Europe: problems with the supply, fears about the link between the vaccine and some thrombosis-caused deaths, the briefly considered, but not enforced ban by the EU on vaccine exports to the UK etc. The view from across the Channel regarding the EU agreement with Astra Zeneca is that the EU has been outsmarted by the countries with faster vaccine authorisation procedures and more flexible decision making structures and that all the legal skirmishes are actually side effects of the post-Brexit EU-UK trade relations.

Under the terms of the EU scheme for vaccine strategy, as set out by Article 7 of the Decision C (2020) 4192 final of 18 June 2020 (mentioned in the previous section), the EU Member States are allowed to conclude separate deals with vaccine producers which have not signed agreements with the EU. The implications of this apparently neutral legal provision are all but neutral: the development by Russia and China of alternative vaccines and the aggressive marketing conducted at state-level in support to their respective national vaccines divided Europe along ideological lines: Poland and Romania, for example, refused even to consider the possibility of importing these vaccines, while countries such as Hungary, Slovakia already bought the Sputnik V vaccine developed by the Russian company Gamaleya. At the end of March, Germany and France started to show more receptiveness about these vaccines, in spite of the ongoing tense relations with Russia over its treatment of political dissidents and involvement in regional conflicts or the disagreements with China over its human rights track record.

In contrast to the European policies, the US measures regarding the vaccine development have been less hampered by bureaucracy, the previous administration pursuing an aggressive policy of 'America first' in securing the supply of vaccine doses for its population through public acquisitions – a significant departure from the practice of letting private companies to procure and distribute vaccines for individuals. A faster authorisation process gave the US a competitive advantage over EU in this matter, even if the legal instruments were similar – the use of advance

[17] The APA signed with Moderna is available at: https://ec.europa.eu/info/files/redacted-advance-purchase-agreement-moderna_en.

[18] The APA signed with Pfizer BioNTech is available at: https://ec.europa.eu/info/files/redacted-purchase-agreement-biontech-pfizer_en.

[19] Gardella Tedeschi B. (2019) "Legal Formants" in: Marciano A., Ramello G. (eds) Encyclopedia of Law and Economics. Springer, New York, NY. https://doi.org/10.1007/978-1-4614-7883-6_708-1.

[20] Simon Jack, "AstraZeneca vaccine - was it really worth it?", 30 March 2021, https://www.bbc.com/news/business-56570364; see also "Covid: What's the problem with the EU vaccine rollout?", 8 April 2021, https://www.bbc.com/news/explainers-52380823.

purchase agreements largely, but not exclusively, funded by the government.

Last, but not least, there are sheer economic considerations at play. Can the pharmaceutical companies (some of which are ranked as "Big Pharma") reign in their drive for profit maximisation and prioritize considerations such as the global solidarity in face of an extraordinary health crisis? From the very beginning of the pandemics, governments and private donors poured huge amount of money in the development of viable vaccines. Some companies, like Astra Zeneca or Johnson & Johnson, announced they intended to sell their vaccines at a price that just covers their manufacturing costs.[21] Given the current EU official trend for redacted contracts, it is not easy to ascertain in practice if their resolution came true with respect to the advance purchase agreements signed with the EU Commission.

All these factors - ideology, politics and economics - are legal formants, in the sense that they do shape the health policies at both national and European level.

5. Conclusions

Aware of the glitches in its health policies and strategies to combat the covid pandemics, the EU Commission has launched on the 31st of March an online public consultation on the Health Emergency Preparedness and Response Authority (HERA), addressing questions on topics such as: "the EU's framework to develop, manufacture and deploy medical countermeasures; anticipatory threat and risk assessments; market dynamics and supply chain intelligence; the development and financing of new countermeasures in times of crisis; the impact, role, scope and coordination of a future HERA"[22]. It remains to be seen if yet another European body will indeed make all the difference in the management of the future crises or if the problems are of a different nature.

In the short run, measures such as streamlining the authorisation procedures for vaccines and increasing the manufacturing capacities of the EU based companies should, in our opinion, take precedence. Based on the divergent decisions adopted by the individual governments with respect to the alternative vaccines purchased in addition to those negotiated on their behalf by the Commission, it may well be that, in the future, the EU Member States will exercise more discretion in opting for certain vaccines, to the expense of the principle of solidarity within the Union. It becomes necessary to adopt a common stance – a Europe who speaks with one voice – which, in turn, will strengthen the principle of solidarity which underlines the whole European legal order.

Unwittingly, the row over the Astra Zeneca advance purchase agreement might have been the impulse for a more pragmatic approach to the all important issues and future decisions regarding our health.

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Online resources:

- The ASTRA ZENECA Advance Purchase Agreement (APA), redacted form, available online at: https://ec.europa.eu/info/files/redacted-advance-purchase-agreement-astrazeneca_en;
- The MODERNA Advance Purchase Agreement (APA), redacted form, available online at: https://ec.europa.eu/info/files/redacted-advance-purchase-agreement-moderna_en;
- The PFIZER-BIONTECH Advance Purchase Agreement (APA), redacted form, available online at: https://ec.europa.eu/info/files/redacted-purchase-agreement-biontech-pfizer_en;
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[21] Lucy Hooker, Daniele Palumbo: "Covid vaccines: Will drug companies make bumper profits?", 18 December 2020, available at: https://www.bbc.com/news/business-55170756.

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LEGISLATIVE AND JURISPRUDENTIAL ASPECTS REGARDING THE PROTECTION OF PERSONAL DATA

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Abstract

The increasing concerns in the matter of protection of personal data have been favoured, among others, by the unprecedented developments in the field of technology and digitalisation. These concerns have over time increased, at the level of the European Union, in the sense that the issue of human rights has increasingly come to the attention of European decision-makers. These aspects have materialized in the inclusion of generous objectives in the amending treaties of the European Union, in the adoption of an adequate derived legislation, but also in a consistent case law.

Keywords: *protection of personal data; Directive 95/46/EC; Regulation (EU) 2016/679; domestic legislation; CJEU case law.*

1. Introduction

The increasing concerns in the matter of protection of personal data have been favoured, among other things, by the unprecedented developments in the fields of technology and digitalisation[1]. The developments are specific to the era we are going through, that of globalization in terms of communication, and include a huge amount of information, with reference to the personal data of individuals. The latter are seen either in their interdependent existence and action or in the representation of entities, as subjects of domestic law, in their capacity as legal persons. We appreciate that it is necessary to make a distinction from the very beginning, although the delimitation between the two situations is quite sensitive, with reference to the debate, respectively to the rather accentuated controversies regarding the relative and absolute character of the right to benefit from the protection of personal data.

If we take into account from a historical point of view, the instruments of international law relevant to the field, we notice that they are not recent. When making such a statement, we consider the Universal Declaration of Human Rights[2], as an instrument of international law with universal character, which in time, through use and practice, has acquired a legally binding character. The legal instruments adopted at European level, by the Council of Europe are added hereby, in particular, the European Convention on Human Rights[3] which has generated consistent case law[4] to the European Court of Human Rights, to which the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[5] is added.

These concerns have over time increased, at the level of the European Union, in the sense that the issue of human rights has increasingly come to the attention of European decision-makers. These aspects have materialized in the inclusion of generous objectives in the amending treaties[6] of the European Union, from the point of view of the protection of fundamental human rights. Without proceeding to an enumeration of all the treaties that directly or incidentally refer to human rights, we appreciate that the spearhead is the moment of Nice[7], with all the preliminary preparatory stages[8]. The Treaty establishing a Constitution for Europe is hereby added, on a transitional basis, as it has never produced legal effects, and which included, in Part III, the very content of the Charter of Fundamental Rights

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[1] In this regard, see, Augustin Fuerea, *Dimensiunea juridică europeană a globalizării în era digitală*, in the volume "In honorem VIOREL ROȘ. Studii de drept privat și public", coordinators Ciprian Raul Romițan and Paul George Buta, Hamangiu Publishing House, Bucharest, 2021, pp. 50-58.

[2] Adopted on 10 December 1948 by Resolution 217 A at the third session of the General Assembly of the United Nations.

[3] Adopted in 1950, entered into force in 1953.

[4] It concerns Art. 8 of the Convention, according to which "1. Everyone has the right to respect for their private and family life, their home and their correspondence. 2. The interference of a public authority in the exercise of this right shall be admissible only in so far as it is provided by law and constitutes, in a democratic society, a measure necessary for national security, public security, the economic well-being of the country, defense of order and prevention of criminal acts, protection of the health, morals, rights and freedoms of others".

[5] Signed in Strasbourg, on 28 January 1981. According to Art. 5, "Personal data subject to automated processing must be: a) obtained and processed correctly and legally; b) registered for determined and legitimate purposes and are not used in a manner incompatible with these purposes; c) adequate, relevant and not excessive in relation to the purposes for which they are registered; d) accurate and, if necessary, up to date; e) kept in a form which allows the identification of the individuals concerned for a period not exceeding that necessary for the purposes for which they are registered".

[6] For international treaties and conventions, sources of law, see Elena Emilia Ștefan, *Drept administrativ. Partea I.Curs universitar*, 3rd edition, revised, completed and updated, Universul Juridic Publishing House, Bucharest, 2019, pp. 45-46.

[7] The Treaty of Nice was signed in 2001 and entered into force in 2003.

[8] It concerns the proclamation of the Charter of Fundamental Rights of the European Union, in 2000.

of the European Union[9]. On the same coordinates, but at a higher place in terms of legal enshrining, is the Lisbon moment[10]. The two treaties regulate separately the issue of the protection of personal data. Thus, Article 39 of the Treaty on European Union (TEU) states that, "according to Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision setting rules on the protection of individuals, regarding the processing of personal data by the Member States, in the exercise of activities falling within the scope of this Chapter, as well as the rules on the free movement of such data. Compliance with these rules shall be subject to control by independent authorities. " We can also note that, while the Treaty on European Union enshrines such an issue in a single paragraph, the Treaty on the Functioning of the European Union (TFEU) reserves, in Art. 16, two paragraphs, giving details about the specifications of Art. 39 TEU. In this regard, par. (1) states that "everyone has the right to the protection of personal data concerning them". In the second paragraph, the ordinary procedure is laid down, as a means of adopting rules on the "protection of individuals with regard to the processing of personal data by the institutions, bodies, offices and agencies of the Union and by the Member States in the exercise of activities falling within the scope of Union law, as well as the rules on the free movement of such data. Compliance with these rules shall be subject to control by independent authorities.

"The reflection of the content of Art. 16 TFEU is given by the adoption of Regulation (EU) 2016/679 on the protection of personal data[11], which is preceded by Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[12]. The Directive was repealed by that Regulation[13].

2. Conceptual delimitations

Currently, the main derivative core of the matter is Regulation (EU) 2016/679 which, at Art. 4 clarifies a number of 26 concepts, among which the concept of "personal data" and the concept referring to the "processing" of these data are significantly important. The need to clarify such notions results from their order at point 1 ("personal data"[14]), respectively at point 2 ("processing"[15]). The biggest difficulty is the phrase by which the definition of the two notions begins, the first word being the same in both situations, i.e., "anything". Thus, personal data "means **any** information relating to a natural person (...)" and processing "means **any** operation (...)". Also, those aspects that follow this first difficulty specific to each concept are neither meaningless or insignificant. This is specified at point 1 ("personal data") with reference to the **identified** or **identifiable** natural person ("data subject"), and "any **operation** or set of operations performed on personal data is invoked at point 2 ("processing"). In the third place and from the same perspective, we appreciate that a special degree of difficulty is represented by that specification (point 1) which refers to the fact that "an identifiable natural person is that person who can be **directly** or **indirectly** identified, in particular by reference to an identifying element". At the same third level, point 2 ("processing") brings into discussion the fact that "any operation" may be carried out **with** or **without the use of automated means"**. The six[16] variables that appeared at these three levels, regarding only the two concepts, are likely to generate numerous controversies. This is also the reason why the Special Working Party set up for the protection of individuals with regard to the processing of personal data[17] adopted Opinion 4 on the concept of personal data, on 20 June 2007. The opinion has as starting point the definition[18] enshrined in Directive 95/46/EC. If we compare it to that enshrined over more than 20 years by Regulation (EU) 2016/679, we cannot help finding that it is much

[9] "An authentic catalogue of fundamental rights", according to Augustin Fuerea, *Manualul Uniunii Europene*, 6th edition, revised and added, Universul Juridic Publishing House, Bucharest, 2016, p. 93.

[10] The Lisbon Treaty was signed in 2007 and entered into force in 2009.

[11] The correct and full name is as follows: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) - published in OJ L119, 4 May 2016.

[12] Published in OJ L 281, 23 November 1995.

[13] "Having in view the importance of the data protection field, the EU legislator has decided to adopt this piece of legislation through a regulation (instead of a directive), because unlike a directive, the regulation is directly binding and applicable in the Member States" - Laura-Cristiana Spătaru-Negură, Marta-Claudia Cliza, *The General Data Protection Regulation: what does the public authorities and bodies need to know and to do? The rise of the data protection officer*, Juridical, Tribune Volume 8, Issue 2, June 2018, p. 490.

[14] "Personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is a person who can be identified, directly or indirectly, in particular by reference to an identifying element, such as a name, an identification number, location data, an online identifier, or one or more specific elements, specific to his/her physical, physiological, genetic, mental, economic, cultural or social identity".

[15] Processing "means any operation or set of operations performed on personal data or personal data sets, with or without the use of automated means, such as collection, recording, organization, structuring, storage, adaptation or modification, extraction, consultation, use, disclosure by transmission, dissemination or making available in any other way, alignment or combination, restriction, deletion or destruction".

[16] "Identified natural person"/"identifiable natural person"; "Any operation"/"any set of operations"; "With the use of automated means"/"without the use of automated means".

[17] Constituted pursuant to Art. 29 of Directive 95/46/EC.

[18] In the sense of Art. 2 point 1 of the Directive, "personal data "means any information relating to an identified or identifiable natural person (data subject); an identifiable person is a person who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more specific elements of his/her physical, physiological, mental, economic, cultural or social identity".

more succinct (lacking, for example, from the Directive, the identified elements with reference to the individual, location data and an online identifier - these two being determined by technological developments, including in the field of personal data). Opinion 4/2007 was issued almost 12 years after the adoption of Directive 95/46/EC[19], meeting the requirements of Art. 32 para. (2) par. 2, even in the conditions in which the transposition period, by the Member States was established for 3 years, in full agreement with the final provisions of Art. 32 para. (1) par. 1 and para. (2) par. 1. The Opinion shall detail the meanings of the phrase "any information", making a detailed analysis, in relation to several criteria considered at that stage by the European Union's legislator, namely: the nature of the information, the content of the information, the format or support on which the information is stored and the biometric nature of the information. The examples provided, according to each criterion of systematization of information, are edifying in order to highlight the diversity and complexity of personal data belonging to natural persons, and especially the difficulties that may arise when talking about the relative nature of data protection (rules and exceptions)[20].

All the other components of the definition given to "personal data", namely: "relating to", "identified or identifiable", "natural person", etc. are equally thoroughly analysed, by the authors of the Opinion.

All the examples are conclusive, but also controversial. Going under the dome of fundamental human rights, the Opinion goes with the details quite far, the achieved analysis stimulating a series of reflections that include the issue of "data on deceased persons", "unborn children" and "legal entities".

The views of the Working Party (which we find in the content of Opinion 4/2007) on the situation where "data do not fall under the definition" are also interesting. Here are stated the following aspects: the application of the national legislation of the Member States, the case law of the Court of Justice of the European Union, the provisions of Art. 8 of the European Convention on Human Rights and the case law of the European Court of Human Rights.

The techniques of anonymization are also evolutionary in the field of personal data protection, in terms of conceptual clarifications and more, and are closely related to the fairly comprehensive meanings of what "personal data" and "processing" mean. The latter are likely to contribute, to some extent, to the balance suggested by the correct and complete names of the two legal acts of the European Union (Directive 95/46/EC and Regulation (EU) 2016/679). Briefly, this balance aims in fact, on the one hand, at the protection of personal data belonging to individuals, and, on the other hand, at the free movement of such data. The balance also refers both to the established rules, but also to the exceptions that can be invoked, including by different socio-professional categories, even within each category where there may be some differences. Jurists, for example (bringing together arbitrators, lawyers, counsellors, executors, magistrates, mediators, notaries, insolvency practitioners)[21], but also diplomats and civil servants with legal education have correlative rights and obligations, both similar and different.

3. Current, internal and European Union regulations on the protection of personal data

Starting from the conclusions of the Working Party formulated at the end of Opinion 4/2007, we appreciate that the national legislator has an important role to play in ensuring that national legislation is in line with that of the European Union, even in the field of data protection. After the entry into force[22] of Regulation (EU) 2016/679, respectively after the date from which it started to be applied[23], two laws were adopted in Romania, with the role of creating the regulatory framework necessary for the correct and complete application of provisions of the mentioned regulation. Thus, the two laws are: Law no. 129/2018[24] and Law no. 190/2018[25]. The first of the two repeals Law no. 677/2001[26], which in turn was adopted during the period when our country had the status of candidate state for accession (2000-2004), going through the stage of negotiations for accession to the European Union and having the obligation to adopt legislation that would be consistent with European Union law, including in this respect. The repealed law is the normative act by which Romania transposed Directive 95/46/EC, even if, at that time, it was not a member state of the European Union. The second component of

[19] The Directive was adopted on 24 October 1995.

[20] About rules and exceptions, see Augustin Fuerea, *Aplicarea legislației, în materia protecției datelor cu caracter personal, de către practicienii în insolvență,* Universul Juridic Review, no. 12/2020, pp. 108-122.

[21] Example taken from Augustin Fuerea, *Aplicarea legislației, ..., op. cit.*

[22] On 25 May 2016.

[23] 25 May 2018.

[24] Law no. 129/2018 for the amendment and completion of Law no. 102/2005 on the establishment, organization and functioning of the National Authority for the Supervision of Personal Data Processing, as well as for the repealing of Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and the free movement of such data, published in the Official Gazette of Romania, Part I, no. 503 of June 19, 2018.

[25] Law no.190/2018 on the implementing measures for Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and for repealing Directive 95/46/EC (General Regulation on data protection), published in the Official Gazette of Romania, Part I, no. 651 of July 26, 2018.

[26] Law no. 677/2001 for the protection of individuals with regard to the processing of personal data and the free movement of such data, published in the Official Gazette of Romania, Part I, no. 790 of December 12, 2001.

Law no. 129/2018 aims at amending and supplementing Law no. 102/2005 (law that was adopted in the stage of preparation of the status of state in the process of accession: 2005-2006). That law aimed at establishing, organizing and functioning of the National Authority for the Supervision of Personal Data Processing (hereinafter referred to as the National Authority). The second law governs the matter of measures implementing Regulation (EU) 2016/679.

Under these two laws, several decisions have been adopted by the National Authority. Among them, the following are significantly relevant: Decision no. 128/2018 on the approval of the standard form for the notification of personal data breach in accordance with Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data, and on the free movement of such data, and the repealing of Directive 95/46/EC[27]; Decision no. 133 of 3 July, 2018 regarding the approval of the Procedure for receiving and resolving complaints[28] and Decision no. 174 of 18 October, 2018 on the list of operations for which it is mandatory to perform the impact assessment on the protection of personal data[29].

Given the fact that the balance in this matter is given by correlative rights and obligations, rules and exceptions or the relative and absolute character, we consider that highly important in the economy of this approach is Directive (EU) 2016/680[30], adopted at the same time as Regulation (EU) 2016/679[31]. In essence, the Directive regulates real exceptions to the application of the Regulation on the protection of personal data. Internally, Romania transposed the directive by Law no. 363/2018[32], but complementary elements of this transposition are also found in Law no. 129/2019[33], respectively in Law no. 544/2001[34] and in Decision no. 133/2018 of the National Authority, invoked above.

Like all national, European and international rules, Regulation (EU) 2016/679 is no exception to the rule according to which no regulation is perfect, but perfectible, being susceptible of additions, modifications, completions, corrections and rectifications. These inevitable corrections or rectifications are all the more necessary as we must take into account some possible errors that might appear in the process of translating, including in Romanian, the legal acts of the European Union[35]. In this regard, we cite, as an example, the rectification of Regulation (EU) 2016/679 published in the Official Journal of the European Union[36] just two days before the date of application of the Regulation. The 24 amendments to the rectification refer to: a recital (71, the fifth and sixth thesis); 20 articles and one point (point 25 of Art. 4).

Specifically, only by way of example, in order to see the difference in matters of legal consistency of the rectification that occurred prior to the application of the regulation, the powers of the supervisory authority are provided at Art. 58 para. (2) letter b). Among them, it was erroneously mentioned that, according to which it could "issue **warnings**[37]" to an operator or a person authorized by the operator if the processing operations infringed the provisions of the Regulation. Following rectification, the supervisory authority "can issue **reprimands**".

4. Jurisprudential aspects

Along with the legislator, the Court of Justice of the European Union has an important role in clarifying/interpreting some provisions of EU legal acts. The role of the European Union's legislator (European Parliament and Council) is highlighted, for example, in the content of Art. 4 of Regulation (EU) 2016/679, where 26 terms are defined. In the same direction, we also remind of the rectification made to the regulation two days before it was applied.

In the short time that has elapsed since the entry into force or application of the Regulation, a number of preliminary requests for interpretation have already

[27] Published in the Official Gazette of Romania, Part I, no. 557 of 3 July, 2018.

[28] Published in the Official Gazette of Romania, Part I, no. 600 of 13 July, 2018.

[29] Published in the Official Gazette of Romania, Part I, no. 919 of 31 October, 2018.

[30] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating or prosecuting criminal offenses or the execution of punishments and on the free movement of such data and to repealing the Council Framework Decision 2008/977/JHA, published in OJ L 119, 4 May 2016.

[31] 27 April, 2016.

[32] Law no. 363 of 28 December 2018 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating, prosecuting and combating crime or the execution of punishments, educational and security measures, and on the free movement of these data, published in the Official Gazette of Romania, Part I, no. 13 of January 7, 2019.

[33] Law no. 129/2019 for preventing and fighting against money laundering and terrorist financing, as well as for amending and supplementing some regulations with subsequent amendments and completions, published in the Official Gazette of Romania, Part I, no. 589 of July 18, 2019. For another perspective, see Elena Emilia Ștefan, "*Interference between the protection of personal data and contraventional legislation"*, published in Volume 7, Issue 2, 2018 of the online journal *"Perspectives of Law and Public Administration"*- http://www.adjuris.ro/revista/articole/an7nr2/6.%20Elena%20Stefan%20EN.pdf, with the access date on 6 April 2021.

[34] Law no. 544/2001 on the free access to information of public interest, with subsequent amendments and completions, published in the Official Gazette of Romania, Part I, no. 663 of October 23, 2001.

[35] Each official language of each EU Member State is an official language of the Union. The entire EU acquis is translated into all 24 official languages of the Union, with the same legal value.

[36] OJ L127, 23 May 2018.

[37] Regarding the warning, see in detail, Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, pp.223-225.

been made. Until that date, by way of example, we mention the ruling of the Court of 16 January 2019 in Case C-496/17[38]. Under point 31, it results from its content, that "the settlement of the main dispute depends on the interpretation of Art. 24 para. (1) par. 2 of the Implementing Regulation 2015/2447, interpreted in the light of Art. 8 of the Charter of Fundamental Rights of the European Union and Regulation (EU) 2016/679, as the tax identification numbers of the data subjects and the contact details of the tax centres competent for them, constitute personal data". Therefore, the Court's solution is "that the customs authorities may require the applicant for AEO status to communicate the tax identification numbers assigned for the purpose of levying income tax, which concern only natural persons who are authorized to represent the applicant or who exercise control over its management, and those responsible for customs matters within it, as well as the contact details of the tax centres responsible for all such persons, in so far as such data enable those authorities to obtain information on serious or repeated infringements of customs legislation; of the fiscal dispositions or to serious crimes related to their economic activity, committed by these natural persons"[39].

Another case in which the Court was asked to provide an interpretation of provisions on the protection of personal data is C-673/17[40]. In the present case, the referring court had doubts, first, as to the validity of Planet 49's (part in the main litigation) obtaining the consent of the users of the website www.dein-macbook.de, which it requested through a box that had to be checked, and, secondly, on the scope of the obligation to provide information, as mentioned in the Privacy and Electronic Communications Directive[41]. In the Court's view, the consent provided on that website "is not validly given when the storage of information or the acquirement of access to information already stored in the terminal equipment of a website user, through cookies, is authorized by means of a box checked in advance which this user must uncheck if he refuses to give his consent". With regard to the scope of the obligation to inform, mentioned in the Privacy and Electronic Communications Directive, the Court noted that "the information that the service provider must provide to the user of a website, includes the duration of the cookies and the possibility or the impossibility for third parties to have access to these cookies"[42].

A final case taken into account, is the one in which the Court was asked to rule, by a preliminary ruling in interpretation, on the transfer of personal data for commercial purposes to third countries, respectively the appropriate level of protection. In the Court's view, the appropriate safeguards, enforceable rights and effective remedies provided in Regulation 2016/679 "must ensure that the rights of individuals whose personal data are transferred to a third country under standard data protection clauses benefit from a level of protection (...) equivalent to that guaranteed in the European Union"[43].

5. Conclusions

The dynamics of legislative and jurisprudential developments are likely to determine the transformation of the issue of personal data protection into a real permanence of existing concerns, internally, but also at European and international level. This is generated by the practice of the field, and by the evolutions that, inevitably, digitalisation will undergo, corroborated with other components of the technical-scientific evolutions which are closely related to the unprecedented multiplication of data belonging to people, some of which are currently difficult to imagine (for example: location data or one or more elements specific to the genetic identity introduced by Regulation (EU) 2016/679 as a novelty, if we refer to Directive 95/46/EC).

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[38] Decision of the Court of 16 January 2019, *Deutsche Post AG v. Hauptzollamt Köln*, C-496/17, EU:C:2019:26.

[39] Point 70 of the decision.

[40] Decision of the Court of 1 October 2019, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. c./Planet49 GmbH*, C-673/17, EU:C:2019:801.

[41] The correct and full name is as follows: Directive 2002/58/EC of the European Parliament and of the Council, of 12 July 2002 on the processing of personal data and the protection of privacy in the public communications sector, published in OJ L 201, 31 July 2002.

[42] Decision of the Court of 16 July 2020, *Data Protection Commissioner/Facebook Ireland Limited and Maximillian Schrems*, C-311/18, EU:C:2020:559.

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LEGAL PERSONALITY OF INTERNATIONAL INTERGOVERNMENTAL ORGANIZATIONS

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Abstract

The legal personality of international intergovernmental organizations is relevant, at international level, from the point of view of the acquisition of rights and obligations. It is the sole way in which the will manifestation of the subjects of international law can be approached. The action of international intergovernmental organizations is limited to the will of founding states, which is regulated by different instruments of international law. Given the fact that the very existence and legality of subjects of public international law depends on the very existence of the legal personality, the study, respectively its analysis, is an equal priority for both theory and practice of the public international law.

Keywords: *international intergovernmental organizations; domestic legal personality; international legal personality; rights and obligations; International Court of Justice.*

1. General considerations regarding the quality of subject of international law of the international intergovernmental organizations

Given the fact that the very existence and legality of subjects of public international law depends on the very existence of the legal personality, the study, respectively its analysis, is an equal priority for both theory and practice of the public international law. There is an intrinsic link between legal personality and the status of subject of international law in the sense that, in general, "the subject of law is the holder of rights and obligations"[1]. The exercise of these rights and obligations concerns the domestic scope, as far as the subjects of domestic law are concerned, respectively the international scope, as far as the subjects of international law are concerned, as it is the case of states or international organizations, and many more. The international legal personality confers upon the subjects of international law, limitations within which the relations of which they may be part, can be organized and carried out. The regulation of such relations falls under the rules of "international law, acquiring the character of relations of international law analysed through the classical legal concepts of: subjects, legal content (rights and obligations) and object"[2].

Starting from the twentieth century, international intergovernmental organizations have been recognized as subjects of international law. Thus, after the Second World War, the scope of subjects of international law has expanded, meaning that, in addition to states, as main, primordial subjects, also the international organizations have appeared, not all, but just the intergovernmental ones, "the only organizations that can be studied in international law"[3]. Thus, we are taking into consideration the provisions of Art. 2 para. (1) letter i) of the Vienna Convention of 1969, according to which "the expression" international organization "means intergovernmental organization". Subsequently, we find a similar wording in the debates of the International Law Commission in 1989, when in the Fourth Report on Relations between States and International Organizations[4], Special Rapporteur Leonardo Díaz González noted that the "definition of the term "international organization" from para. (1) of Art. 2 of the Draft Articles on Treaties Concluded between States and International Organizations or between International Organizations[5], is identical to the one given in Art. 2 para. (1) letter i) of the Vienna Convention on Treaties of 1969". Therefore, the international organization is assimilated to an intergovernmental organization.

As it is already known, for an entity to be subject of international law, of state type, "the following conditions must be met: permanent population, determined territory, government and the capacity to establish relations with other states"[6]. Once these requirements are met, the state becomes "direct and immediate subject of international law, having full capacity of assuming all international rights and obligations"[7]. Likewise, it is necessary for the international organization to meet certain conditions in order for it to be qualified as subject of international law. *The Draft articles on the legal situation of state*

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[1] Gheorghe Moca, *Drept internațional public*, Era Publishing House, Bucharest, 1999, p. 130.

[2] *Ibidem*, p. 131.

[3] Grigore Geamănu, *Drept internațional public*, vol. II, Didactic and Pedagogical Publishing House, Bucharest, 1983, p. 197.

[4] Presented at the 41st session of the International Law Commission, held in Geneva, Switzerland, from 2 May to 21 July 1989.

[5] Currently, the Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted in Vienna, 1986 (not in force).

[6] According to Art. 1 of the Montevideo Convention (1933).

[7] Adrian Năstase, Bogdan Aurescu, *Drept internațional public. Sinteze*, Edition 9, C.H. Beck Publishing House, Bucharest, 2018, p. 96.

representatives to international organizations[8] define the international organization as "an association of states, constituted by treaties, endowed with a constitution and common bodies and possessing a legal personality distinct from that of Member States"[9]. Thus, the international intergovernmental organization is a subject of international law if the following requirements are met: the members of the organization must be the states, i.e., the organization must be intergovernmental (interstate); the will agreement of states is necessary for the establishment of the organization; the organization must have its own institutional structure, which gives it "functional autonomy in international relations"[10] and must have legal personality.

Although the requirement of having legal personality is included in the constituent elements of the international organization, it should not be overlooked that it becomes subject of international law "in so far as States confer upon it this quality"[11] through the constitutive act.

Therefore, if we refer to international intergovernmental organizations, we find that their legal personality is an independent component, along with others, of course. "The endowment of legal personality [to international organizations] is the "key" element in determining the "distinction" between international organizations and forms or structures of international cooperation without legal personality in international law"[12].

2. Legal personality of international intergovernmental organizations

In order to be able to discuss about the legal personality of international intergovernmental organizations, we must keep in mind that, next to states, there are also other subjects of international law. Only then must we acknowledge that it is imperative to dissociate international legal personality from sovereignty[13].

As mentioned, legal personality can be conferred upon an international intergovernmental organization, either directly, through the legal instrument by which such an entity under international law[14] arises, or indirectly, resulting "implicitly" in so far as in order for the organization to exist and function, it is endowed with its own bodies, and for which "competences or tasks [which] could not be fulfilled in the absence of international legal personality"[15], are established.

Acquiring international legal personality through the constitutive act is also provided in the *Draft Articles on the Liability of International Organizations*[16], which, at Art. 2 letter a), states that the term "international organization" means any organization established by a treaty or other instrument governed by international law and endowed with its own international legal personality (...)".

Regarding the implicit conferment of legal personality upon international intergovernmental organizations, it is important to remember that the international case-law recognized this prerogative to those organizations for which the members had not provided, through the constitutive act. This is the well-known Advisory Opinion of the International Court of Justice[17] of 11 April 1949. In the present case, one of the questions addressed to the Court concerned the legal capacity requested to an organization (UN), which had not been endowed with legal personality through the constitutive act, to bring international claims. In other words, does the organization have international legal personality, given the fact that the constitutive act provides differently? The Court acknowledges that "this legal capacity is obviously inherent to the State; one state may bring an international claim against another state"[18]. The Court's answer is clear, in the sense that "the organization is subject to international law (...) being able to hold international rights and obligations and has the capacity of keeping these rights intact by bringing international claims"[19]. And this is possible because "the organization has been created to exercise and hold, which actually does, functions and rights that can only be explained by the fact that it has, to a large extent, personality and capacity to operate

[8] Included in the third *Report on Relations between States and Intergovernmental Organizations*, presented by M. Abdullah El-Erian, Special Rapporteur, at the 20th Session of the International Law Commission, held in Geneva, Switzerland, between May 27 and August 2, 1968.

[9] Article 1 letter a) of the Draft Articles.

[10] Marțian Niciu, *Drept internațional public*, Servo-Sat Publishing House, Arad, 1999, p. 85.

[11] Gheorghe Moca, *op. cit.*, p. 156.

[12] Ion Gâlea, *Manual de drept internațional*, vol. I, Hamangiu Publishing House, Bucharest, 2021, p. 209.

[13] According to Frédéric Joël Aivola, *Question de la personnalité juridique internationale des associations d'états,* Revue de la recherche juridique. Droit prospectif, N. XXXV - 134 (35ème année – 134ème numéro), 2010, p. 1740 (https://bec.uac.bj/uploads/publication/0e8ba4372126af1b573f0eb47fef05bf.pdf, accessed on 24 February 2021).

[14] For example, the Treaty establishing the European Atomic Energy Community (Rome, 1957) provides in Art. 184, the fact that Euratom has legal personality; the Constitution of the International Labour Organization provides in Art. 39 the following: "The International Labour Organization shall have full legal personality and, in particular, the capacity to: (a) contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings".

[15] *Ibidem*, p. 209.

[16] Adopted by the Commission on International Law at its 63rd session in 2011 and presented to the General Assembly as part of its report on its work (https://legal.un.org/ilc/texts/instruments/french/draft_articles /9_11_2011.pdf, accessed on 23 February, 2021).

[17] *Repair of Damage Suffered in the United Nations Service*, https://www.icj-cij.org/public/files/case-related/4/004-19490411-ADV-01-00-EN.pdf, accessed on 24 February 2021).

[18] Page 7 of the Opinion.

[19] Page 10 of the Opinion.

internationally. At present, it is the highest type of international organization and could not meet the intentions of its founders if it lacked international personality. It must be accepted the fact that its members, by conferring certain functions upon it, with the inherent obligations and responsibilities, have assigned to it, the competence required for those functions to be performed effectively"[20].

The European Union offers another situation of implicit legal personality, being an entity which, until the entry into force of the Treaty of Lisbon[21], had not expressly had legal personality[22]. However, taking into account the criteria used by the ICJ in its Opinion of 1949 (the mission, functions, rights and obligations that the UN fulfilled, according to the will of founding states), we can argue that the EU had implicit legal personality. Thus, the Union has been created for an indefinite period with the mission of "asserting its identity on the international stage"[23]; at the same time, the Union "defines and implements a common foreign and security policy"[24] (CFSP) and so on. In these circumstances, we can see that the Union organized the institution of "special envoys" in the person of the High Representative for the CFSP, in the Middle East, in Kosovo and others. Moreover, once the Treaty of Amsterdam entered into force on 1 May 1999, the Union acquired the capacity to conclude international agreements with third countries in the fields of CFSP, justice and home affairs.

Given the fact that international organizations are the result of the will agreement of states, the latter establish, by the constitutive act, their field of activity, purpose and mission. The clarification of the ICJ, stated in the Opinion of 1949 is important for our approach, because according to this clarification, the organization is not a state, "which, obviously, cannot be"[25], and "its legal personality, as well as its rights and obligations are the same as those of a state. (...) It does not even imply that its rights and obligations are necessarily exclusively international, just as not all the rights and obligations of a state are exclusively international"[26]. Therefore, legal personality under international law should not be confused with legal personality under domestic law.

3. Legal personality of domestic law of international intergovernmental organizations

As a rule, the constitutive acts of international organizations regulate, distinctly, their internal legal personality[27].

The legal personality of domestic law represents the possibility for the international intergovernmental organization to acquire "the status of subject of domestic law of the Member States, to hold rights and obligations, with the consequence of having" legal capacity "or" civil capacity»"[28]. According to the rule, the international organization benefits, on the territory of each of its members, from legal capacity to perform its functions and purposes. Thus, the organization can conclude contracts for goods, services, premises. Consequently, the organization has the right to establish legal relations with natural or legal persons of domestic law from states where it has its headquarters. By virtue of personality of domestic law, the organization may buy goods or rent premises for activities (premises agreement[29])[30]. The organization may also carry out a legal activity in the state in which it is established and may enter into agreements with Member States which enable it to operate. In case of contingent problems, it can defend its rights before the courts of these states. For example, according to the constitutive act, "the European Union may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings"[31].

International intergovernmental organizations also enjoy privileges and immunities, such as the inviolability of space and archives. The authorities of the headquarters State shall not have the right to enter the premises of the organizations without the authorization requested and received for this purpose from a representative of the organization. Tax and

[20] Page 9 of the Opinion.

[21] Following the Treaty of Lisbon, the Union expressly acquires legal personality, becoming a subject of international law, with its own legal order, distinct institutions, bodies, offices and agencies, to which precise objectives and values are added.

[22] On the legal personality of the EU, before and after the entry into force of the Treaty of Lisbon, see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, pp. 19-22.

[23] Article B of the Treaty on European Union, signed in Maastricht in 1992.

[24] *Idem*.

[25] Page 10 of the Opinion.

[26] *Idem.*

[27] For example: UN Charter, Art. 104: "The organization shall enjoy on the territory of each of its members the legal capacity necessary for the performance of its functions and the achievement of its purposes"; Treaty on the Functioning of the European Union, Art. 335: "In each of the Member States, the Union shall have the most extensive legal capacity recognized to legal persons under their domestic laws (...)".

[28] Ion Gâlea, *op. cit.*, p. 210.

[29] The premises agreement is an international agreement concluded between an international organization and the state on which territory it is based. Such an agreement can also be concluded with a state that is not a member of that organization (according to Djuma Étienne Galilée, *Quid de la personnalité juridique des organisations internationales?,* 2020 https://www.leganet.cd/Doctrine.textes/DroitPublic/ONG/Quiddelapersonnalitejuridiquedesorganisationsinternationales.Djuma%202020.pdf ,accessed on 26 February, 2021).

[30] According to Carmen Moldovan, *Drept internațional public. Principii fundamentale și instituții*, 2nd edition, Universul Juridic Publishing House, Bucharest, 2018, p. 332.

[31] According to Art. 335 TFEU.

financial privileges also allow organizations to avoid paying taxes and duties.

4. International legal personality of international intergovernmental organizations

After creating an international organization, States have to provide it with the indispensable and necessary legal instruments to carry out the inherent functions. *De facto*, the international legal personality allows the organization to act on the international stage, to use the instruments of international law[32].

International organizations have an international legal personality different from that of states, because organizations are limited to the functions entrusted to them by states.

The international legal personality of international organizations has two essential characteristics: objective and specialized. The objective nature results from the fact that "the legal personality of the international organization is opposable to third countries"[33], as emphasized by the ICJ in its Advisory Opinion of 1949[34]: "Fifty states, representing the majority of members of the international community, had the power, under international law, to establish an entity that has an objective international legal personality, not just a legal personality recognized only by them (...)"[35].

"The specialized character of the legal personality presupposes that the organization will be able to be the holder only of those rights and obligations that correspond to the assigned competences"[36].

By virtue of international legal personality, the international organization acquires several rights, namely: the right to conclude treaties; the right to file complaints against another subject of law; the right to stand in Court; the right to send and receive diplomatic missions (the right of passive and active legation).

The right to conclude treaties is recognized to international organizations, also through the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) which, in Article 6 states: "the capacity of the international organization to conclude treaties shall be governed by the rules of that organization". "This capacity is not universal, but specific, depending on its purposes and functions"[37]. Therefore, this right is not absolute, in the sense that states can prohibit organizations to participate in international relations, by concluding treaties. The subjects of law with which they may conclude treaties are: Member States, third countries or other international organizations. An example worth mentioning is that of the European Union, which has concluded, in its own name or with the Member States (mixed agreements), 1266[38] agreements[39] in the most diverse fields. Some of these agreements establish reciprocal obligations (e.g., synallagmatic trade concessions), others contain interdependent obligations (e.g., compliance with fishing quotas in a certain marine area or the obligation to prohibit the use of certain dangerous substances on its territory)[40].

The right to file international complaints[41] is exercised both in its own name and for its agents, in the event that the international organization has suffered damages. Relevant in this regard is the same ICJ Advisory Opinion of 1949, in which the Court expressed its opinion on the request of the General Assembly that wished to know whether it could make a complaint in the place of Count Bernadotte, one of its officials who, in his capacity of UN mediator in Palestine (so, an agent of this organization) was assassinated. According to the Court, "the organization has the legal capacity to seek compensation for damage (...) and it is authorized to include reparation for the damage suffered by the victim". Moreover, the Court considers that "fifty States (...) had the power, under international law, to establish an entity with international legal personality (...) [and] the legal capacity to bring international claims"[42].

The right to stand in Court gives to international organizations, the opportunity to capitalize on possible claims, but also the benefit of a certain international legal status, based on the immunities and privileges it is endowed with.

The right of representation (active and passive legation) allows international organizations to send or receive diplomatic missions, respectively, to / from Member States, third countries or other international organizations.

In addition to the rights that it confers upon international organizations, the legal personality also requires them to comply with and apply the rules and

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[32] According to Djuma Étienne Galilée, *op. cit*.

[33] Ion Gâlea, *op. cit*., p. 211.

[34] *Precited*.

[35] Page 14 of the Opinion.

[36] *Idem*.

[37] Cristian Baci, Adrian Pătrașcu, Florin Nan (coord.), *Dreptul tratatelor. Noțiuni de teorie și practică,* Publishing House of the Ministry of Interior and Administrative Reform, Bucharest, 2008, p. 86.

[38] According to Service européen d'action extérieure, Treaties Office Database, https://ec.europa.eu/world/agreements/default.home.do, accessed on 26 February 2021.

[39] Of which 982 are bilateral agreements and 284 - multilateral agreements.

[40] According to Emanuel Castellarin, *Le sort des accords internationaux de l'Union européenne après le retrait du Royaume-Uni,* 2020, https://hal.archives-ouvertes.fr/hal-02951778/document, accessed on February 26, 2021.

[41] From another perspective, regarding complaints for maladministration, see Elena Emilia Ștefan, *The European Ombudsman and the right to good administration*, CKS e-book 2010, pp.748-763, http://cks.univnt.ro/cks_2010.html, accessed on 26 February 2021.

[42] Page 14 of the Opinion.

principles of international law (customary or conventional) in their relations with Member States, third countries, other international organizations and other subjects of international law[43]. Failing to comply with this obligation may result in the liability[44] of international organizations.

5. Conclusions

At international level, the legal personality of international intergovernmental organizations is relevant from the point of view of the acquisition of rights and obligations (benefit of rights and fulfilment of obligations). It is the sole way in which the will manifestation of the subjects of international law can be approached. Their action is limited to the will of states that establish the respective international organizations and that is regulated by different instruments of international law, as it is the case, for example, of the (UN) Charter, of the institutional/constitutive treaties (European Communities and the European Union) and of the Statute (Council of Europe). The current international society favours the multiplication of the subjects of international law, of the type of international organizations, in the most diverse fields, some of them of vital importance and of great topicality related to the evolutions of life, in general (environment, climate, technology, digitalization, etc. a.) and, implicitly, stimulates the establishment of a new type of legal personality, correlative to the inherent rights and obligations of such international organizations.

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[43] For example, the Sovereign Order of Malta.

[44] In Romanian, "two terms responsibility and liability are used with the same meaning or with very close meanings (...). Usually, the terms (...) have the meaning of a formally established obligation, to do or not to do something specific, in relations with other subjects of law (according to Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, ProUniversitaria Publishing House, Bucharest, 2013, p. 13.

EXPLORING EXISTING AND POTENTIAL NORMATIVE SOLUTIONS FOR AN EU-WIDE LEGAL FRAMEWORK FOR SECURITY OF INFORMATION IN THE CONTEXT OF DEFENCE AND SECURITY PROCUREMENT

Simion-Adrian PURZA*

Abstract

In the current international environment, an effective implementation of national security objectives is to a great extent dependant on the ability of national governments to ensure the highest possible degree of confidentiality to information used in strategical, as well as tactical decisions. Ensuring security of information has been a conundrum for all international organisations seeking to reach varying degrees of coordination, cooperation or integration. As the most ambitious of all, thus far, the EU has raised the bar even higher, especially in terms of desired cooperation in defence and security, where the drive for integrated defence procurement takes centre stage. Consequently, the issue of sharing (classified) information between the Member States and their relevant authorities is of fundamental importance. Against this backdrop, this paper seeks to identify potential regulatory solutions for the management of classified information that would effectively contribute to the final objective of integrating defence and security procurement, as envisaged by the Defence Procurement Directive 2009/81/EC. An essential prerequisite in this respect is to determine what legal solutions could better serve this purpose, starting from normative instruments already implemented at various levels in the EU institutional mechanism. To this end, the paper is based on a two-phased theoretical approach: (1) the material segment – the characteristics of an effective integrated system for security of information (within the scope of defence procurement integration) and (2) the procedural segment – how to apply a potential solution at EU level (by what means). Ancillary research questions are aimed, first, at understanding the current state of play of the EU regulatory framework pertaining to handling classified information, in terms of granting security clearances to both individuals and legal persons (private, as well as public).

Keywords*: security of information, classified information, defence procurement, EU integration.*

1. Introduction

Information, understood in its widest possible definition, is a critical part of any decision-making process and even more so for strategic planning and action in the realm of national security. The delicate balancing act of ensuring security of information has been a conundrum for all international organisations seeking to reach varying degrees of coordination, cooperation or integration, such as the UN or NATO. As the most ambitious of all, thus far, the EU has raised the bar even higher, especially in terms of desired cooperation in defence and security. Consequently, the issue of sharing (classified) information between the Member States and their relevant authorities took centre stage.[1]

The main hypotheses of this paper are based on the idea that a highly coordinated (if not unitary) regime for classified information among EU Member States[2] – for the purpose of defence procurement integration – could be achieved following the same rationale used for the gradual integration of defence and security matters into the EU institutional mechanism (still an ongoing process).[3] The key starting point is the contention that, albeit some positive feedback, the fit-for-purpose provisions of Directive 2009/81/EC[4] on security of information have proved to be of little effect in terms of enabling and encouraging cross-border tendering. It should also be reiterated that, in general terms, despite an initial positive feedback from the member states and the various stakeholders after the publication of the Defence Procurement Directive, the most recent report on its effectiveness[5] underlines its limited overall impact, in terms of both legal harmonization and concrete results for the EU defence industrial base.

Although debatable, it can be said that the EU has established a proprietary and functional framework for

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[1] For an EU perspective on the relevance of information-sharing, *see* MK Davis Cross, 'Security Integration in Europe. How Knowledge-Based Networks are Transforming the European Union' (The University of Michigan Press, 2014) 49-72.

[2] For a discussion on the need for an EU-wide integrated regime for security of information, see M Trybus 'Buying Defence and Security in Europe. The EU Defence and Security Procurement Directive in Context' (Cambridge University Press, 2014), pp. 393-394.

[3] See SA Purza, 'Setting the Scene for Defence Procurement Integration in the EU. The Intergovernmental Mechanisms' (2018) 4 European Procurement & Public Private Partnership Law Review 257, 260.

[4] Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, Official Journal of the European Union, L 216, 20.8.2009 (hereinafter "Defence Procurement Directive").

[5] Commission Staff Working Document: Evaluation of Directive 2009/81/EC on public procurement in the fields of defence and security, SWD (2016) 407 final, p. 94.

dealing with classified information, covering both its institutional actors, as well as its dynamics with the member states and among themselves, when dealing with EU classified information. What is, then, the missing link for establishing an integrated and functional framework for the protection of classified information that would also benefit the integration of defence procurement – i.e. what needs to change?

An evaluative study conducted by the Commission in 2016 has shown that 61% of contracting authorities strongly agreed or agreed that the Defence Directive's provisions on security of information are sufficient to ensure the protection of classified information.[6] The same study revealed that, among business respondents, a 'relative majority' of 33% expressed a favourable view, while 'only' 9% disagreed.[7] Based on these statistical iterations and additional interview-based feedback, the Commission seems content with the effectiveness of the security of information provisions in the Defence Procurement Directive.

On this point, if the benchmark is the contribution that the Directive effectively brings to opening defence procurement for the EU market, then the appropriateness of the security of information provisions must be weighed considering their concrete contribution towards achieving this goal. Therefore, as long as the provisions are only considered sufficient from the point of view of the contracting authorities (and even the industry, although to a lesser extent), but they do not actually facilitate increased market access and equal opportunity, then it must be ascertained that their appropriateness is at least questionable. In this respect, the market access barrier created by the lack of a harmonised regime for access to and protection of classified information is a strong argument as to the insufficient effectiveness of the Defence Directive's provisions on security of information.

Although outside the field of regulatory competence of the EU, the protection of classified information has been dealt with at an *ad-hoc* basis, while gradually undergoing a process of harmonisation between the main institutional actors of the EU. This evolutionary experience could provide (normative) solutions for a wider and more substantive integration of the protection of classified information at EU level, for the benefit of harmonised procurement aimed at integrating the markets for defence and security products and services.

Thus, the overarching interrogation of this paper seeks to identify potential avenues for future regulatory solutions for the management of classified information (beginning with security clearances) that would effectively serve the final objective of integrating defence and security procurement, as envisaged by the Defence Procurement Directive. An essential prerequisite in this respect is to determine whether there is legal basis to enact new EU legislation that would alleviate (or even solve) the issues pertaining to security of information. The objective is therefore that of a principled discussion with no pretention to elaborate concrete normative solutions – which could form the object of a subsequent study.

Determining if and what (regulatory) solution can be implemented is based on a two-phased theoretical approach to the issue: (1) the material segment – the characteristics of an effective integrated system for security of information (within the scope of defence procurement integration) and (2) the procedural segment – how to apply the envisaged solution at EU level (by what means). Ancillary research questions are aimed, first, at understanding the current state of play of the EU regulatory framework pertaining to handling classified information, in terms of granting security clearances to both individuals and legal persons (private, as well as public).

Aside from literature and legislative analysis, the research is complemented by an examination of the relevant case-law of the European Court of Justice dealing with security of information at large. The examination seeks firstly to find indications as to the underlying principles that the Court has defined in this field, especially in the logic of striking a balance between (national) security interests and democratic access to information. Secondly, the analysis might reveal a confirmation or critique of potential regulatory solutions that have been implemented or should be implemented in the field of security of information at EU level.

2. Defining the main concepts

The protection of classified information is an essential prerequisite for contracting authorities, but it also bears significance for the industry – national security interests and commercial confidentiality requirements dovetail, especially in fields such as defence and security. To put the issue in context, it is important to underline that, in the field of defence procurement, potential tenderers often require access to classified information while the contracting authorities seek a solid guarantee of the reliability of said tenderers regarding their ability and will to safeguard the necessary level of confidentiality. Therefore, on the one hand, there is a specific need emanating from the industry, and on the other, a (potentially) contending need of the member states, stemming from national security.

In moral or sociological terms, confidence building is key in any endeavour pertaining to the protection of classified information. Various legal instruments have been developed by national or international legislators to ensure that this notion gets empirical validation and a concrete system of accountability is in place. Nonetheless, the fundamental

[6] SWD (2016) 407 final, *op.cit.*, p. 77.
[7] Ibid.

issue is whether the originating source of the information feels enabled and safe enough to entrust said information onto one or more third parties, and more so to accept the possibility of it being subsequently distributed. Confidence building is not just an abstract moral issue, as it is also manifested in the relation between EU bodies and institutions, the most relevant case being that of the negotiations between the European Parliament and the Council on access to classified information handled by the latter.[8]

Amongst various other considerations, the foremost legal and operational principles in the field of security of information are authorization or clearance (subject to meeting a set of requirements) and need-to-know. They represent two sides of the same coin, as interdependent and cumulative conditions to be met in order that a person (private or legal) is granted access to documents and materials containing classified information. Of course, the classification policy employed by the national authorities of each state also bears important significance, but it goes further into the inner workings of security of information mechanisms and beyond the scope of this analysis.[9]

'Authorization' or 'clearance' is a type of formal validation granted to a person, natural or legal, in confirmation of their capacity to handle classified information, based on the requirement to meet strict criteria and subject to evaluation thereof.[10] This can be regarded as the first line of defence in security of information and a universal tool used to control access and contain the risks of unwarranted disclosure of information.

'Need-to-know' is to a great extent a self-explanatory notion. In context, it can be defined as a principle according to which a person can have access to classified information only if knowledge of said information is needed in carrying out their duties.[11] Establishing the existence of the need-to-know in a particular situation is generally the attribute of the originator of the information or, in some cases, the holder. This concept is widely used at national and international level,[12] either intrinsically, as a transversal notion, or expressly stated in legal or administrative acts as a mandatory prerequisite for access to information.

For clarity of argument, basic concepts such as 'classified information', 'security of information' or 'sensitive information' should be defined herein. These notions have been defined on numerous occasions and in various contexts but have retained their underlying meanings throughout. For that reason, an in-depth comparative analysis of the various definitions, although an interesting debate, would not provide any meaningful contribution to the present analysis. Therefore, for the purposes of this paper, it is most appropriate to recourse to legal definitions that have been provided within EU legislative acts (where available) and relevant policy documents.

'Classified information' has been defined[13] as 'any information or material, in any form, the unauthorised disclosure of which could cause varying degrees of prejudice to the interests of the European Union, or of one or more of the Member States, and which bears' one of the EU or corresponding classification markings.[14] The Defence Procurement Directive provides a similar definition, albeit more complex and from a national security perspective: 'any information or material, regardless of the form, nature or mode of transmission thereof, to which a certain level of security classification or protection has been attributed, and which, in the interests of national security and in accordance with the laws, regulations or administrative provisions in force in the Member State concerned, requires protection against any misappropriation, destruction, removal, disclosure, loss or access by any unauthorised individual, or any other type of compromise' (article 1.8). [15]

On the other hand, 'sensitive information' is a more elusive concept. It can be understood as a quality or characteristic of documents or information whose unauthorised disclosure is liable to bring prejudice to private or public interests, in the general sense. Therefore, it is not inherently different from classified information, the distinctive element residing solely in terminology, as classification can be regarded as the formal or administrative confirmation of the sensitive nature of a document or a piece of information. Still,

[8] D Galloway, 'Classifying secrets in the EU' (2014) 52 3 Journal of Common Market Studies 668, 681.

[9] For details on what classification policy entails (tailored for NATO) *see* A Roberts, 'Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy' (2003) 36 Cornell International Law Journal 329, 332-340.

[10] A Roberts (2003), *op.cit.*, pp. 338-339.

[11] A Roberts (2003), *op.cit.*, p. 337; s*ee* also R Dover, MS Goodman, C Hilldebrand (eds), 'Routledge Companion to Intelligence Studies' (Routledge, 2014) 258; B Driessen, 'Transparency in EU Institutional Law: A Practitioner's Handbook' (2nd ed, Kluwer Law International, 2012) 32.

[12] For an EU-level example, *see, inter alia,* Interinstitutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, OJ 2014 C 95/1, article 4.4.(a).

[13] Article 2 of the Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union, Official Journal of the European Union C202, 8.7.2011, hereinafter 'Member States' Agreement on classified information'.

[14] Other EU legal acts have provided similar definitions, such as, *inter alia*: Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union L 274, 15.10.2013, article 2.1.; Commission Decision (EU, Euratom) 2015/444 of 13 March 2015 on the security rules for protecting EU classified information, Official Journal of the European Union L 72, 17.3.2015, article 3.1.

[15] For a doctrinal perspective, *see, inter alia,* D Curtin, 'Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?' (2013) 50 Common Market Law Review 423, 425-426; Galloway (2014), *op.cit.*, p. 672.

doctrine has at times referred to sensitive information as a distinct category (other than classified) that warrants some level of confidentiality (such as commercial information or personal data) but does not bear a formal security classification[16] or as unclassified information with controlled dissemination.[17] Nonetheless, the notion has received a formal, legal definition in Regulation 1049/2001 on public access to EU documents,[18] which effectively equates it with classified information (the wording of the Regulation refers to 'sensitive documents' and 'classified documents'). Building on this approach and considering that the differentiation proposed by doctrine is of no consequence for the analysis made in this paper, any further reference to 'sensitive information' should be considered equivalent to 'classified information' if not expressly stated otherwise.

Against this background and seen in the context of the Defence Procurement Directive, 'security of information' can be described as both a characteristic and a set of requirements. Thus, it can be regarded as 'the ability and the reliability of economic operators to protect classified information'[19] or as a set of 'measures and requirements necessary to ensure the security of such information',[20] the two perspectives bearing equal relevance.

Focusing on the field of procurement for defence and security, the most pressing issues from the perspective of the contracting authorities, when dealing with industry representatives, are national security clearances (or authorisations, needed to access classified information pertaining to this field) and the criteria used for granting them, as well as ensuring appropriate means of protection and control of the security of information throughout its lifecycle. Considering the aim to push for integration in this field, the cross-border dimension of the two bears considerable significance. As the Commission concluded, the 'lack of a harmonisation of national security clearance systems can create problems and market access barriers.'[21]

The Defence Procurement Directive is the keystone of defence procurement integration in the EU. Its central position is tributary to both its daringly ambitious goal as well as to its absolute novelty to date. As such, the red thread of its philosophical approach and key concept is *integration*, on the backdrop of which each individual normative instrument is sized and adjusted. In this respect, by resorting to an analogy with the harmonising drive of internal market law in general, Trybus underlines the similar impetus of the Defence Directive, which seeks to 'bridge the gap' between the internal market objectives of the EU and what he describes as the 'legitimate concerns of the Member States', including those pertaining to public security.[22]

This read thread is applied – albeit unevenly – to security of information as well. To this end, the recitals of the Directive outline the symbiotic link between procurement in the fields of defence and security and security of information requirements – paragraphs (9), (20) and (47) – while hinting the urgency (or usefulness, in a blander interpretation) of 'an Union-wide regime on security of information'. Although the Directive does not reach that level of ambition, it nonetheless transposes the overall approach towards the importance of security of information concerns in provisions that allow contracting authorities to include requirements pertaining to security of information in various key elements of the procurement procedure, such as conditions of performance, selection criteria or exclusions.

As with complex issues in general, where opposing interests are confronted, compromise was often used to agree on various solutions pertaining to the publicity and transparency of the procedure, while safeguarding security concerns. The Commission Staff Working Document presenting the impact assessment of the future Defence Directive showcased numerous such compromises in terms of security of information, starting with the possibility to disclose sensitive information pertaining to the procurement procedure only to the successful bidder, at a later stage – which the document considered to be "best-suited, since it allows safeguarding security of information while still ensuring equality of treatment and a fair level of transparency".[23]

3. The EU regulatory perspective

Owing to their exclusively economic scope, significantly narrower than today's comprehensive agenda, the initial European Communities had neither the incentive nor the legal justification to set up rules

[16] Galloway (2014), *op.cit.*, p. 672.
[17] D Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52 Journal of Common Market Studies 684, 686 and 691.
[18] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, Official Journal of the European Union L145, 31.5.2001, article 9.1.
[19] M Trybus (2014), op.cit., 43-44.
[20] Directive 2009/81/EC, article 22.
[21] SWD (2016) 407 final, *op.cit.*, p. 77.
[22] M Trybus (2014), op.cit., p. 280.
[23] Commission of the European Communities, 'Commission Staff Working Document – Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of certain public works contracts, public supply contracts and public service contracts in the fields of defence and security – Impact Assesment', Brussels, 5.12.2007 SEC(2007) 1598, pp. 47-48, available at: https://secure.ipex.eu/IPEXL-WEB/dossier/document/SEC20071598FIN.do [last accessed 8 January 2021]; see also M Trybus (2014), op.cit., p. 364.

on protecting classified information.[24] Somewhat unsurprisingly, the exception to this rule was provided by domains such as defence and security, particularly related to aspects of nuclear safety under the Euratom Treaty.[25]

Further on, advances in cooperation on military and civilian management operations,[26] as well as in tackling criminal matters (with a focus on transnational terrorism), have prompted exponential evolutions in the management of classified information within the EU. Therefore, it can be said that the EU's step by step involvement in defence and security matters, albeit by way of an intergovernmental approach,[27] has also served as the driving force behind initiatives focused on the protection of classified information.

In this respect, it is relevant to note that the EU has previously shown the political will power and the necessary means to respond to legitimate concerns voiced by its partners in terms of security of information. A case in point is the largely debated initiative promoted in 2000 by High Representative Javier Solana, seeking to provide reassurances to NATO on the protection of classified information it exchanged in its cooperation with the EU, which was on a strong path of consolidation at that time.[28]

The road to harmonization still faces many challenges, brought on especially by the Member States' different perspectives on how classified information should be managed, a fact that had been taken into consideration by the Defence Procurement Directive but to no conclusive solution. For example, one such element of distinction was the position of Sweden and the United Kingdom, which practically invalidated the principle of originator control[29] in situations where there is a request for the content of a classified document to be made public or to be sent to judicial authorities.[30] In such a scenario, public authorities are required and empowered to assess whether disclosure is in the public interest, thus disregarding the obligation to obtain the agreement of the originator.

David Galloway has astutely observed that the EU was required to have an original approach to regulating the management of classified information, since the Treaties lacked the proper legal basis for binding rules in this field.[31] Moreover, article 352 TFEU paragraph 4 expressly prohibits the Union from relying on the mechanism established by this article to attain objectives pertaining to the Common Foreign and Security Policy (CFSP) while also reiterating the limitations to adopt acts, enshrined in article 40 TEU. Thus, there was no possibility of having a unified legislative instrument addressing the protection of classified information. For that reason, the EU institutions, guided by the driving force of the Council, have adopted a sectoral approach, seeking to implement measures that would ensure an adequate level of protection for information deemed classified, focused on their own specific administrative procedures and processes.[32]

The EU's relationship with classified information has been split between two imperatives which carry varying weights both within the Union itself (different perspectives of the executive and parliamentary branches) and those of the public (NGOs and lobby groups especially). Thus, the EU is tasked with conciliating democratic governance (which entails extended access to sensitive information for the public) with efficient political action (which for its part might require a heightened level of discretion). A renewed legislative response could be a way to respond to both imperatives, that is to ensure the exercise of the fundamental right of access to information while also to provide a clear and effective framework to legitimately protect classified information.

In her paper on how the EU deals with classified information,[33] Deirdre Curtin asserts that adopting general rules on how the EU Council shares classified information with the European Parliament is 'a matter of broader democratic concern'. Extrapolating from this conclusion, it could be argued that the need for an EU-wide regime for clearance and access to classified information for industry representatives – seen as *sine qua non* for taking part in defence and security procurements – also touches on issues pertaining to democratic governance, in the context of common market rules and observing the need to ensure an effective benefit of the possibilities afforded by the Defence Procurement Directive. On this issue, research has underscored the contrast between the EU's approach towards intra-community transfers, which benefit from an EU Directive, and the recognition of security clearances, which has yet to be regulated at a similar level.[34]

One issue identified by doctrine, also building on the perspective of legitimate access, is that a lack of substantive classification criteria leads to intentional or unintentional abuse of power by the EU institutions –

[24] D Galloway, 'Classifying secrets in the EU' (2014) 52 3 Journal of Common Market Studies 668 and 675.
[25] ibid.
[26] ibid 674.
[27] SA Purza, 'Setting the Scene for Defence Procurement Integration in the EU. The Intergovernmental Mechanisms' (2018) 4 European Procurement & Public Private Partnership Law Review 257, 260.
[28] Rosén, G. (2015), 'EU Confidential: The European Parliament's Involvement in EU Security and Defence Policy', Journal of Common Market Studies 53:2, pp. 388-389.
[29] For more details on the principle of originator control *see Curtin* (n 15) 691.
[30] Galloway (2014), *op.cit.*, p. 674.
[31] *See* Galloway (2014), *op.cit.*, pp. 675-676.
[32] Ibid.
[33] *Curtin* (n 15) 696.
[34] M Trybus (2014), op.cit., p. 362.

the Council in particular – when exercising their discretion in granting low-level classified status to information (such as 'restricted').[35] This practice can effectively limit or ban otherwise relevant information from legitimate public knowledge, in the disadvantage of both individual citizens as well as NGOs or the industry. Similar issues concern the way national governments make use of their prerogative to declare information of a certain type or pertaining to a specific sector as classified on the lowest possible level, but which still makes it undisclosable to third parties, thus providing a valid reason to apply the Article 346 TFEU exemption or at least inhibit the participation of (some) tenderers.

The analysis on relevant EU legislation provided further on seeks to identify and explain specific instruments of governance regulated at EU level for the management of classified information, with a focus on the degree to which the competent authorities of the Member States are involved in the process and how the distribution of tasks and authority is made. The documentary results should in turn provide a basis for evaluating if the mechanisms in place satisfy the Member States' desire to exercise an adequate level of control. To this end, the scope of the legal framework analysis includes a selection of legal/procedural instruments specially tailored for the needs of the EU institutional framework pertaining to handling classified information. The analysis is predicated *inter alia* on the notion that the Commission has had an early leading role in terms of security of information, but its position has been taken by the Council, especially considering its competences and those of the Member States in areas such as the CFSP and the Common Security and Defence Policy (CSDP).[36]

3.1. The EU regulatory perspective

The first iteration in terms of regulating the management of classified information within the EU came as an early onset, by means of Regulation (Euratom) No 3 implementing Article 24 of the Treaty Establishing the European Atomic Energy Community, a regulation which is still in force.[37] Viewed in the context of modern-day regulatory initiatives, it can be regarded as a landmark achievement in a field of profound reluctance on the part of the Member States, and, even more so, as the blueprint for future rules.[38]

Still, in the interest of objectivity, it should be underscored that the adoption of the Euratom Regulation had benefited from several favourable circumstances, such as the limited number of Member States that had to come to an agreement at the time, inspired, moreover, by the obvious and stringent need for close cooperation, following the aftermath of the Second World War. The fact that the regulation had a limited sectoral scope also came as an advantage, thus streamlining each Member States' calculations on the potential strategic and security impact of the new rules.

The main issues under consideration of the still germinating Community legislator at the time of the Euratom Regulation were the defence interests of the Member States, as explained by the only argumentative paragraph of the very concise preamble. It is interesting to note, on this point, that the preamble, as well as the normative text of the regulation[39] make no reference to the interests of the Community, as opposed to subsequent legislation that has incorporated the notion of Community/Union interests.

The underlying goal of the regulation was to empower the Commission to manage security measures applied to sensitive information, acting as a supervisory body in matters pertaining to both the content of the information as well as its dissemination. That is why the scope of the Euratom Regulation includes the two main dimensions of security of information, i.e. security grading and protective measures, which cover both information acquired by the Community, in its capacity as a standalone collective body, and that which is communicated by the Member States.[40]

Article 24.1. of the Treaty establishing the European Atomic Community[41] mandates the Council to regulate issues pertaining to security of information, following a proposal from the Commission, including a system of security gradings and complementary security measures. It is noteworthy that the Commission is entrusted with a significant margin of discretion traditionally afforded exclusively to national governments – the ability to decide on the appropriate classification (grading) level for sensitive information.[42] This courageous transfer of an inherently national prerogative to the supranational level gives additional weight to the novelty and long ranging impact that the Euratom rules have had in the field of security of information within the EU.

A general assessment of the Euratom Regulation reveals that its normative structure is based on a tailored assimilation of the fundamental principles, processes and authority instruments that define protection of classified information (indicated *supra*). The main considerations underpinning the Regulation are evident from its brief preamble, which focuses on the pre-eminence of the defence interests of the Member States, the central role of the Commission and the reach of its

[35] *Curtin* (n 15), 690.
[36] Curtin, D. (2013), op.cit., p. 424.
[37] Published in the Official Journal of the European Communities no. 406/58, hereinafter 'Euratom Regulation'.
[38] Curtin, D. (2013), op.cit., p. 427.
[39] *See*, *inter alia*, article 10 of the Euratom Regulation.
[40] Article 1.1. of the Euratom Regulation.
[41] *See* Consolidated Version of the Treaty Establishing the European Atomic Energy Community, OJ 2016 C 203/1, hereinafter 'Euratom Treaty'.
[42] Article 24.2. of the Euratom Treaty.

security measures, intended to cover both the subject matter of the information and its distribution regimen.

The provisions of Articles 1 through 5 of the Euratom Regulation, regarding its scope, have a threefold approach, providing criteria to discern according to subject matter and personal capacity, while also touching on the interaction with the dedicated regulations of the Member States. In terms of subject matter, the Euratom Regulation covers both the various security levels or gradings and their respective protective measures, which apply to information communicated by Member States within the framework of the Treaty and to that acquired *ad novum* by the Community. All information that is subject to protective measures is considered under the common denomination 'Euratom Classified Information'.

Article 5 provides guidelines regarding the interaction between the Euratom Regulation and other sector specific normative instruments enacted either at Community level or by the national authorities of the Member States. The main principle in this respect is that the rules within the Regulation are to be construed as minimum requirements in terms of the protection of classified information. As such, the Community and the Member States are provided with a limited prerogative to supplement the framework with new rules tailored for the needs of their jurisdictions. The limited aspect is indeed puzzling, as it is formulated somewhat counterintuitively, in that while it opens the possibility to adopt 'appropriate provisions of their own' it also excludes complementary provisions that would 'adversely affect the uniform treatment of Euratom classified information', without providing adequate criteria to discern between acceptable and unacceptable provisions. Thus, it seems difficult to envision any type of complementary rule, adopted at national level, that would not, to some extent, affect the prescribed uniform regime.

In terms of one of the fundamental building blocks of security of information – the clearance process – the Regulation establishes the primacy of the two essential (pre)conditions for access to classified information – prior authorisation and need-to-know.[43] While the need-to-know ('need to be informed') is only briefly explained by reference to the official duties of the person seeking access, the authorisation procedure is described in detail, touching upon granting authority, recognition and the distribution of competences between Community bodies and the Member States. The authority to grant clearances is shared by the Security Bureau and the relevant authorities of the Member States. Nevertheless, the Member States retain fundamental control in granting clearances, as the Security Bureau is afforded only a slim margin of appreciation in this respect.

Once granted, the authorisation is provided with universal recognition, i.e. it is opposable to all other bodies of the Community, as well as the Member States. This is as an important step forward in terms of the Member States investing confidence and abandoning their innate reluctancy towards sharing their prerogatives and instruments of control in matters pertaining to classified information. Although it would be far-fetched to consider this a milestone, it is nonetheless an indication as to the national authorities' willingness to stretch their own limitations in the interest of cooperation, when there is a strong political will and pragmatic incentives to do so.

3.2. The EU Council Model Rules

In a pragmatic acknowledgment of the need to exchange classified information, EU Member States resorted once again to the intergovernmental framework as a panacea for solving predicaments that held back effective cooperation. Therefore, an overarching covenant was negotiated and implemented under the title "Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interests of the European Union".[44]

While at first glance this Agreement on classified information would appear as nothing more than a fit-for-purpose international cooperation document, its underlying value should not be underestimated. It establishes a basic legal framework of general rules applicable to the protection of European Union Classified Information (EUCI) during its exchange between the Member States, on one hand, and the EU institutional body (as a whole), on the other. This represents a cornerstone firstly because it enshrines the Member States' formal recognition of the EU institutional model for the protection of classified information, thus overcoming their initial reluctancy[45] by applying similar protection measures as those provided by national laws and regulations. Secondly, it marks the determination of the Member States (and, conversely, that of their national authorities) to apply a complementary and supranational model for the classification and protection of information. Thus, this Agreement represents a form of consensus between all Member States, under the guidance of the EU, on sensitive issues pertaining to classified information. Moreover, it can be perceived as a much-needed first iteration in terms of a formalised, systemic approach towards regulating classified information in the EU, to which more in-depth rules quickly followed suit.

It is worth noting that, at the time the Agreement came into force, the EU had already developed a mechanism for the protection of EUCI, starting with internal protection regimes developed by the Commission as early as 1986[46] and decisions of the

[43] Article 14.1. of the Euratom Regulation.
[44] Published in the Official Journal of the European Union, C 202, 8 July 2011, hereinafter 'Agreement on classified information'.
[45] Galloway (2014), *op.cit.*, p. 674.
[46] Ibid.

Secretary-General of the council, starting with 1995,[47] followed by Council Decisions to date.[48] In this respect, doctrine has pointed out that the Council explicitly sought to promote and institute its self-devised rules as a uniform solution for the EU as a whole (institutions and Member States alike).[49] The said reluctance of the Member States to formally adhere to the EU mechanism for handling classified information, despite the latter's sensible record of accomplishment until 2011, is in itself indicative as to complex underpinnings of such a decision.

According to Article 1 of the Agreement on classified information, its scope is twofold, in the sense that it covers two main categories of classified information according to its originator, namely: originating in the EU institutional mechanism (institutions, agencies, bodies or offices) and originating in the Member States. From an operational point of view, the Agreement covers information related to the interests of the EU, i.e. information that is classified according to EU standards, communicated either between the Member States themselves or between EU institutions and the member states.

On the backdrop of the general framework provided by the Agreement on classified information, the analysis will further touch upon one of the main pillars of EU legislation in terms of the protection of classified information, represented by the latest iteration of the Council Decision on protecting classified information (i.e. Council Decision 2013/488/EU on the security rules for protecting EU classified information[50]).

Of all the regulatory documents pertaining to security of information in the EU, Council Decision 2013/488 is the most comprehensive and, as such, could be regarded as somewhat of a standard for all other rules enacted by various institutions – in this respect, recital (7) provides that EU bodies and agencies should apply the basic principles and minimum standards laid down in the Decision.[51] This notwithstanding, the analysis reveals that the system of rules it enforces has inherent vulnerabilities stemming from the safeguards afforded to national authorities, coupled with the high level of expectations they thus create for the Member States.

From the outset, it should be noted that the scope of the Decision, however complex, is intrinsically curtailed by the limited regulatory reach afforded by its legal basis – Article 240(3) TFEU, the provisions of which enables the Council to act only in procedural matters or for the adoption its own rules of procedure. This does not necessarily mean that the normative power of the Decision is limited to the activities of the Council or its various bodies, nor does it preclude the applicability of its provisions to actions of the Member State or its national institutions, whether within the Council itself or on national territory.

The Council Decision's status as a standard for other norms of EU institutions pertaining to the protection of classified information is confirmed by the breadth of its scope, as defined by Article 3.1., which also includes Member States, as mentioned *supra*. This is especially evident when seen in comparison to the similar normative act of the Commission (i.e. Commission Decision 2015/444) which is expressly limited *ratione personae* and *ratione loci* to Commission staff and premises, respectively.

The normative structure of Council Decision 2013/488 is built on the foundation of the well-established universal legal and operational principles of originator consent (for altering the classification level – Article 3.2.), need-to-know and security clearance (Article 7.1.).

According to Article 4.3., classified information originating from Member States and with a national classification level already ascribed is protected by means of the equivalency principle, which determines the necessary protection measures according to the requirements applicable to EUCI. This provision applies not only to classified information introduced by the Member States in the EU Council or its General Secretariat, but also to that which is introduced 'into the structures or networks of the Union'. This last phrase seems to indicate that the equivalency principle is deemed to have a transversal application throughout the institutional architecture of the EU, even though the scope of the Decision is, as mentioned above, limited to the activities of the EU Council and its General Secretariat. This potential normative conflict should be clarified by cross-referencing the relevant provisions of the various regulatory instruments enacted by EU institutions in this field. The prerogatives afforded to the originator of the information, in application of the aforementioned principle, are wide-reaching and have a significant impact throughout the life-cycle of EUCI.

The corner stone of any system for security of information – personnel security – is regulated in detail throughout the Council Decision, with implementing rules provided in Annex I. The three fundamental caveats that must be respected for an individual to be

[47] Decision 24/95 of the Secretary-General of the Council of 30 January 1995 on measures for the protection of classified information applicable to the General Secretariat of the Council (not published); Decision of the Secretary-General of the Council/High Representative for the Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council (Official Journal of the European Communities, C 239, 23 August 2000).

[48] Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations (Official Journal of the European Communities, L 101, 11 April 2001); Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information (Official Journal of the European Union, L 141, 27 May 2011); Council Decision 2013/488/EU of 23 September 2013 on the security rules for protecting EU classified information (Official Journal of the European Union, L 274, 15 October 2013).

[49] Curtin, D. (2013), op.cit., pp. 437-438.

[50] Council Decision of 23 September 2013 on the security rules for protecting EU classified information, Official Journal of the European Union, L 274, 15.10.2013 (hereinafter "Council Decision 2013/488").

[51] *See* Curtin, D. (2013), op.cit., p. 13.

granted access to EUCI are: to have the need-to-know established by the competent authority; to have the appropriate security clearance; to have been duly briefed on the responsibilities incumbent upon the person in connection with handling classified information.

Although Article 7.3. of Council Decision 2013/488 grants the General Secretariat of the Council (hereinafter "GSC") the power to authorise its personnel to access EUCI, it is nonetheless dependant on the result of the vetting procedure carried out by the National Security Authorities (hereinafter "NSA") – or other competent authorities – of the Member States, according to Article 4, corroborated with Articles 7, 16 and 18 of Annex I to the Council Decision. Thus, NSAs are primarily tasked with providing *de facto* security checks, according to the applicable national laws and regulations. This is both a burden of responsibility, as well as an essential leverage tool afforded to the Member States in the decision process as to whom is granted access to EUCI.

The leverage is indeed substantial. The "investigative and administrative procedures" – as coined by Article 1 of Annex I to the Council Decision – are built around the results of the security investigations conducted by the NSAs, which are decisive for approving or rejecting authorisation requests. The standards used by NSAs are essentially those established by national laws and regulations, although indicative criteria are provided in Article 7 of Annex I. The investigation results either in the issuance of a Personnel Security Clearance (PSC) – by the national authorities of the Member State for their own nationals –, either in the provision of "assurance" to the GSC that the individual concerned can be subsequently granted authorisation to access classified information. Thus, according to Article 18(a) of Annex 1, the GSC Appointing Authority is vested with the option (not obligation) to grant authorisation when the security check is positive, while it is expressly prohibited from granting authorisation when the result of the check is negative. Conversely, if the NSA withdraws the assurance given with regard to a person, the GSC has the obligation to withdraw said person's authorisation for access to EUCI.

The prerogatives of the Member States in connection with the decision making process and the involvement of their NSAs in this respect are further consolidated through the establishment of a Security Committee. This collegiate body, defined in Article 17 of the Council Decision, is tasked with examining and assessing "any security matter within the scope of [the] Decision" and making recommendations to the Council. It is composed of representatives of the NSAs and its meetings are also attended by a representative of the Commission and the EEAS. From a hierarchical point of view, the Committee takes instructions primarily from the Council but it can also be convened at the request of the Secretary-General of the Council or of an NSA. Although the wording of Article 17 provides that the Security Committee's central role is to "make recommendations on specific areas of security" – thus suggesting a consultative position – its standing in the overall mechanism established by the Decision is of a significant relevance, as it contributes with insights and recommendations in key moments of the decision-making process.

In terms of integration, Article 21 of Annex I to the Council Decision institutes a regimen of interinstitutional validity for authorisations for access to EUCI. Thus, the GSC is directed to accept authorisations granted by any other institution, body or agency of the EU – provided it is valid – with regard to any person working within the secretariat, irrespective of his or her assignment. This automatic recognition of authorisations is relevant, on the one hand, because it streamlines cooperation between institutions and fosters personnel mobility, contributing to enhanced operational capacity and, on the other hand, because it promotes a model of mutual institutional trust between bodies that have different – albeit complementary – roles in the Union.

Another interesting provision that could be construed as a discreet yet solid contribution to the supranational dimension of the system of prerogatives pertaining to security of information is the exceptional power of the Secretary General of the Council to grant access to EUCI to persons that have not been submitted to the prescribed security vetting procedure. According to Article 36 of Annex I, this possibility is limited to "very exceptional circumstances", which are not defined *per se* or linked to specific criteria, but only described through a non-exhaustive list of examples: 'missions in hostile environments', 'periods of mounting international tension', 'the purpose of saving lives'. Furthermore, access cannot be granted above the 'EU SECRET' grading. Like the case of automatic validation of an existing authorisation, this is another situation in which the control and supervision attributes of the Member States are superseded by the supranational prerogatives of the EU. It should be noted that such an occurrence is of an exceptional nature and it cannot be construed as an unwarranted intrusion into the exclusive competences of the Member States in issues of national security. However, it could be argued that the rather vague description of what would constitute a 'very exceptional circumstance' leaves room for potential dissenting perspectives between national authorities and the GSC.

The provisions of Council Decision 2013/488 dedicated to industrial security cover both the pre-contractual negotiations, as well as the entire lifecycle of classified contracts entered into by the GSC. From a personal point of view, the scope of said provisions includes contractors and subcontractors, so on a preliminary account it would seem that the regulations are generous in covering a wide range of possibilities.

Similar to standards developed in the field by the European Defence Agency[52], the Council Decision establishes a series of legal and contractual instruments aiming to ensure awareness and control of security related issues within a classified contract: the Security Classification Guide (SCG), the Security Aspects Letter (SAL) and the Programme/Project Security Instructions (PSI). The three are complementary and interconnected in providing standards for the contract awarding and execution phases.

Albeit consistent efforts throughout the Council Decision to ensure proper consideration and protection of the interests of Member States pertaining to national classified information and/or EUCI, the provisions on the transfer of the latter to contractors located in third states breaks this consistency. Thus, Article 30 of Annex V provides that EUCI shall be transferred to contractors and subcontractors located in third states based on "security measures agreed between the GSC, as the contracting authority, and the NSA/DSA of the concerned third State". This solution, based on the individual action and assessment of the GSC, significantly departs from previous ones, which ensured some form of control or participation of the Member States, either through guidelines adopted by the EU Council or through the involvement of the Council Security Committee in key inflexion points of various procedures entailing classified information. The aforementioned solution could prove problematic for the security interests of the member states related to EUCI, considering that, According to Article 2.1. of the Council Decision, this type of classified information is by definition liable to cause prejudice to the interests of the Member States. Since there are no criteria provided to discern between the EUCI that can be shared, one could ask how the principle of originator consent is observed. This issue is particularly relevant in cases where contractors from third states are involved, with different approaches to security of information.

In terms of governance, the Council Decision seeks to achieve a much-needed balance between the prerogatives of the Member States and the margin for action afforded to the GSC for it to carry out its functions. In effect, the interweaving of exclusive and shared competences, as well as areas of direct cooperation, come together to create an original framework complete with the types of normative complexities one would expect in a *sui generis* construct such as the EU. Aside from providing the tools necessary to ensure that the goal of the Council Decision is reached, this mechanism also serves as a driving force for synchronicity at EU level in the field of security of information. The procedural and normative instruments devised to this end operate on two complementary yet distinct layers: technical/administrative and political, with varying degrees of effectiveness.

The Council Decision has a unitary approach to the operational and administrative tasks pertaining to the management of EUCI in terms of functions, as well as in terms of institutions, which are designed to be mirrored in the national systems of each Member State, as well as by the GSC. Thus, the competent authorities within the GSC and the Member States are tasked with establishing corresponding authorities for information assurance (for electronic means of communication, including operation tasks), cryptographic approval and distribution and security accreditation (Articles 10.8 and 10.9).

A key denominator in terms of distributing governance prerogatives is the algorithm applied with respect to the principle of originator consent. While it is abstract in nature and is not intended to give priority to the interests of either actors involved in the protection of EUCI, it is nonetheless a significant source of influence – whether direct or indirect – for the Member States because it affords them the possibility to control what happens to EUCI considered to have originated from them (e.g. Article 3 of Annex III to the Council Decision).

4. The Search for Middle Ground: CJEU Case-Law on Security of Information

The involvement of the Court of Justice of the European Union (CJEU) in matters pertaining to sensitive information has seen an early onset, with the EURATOM Treaty expressly mandating the Court to set the terms applicable to licenses or sub-licences granted by the Commission, in situations where the latter was unable to come to an agreement with the licensee.[53] Building on the relevant jurisprudence developed since, this section provides a concise analysis of CJEU case law (covering both the Court *per se* and the General Court) that has ruled on issues pertaining to the protection of and access to classified information, both at EU and member state level.

The case-law is analysed in chronological order, with emphasis on the evolution of relevant principles, where applicable, and takes into consideration both situations pertaining to access to information, in general, and those pertaining to defence and security related information, in particular. This dual approach is based on the consideration that mechanisms granting public access to information managed by EU institutions represent a primary hazard for the confidentiality of said information and arguments in favour or against increased confidentiality and the way they have been received or developed by the Court provide relevant insight as to how security of information works from an institutional perspective.

In a 1999 case relating to parliamentary access to EU documents, [54] the Court examined some of the key

[52] For details on standards for the security of information developed by the European Defence Agency, *see* SA Purza, *op.cit.*pp. 261-265.
[53] Article 12 of the Euratom Treaty.
[54] Judgment of 6 December 2001, *Council v. Hautala*, C-353/99 P, ECLI:EU:C:2001:661 (hereinafter "C-353/99 P".

concepts related to access to information, including the meaning of the notion "public interest with regard to international relations". The examination was made in the context of the request made by a Member of the European Parliament to access a report drafted by the Working Group on Conventional Arms Export of the Council – the CJEU confirmed the initial ruling of the Court of First Instance,[55] which granted access to the document in question. Thus, the Court of First Instance implicitly included in the general concept of "public interest with regard to international relations" information related to the "exchanges of views between the Member States" on issues relative to third countries, which, on account that they contain "formulations and expressions which might cause tension with certain non-member countries" can be exempted from public access.[56] The Court of First Instance and, subsequently, the CJEU, therefore confirmed the Council's assessment on the extent to which protection should be granted to information exchanged with the Member States on issues falling within the general scope of international relations.[57] Another relevant guiding interpretation that resulted from this case is the distinction made between access to documents and access to information. Thus, the principle of access is not limited to documents *per se*, as individual, identifiable material objects, but is naturally extended to include the more abstract notion of "information", which is contained by documents.[58]

In its judgment in the widely cited case of Sison v. Council,[59] the CJEU made important advances in clearing out the dense web of concepts and thus further streamlined the approach to be taken regarding the margin of appreciation afforded to the institutions in the protection of confidential documents and information. In this case, the Court was called to review an appeal brought against the judgment delivered by the Court of First Instance of the European Communities on 26 April 2005 in joined cases T-110/03, T-150/03 and T-405/03,[60] which found in favour of the Council's decision to refuse access to documents and information requested by the applicant in connection with the adoption of a series of Decisions of the Council on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. The applicant had requested *inter alia* disclosure of the identity of the States which had provided certain documents in that connection.[61]

In the initial ruling, the Court of First Instance upheld the need for classified information to be adequately protected against inappropriate dissemination when it is received from national authorities of Member States or those of third States, by reference to the need to protect the position of the EU in 'international cooperation concerning the fight against terrorism'.[62] The Court also explicitly gave weight to the third States' desire for their identity not to be disclosed and to the inherent secret or confidential nature of a particular type of information - concerning persons suspected of terrorism.[63] Furthermore, both the Court of First Instance[64] and the CJEU[65] explicitly confirmed the Council's approach on the statement of reasons for non-disclosure, thus validating the latter's option to provide only a brief statement of reasons, without additional information that might have been liable to breach the confidentiality they were aiming for. From a right of access perspective, the Court's approach in this judgment has been considered as conservative, owing to the arguably limited margin of examination the CJEU had afforded itself.[66]

Furthermore, the CJEU confirmed the full applicability and effectiveness of the originator consent principle, as a tool to ensure that sensitive information is not made publicly available when the member or third state which sent it to the EU institutions opposes disclosure. Moreover, it confirmed the applicability of this principle to both the disclosure of a document's content and to information regarding its very existence or its origin.[67] Thus, in interpreting the security exception of Regulation 1049/2001, the CJEU established a wide margin of appreciation for the EU institutions as well as the Member States, when exercising the principle of originator control. The classified nature of the document and the information it contains can also be extended to the identity of the originating Member State (or third state) and even to the very existence of such document. The proportional character of such measures to protect the security of information has also been confirmed against the backdrop of additional difficulty incumbent on the

[55] Judgment of 19 July 1999, *Hautala v. Council*, T-14/98, ECLI:EU:T:1999:157 (hereinafter "T-14/98").
[56] T-14/98, para. 73-74.
[57] See, also, Rosén, G. (2015), op.cit., p. 389.
[58] T-14/98, para. 87-88; C-353/19, para. 23.
[59] Judgment of 1 February 2007, *Sison v. Council*, C-266/05 P, ECLI:EU:C:2007:75 (hereinafter "C-266/05 P".
[60] Judgment of 26 April 2005, *Sison v. Council*, T-110/03, T-150/03 and T-405/03, ECLI:EU:T:2005:143 (hereinafter "T-110/03").
[61] See T-110/03, para. 2-4.
[62] See, also, Labayle, H. (2010), 'Principles and procedures for dealing with European Union Classified Information in light of the Lisbon Treaty', European Parliament – Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, pp. 7-8, available at: https://www.statewatch.org/media/documents/news/2010/may/ep-classified-information-study.pdf [last accessed: 15.03.2021].
[63] T-110/03, para. 80-81.
[64] T-110/03, para. 62-63.
[65] C-266/05 P, para. 82.
[66] Neamtu, B, Dragos, D. (2019), 'Freedom of Information in the European Union: Legal Challenges and Practices of EU Institutions', in Dragos, D., Kovač, P., Marseille, A. (eds.) (2019), 'The Laws of Transparency in Action. A European Perspective', Palgrave MacMillan, p. 41.
[67] C-266/05 P, para. 86, 101-102.

applicant if a high degree of discretion were to be applied.[68]

In 2005, the European Commission brought an action against Germany for its failure to fulfil obligations because of its exemption from duty of imports of military materials, spanning a 4-year period.[69] In its defence, Germany argued that Article 346 TFEU (Article 296 EC at the time of the proceedings) allowed derogation from the application of the Common Customs Code, "where the imports are of equipment exclusively intended for military purposes, and where the objective is the protection of the essential interests of its security".[70] Furthermore, Germany made a without prejudice payment, failing to detail which imports and what periods it covered, arguing that the relevant information was confidential and that the system for processing information in customs declarations is liable to cause "serious damage to the essential security interests of Member States".[71]

In this case, the Court recognised the existence and overall effectiveness of the "obligation of confidentiality" imposed on both Member States' nationals and EU institutions' staff, as an instrument "capable of protecting the essential security interests of the Member States." Thus, it could be argued that, in this instance, the CJEU considered that the various approaches towards the protection of the security of information employed by the Member States and the institutions are capable of ensuring the requisite level of protection, notwithstanding the (most probable) elements of distinction, both form a procedural and principled point of view.[72] Nonetheless, the Court made its own assessment of the potential that third-party access to information of a certain type might damage the interests of Member States in respect of either security or confidentiality. This examination and subsequent conclusion of the Court arguably go against the very essence of what Article 346 TFEU intended - which is to afford the Member States a sufficiently wide enough margin of appreciation in such issues, to properly safeguard their national security interests as they see fit. The risk of this type of overriding action by the Court should be managed in any future regulation on an EU-wide regime for security of information.[73]

It is also interesting to note, in the fashion of the analysis made by Martin Trybus on this case,[74] the argument put forth by some Member States – among which, chiefly, Germany – that they were under no obligation to supply the information that the Commission needed to examine and prove an infringement of the provisions of the Treaties. Thus, based on the provisions of Article 346 TFEU, Germany claimed the Commission's action was inadmissible due to the former's prerogative to abstain from disclosing information, which would substantiate the case of the latter – a genuine situation of *probatio diabolica*. Of course, the Court was not persuaded by this line of argumentation.

In a preliminary ruling concerning the interpretation of the provisions of EU law on freedom of movement, the Court made an assessment of the need to safeguard the classified nature of information pertaining to public and national security, in the context of the fundamental rights granted by the Charter in terms of effective judicial protection.[75] It argued that Member States need to do more in the way of ensuring an appropriate balance between non-disclosure and access to effective judicial review. Thus, while not challenging the prerogative of national authorities to withhold information pertaining to state security, it nonetheless set higher standards for what an appropriate conduct would be in relation to a person whose rights might be affected by administrative decisions based on classified information. By all accounts, this cannot be interpreted as undermining the possibility of national authorities to ensure effective protection of sensitive information by means of ascribing to it a classified (secret) nature, since, as already underlined, this point was not an issue in this case. Rather, it remains to be ascertained whether the additional requirement described by the Court in order to satisfy the right for effective judicial protection – i.e. the mandatory scrutiny by the judiciary of the proportionality of the authorities' non-disclosure decision – is liable to produce, in the medium to long terms, situations in which the security of sensitive information might be affected to a lesser or more serious degree.

Going further, the Court also confirmed a widely accepted reasoning of the national authorities contending that the evidence supporting a decision on grounds of national security could in itself be liable to 'compromise State security in a direct and specific manner'.[76] Thus, the obligation of national authorities to disclose, to the interested person, the grounds and evidence on which a decision is based (refusing a citizen of the European Union admission to a Member State on public security grounds) is limited to 'that which is strictly necessary', with due account to the necessary confidentiality of the evidence in question.[77]

[68] C-266/05 P, para. 103.
[69] Judgment of 15 December 2009, *Commision v. Germany*, C-372/05, ECLI:EU:C:2009:780 (hereinafter "C-372/05").
[70] C-372/05, para. 19.
[71] C-372/05, para. 25, 58-59.
[72] C-372/05, para. 74.
[73] C-372/05, para. 75.
[74] Trybus, M., *Buying Defence…*, p. 132.
[75] Judgment of 4 June 2013, *ZZ*, C-300/11, ECLI:EU:C:2013:363, para. 65 (hereinafter "C-300/11").
[76] C-300/11, para. 66.
[77] C-300/11, para. 69.

The reluctance of Member States to confide trust in each other's national security authorities, in terms of handling classified information, has seen confirmation in a judgment against Austria in a case concerning its failure to fulfill its obligations related to public service contracts, which entailed the protection of essential security interests.[78] The CJEU once again proved that it is playing its part in ensuring that the need for security against transnational crime and terrorism, albeit tangible and urgent, does not become an umbrella for abuse of rights by the authorities of Member States, that would irrevocably turn the balance away from the founding principles of the common market and even the individual rights and freedoms, as guaranteed by the EU legal order.

In the cited case, the CJEU has approached the issue of classified information by using its well-established narrow or strict interpretation, based on the all-encompassing principle of proportionality. Thus, it argued that the non-disclosure provision of Article 346(1)(a) TFEU does not apply indiscriminately to any type of information that a Member State might consider to be sensitive.[79] The Court even went so far as to assess the degree in which a facility under some form of control by a Member State is in fact better suited to ensure the confidentiality of sensitive information in a works contract than other companies operating in said Member State or others. In this respect, it argued that the necessary degree of confidentiality of information could be guaranteed by means of special arrangements imposed through private-law contractual mechanisms. It should be noted that the case under consideration did not entail high-level classified information. [80]

In a recent case[81] the General Court the General Court has recognised some limitations to its powers to examine and decide on the institutions' refusal to grant access to information. Thus, the General Court is mandated to assess only if the procedural rules and the duty to state reasons have been complied with and whether the facts have been accurately described. It follows, then, that in substantive terms only finding "a manifest error of assessment or a misuse of powers by the institution" would be grounds for censoring the institution's decision to refuse access.[82] Case T-31/18 is exemplary in this respect, as the Court has established the pre-eminence of the need to protect operational information held by the institutions, *in casu* the European Border and Coast Guard Agency (FRONTEX).[83]

5. Conclusions

The research at the heart of this paper was based on the overarching idea that the provisions of the Defence Procurement Directive proved inapt to furnish a functional framework for managing the various security of information concerns and, thus, an alternative solution should be sought with a view to obtain a highly coordinated (if not unitary) regime for classified information among EU Member States.

Along these lines, the research has firstly sought to establish whether there are sufficient reasons to conclude that the EU has, thus far, managed to establish a proprietary and functional framework for dealing with classified information, covering both its institutional actors, as well as its dynamics with the member states and among themselves. On this point, the examination of the provisions of the EURATOM Regulation and those of Council Decision 2013/488 has shown that the inherent limitations of the EU's approach to a sectoral/procedural dimension in defining rules and regulation for security of information has not impeded it from tackling more substantive aspects, such as granting clearances or their automatic recognition at EU institutional level.

This conclusion is based, on one hand, on the fact that the rules prescribed by the EURATOM Regulation for the protection of classified information have stood the test of time and have proven – even if for this reason alone – their ability to respond to the specific needs of the Member States and the Community as a whole. As shown, these rules touch on the fundamental issues underpinning security of information and have therefore proven that multinational consensus can be reached and effectively implemented. Secondly, the basic elements of the solutions enacted by the EURATOM Regulation have been subsequently confirmed in the relevant Council Regulations which, and the instruments provided therein have been tested and validated by the CJEU in various circumstances.

Thus, the analysis of the rules and procedures set up by the EU for the protection of classified information has outlined that the Union has taken this imperative security need very seriously since its very inception. Moreover, it has proven consistency and determination in monitoring, evaluating and improving the mechanisms in place, in close coordination with the relevant authorities of the Member States. Current regulations and procedures duly observe the fundamental legal and operational principles, instruments and requirements pertaining to the protection of classified information (on clearance, physical protection, administrative measures, management etc.) largely implemented by Member

[78] Judgment of 20 March 2018, *Commission v. Austria (State printing office)*, C-187/16, ECLI:EU:C:2018:194, para. 68 (hereinafter "C-187/16").
[79] C-187/16, para. 72.
[80] C-187/16, para. 84-85.
[81] Judgment of 27 November 2019, *Izuzquiza and Semsrott v. Frontex*, T-31/18, ECLI:EU:T:2019:815, para. 25 (hereinafter "T-31/18").
[82] T-31/18, para. 65.
[83] T-31/18, para. 91, 112.

States – while reserving a margin of criticism, voiced *supra* in individual cases, where relevant. The question remains if this conclusion bears enough weight in the rationale of the Member States to encourage them to move forward towards an EU-wide legal and procedural mechanism for the management of classified information that would provide the tools needed for unimpeded access by potential tenderers to defence and security contracts in any member state at any time.

Furthermore, the aptitude of the EU institutional framework to provide the requisite level of security of information has been acknowledged by doctrine, albeit by specific reference to the experience of the Commission in handling professional secrecy in the context of competition cases.[84] In the same line of reasoning, another paper concluded that the internal rules-based system implemented by the EU has proved effective in providing a level of protection for classified information similar to that given in member states.[85]

This positive perspective has been – to some extent – confirmed by the case-law of the CJEU, as shown in the relevant section. Thus, some points of concern notwithstanding, the Court has shown that the basic concepts and principles related to security of information have been astutely adopted and implemented by the EU institutional framework and have stood the test of judicial scrutiny, including in the context of access to information, which is particularly demanding.

In the more challenging realm of identifying potential avenues for future regulatory solutions for the integrated management of classified information, which would ultimately serve *inter alia* the specific purpose of defence procurement integration, the main issue of contention is the legal basis for any such initiative. An analysis made by Deirdre Curtin has concluded, in general terms, 'that there is no separate treaty based legal basis for adopting Union wide rules on the classification of documents'.[86] From a strict, *ad litteram*, normative perspective, this conclusion holds true, as the TEU and the TFEU do not contain an explicit mandate for the Union to regulate in this field. Nevertheless, the same analysis explores various indirect legal foundations that might be used to substantiate a regulatory initiative in this respect. It should be noted, at this point, that in Opinion 2/00 (EU:C:2001:664, paragraphs 5 and 6), the CJEU emphasised that to proceed on an incorrect legal basis is liable to invalidate the act concluding the agreement, and that that is liable to create complications both at EU level and in international law.

In the same spirit of intellectual debate and normative exploration, the research presented in this paper has hinted to some potential solutions for an EU-wide legal framework for the protection of classified information, whether in broader or more specific terms. These possibilities are presented herein, with the understanding that they require further and more in-depth research, which can form the topic of a future paper on the matter.

Before proceeding to the potential avenues of regulatory action, it is important to note that this research has revealed specific requirements pertaining to the protection of classified information, some of which have been adopted in security policies across the spectrum, ranging from civil to military organisations. Among these, the following concepts have stood out as legal and operational instruments used by national authorities to guarantee an effective level of control and protection and should thus be mandatorily included in any normative initiative in the field: security screening and authorisation; originator consent/control; physical security (premises and cyber); as a corollary to control mechanisms, the ability to invoke legal responsibility, from civil/administrative liability to prosecution under criminal law.

One way to act is still tributary to classical intergovernmental means of cooperation, considering that CFSP, CSDP – fields in which security of information is particularly relevant, especially in terms of defence and security procurement – are still outside the community acquis and out of the scope of EU regulatory instruments. In this respect, a potential solution could have a one-fold or two-fold approach. Thus, the one-fold solution envisages the Council adopting a Decision that tasks the Commission with establishing an open-ended (starting from a minimal base ensuring fundamental functionalities) EU-wide system for coordinating security of information mechanisms through an individual body set up within the European Defence Agency, having a separate governing body, comprised of designated representatives of each MS, mandated to decide on the pathway for the evolution of the mechanism for security of information tailored for defence and security procurement. The two-fold solution[87] would presume the creation of an adequate legal basis in an intergovernmental conference, within the co-decision framework and then use the mandate thus conferred to enact a normative instrument pertaining to the regime of classified information.[88] Additional research is required as to the advantages/disadvantages of each option and, more importantly, their applicability and effectiveness.

It is important to note that the solution of creating a legal framework through an international agreement should be subjected to the CJEU's autonomy test. Thus,

[84] M Trybus (2014), *op.cit.*, p. 130.
[85] Galloway (2014), *op.cit.*, p. 682.
[86] D. (2013), op.cit., pp. 433-436.
[87] *See* Curtin (2014), *op.cit.*, p. 693.
[88] The idea of a Directive that would regulate an EU-wide regime for security clearances has been mentioned by doctrine, *see* M Trybus (2014), *op.cit.*, p. 393.

if the proposed solution would be completely outside the EU legal order (a consideration that should also face scrutiny), then it should be determined whether it is liable to affect the EU's jurisdictional legal order, as defined by the concept of autonomy aiming at preserving the unity of the EU legal order and the uniform application of its rules.[89] In this respect, an original solution could be to circumvent the lack of legal basis in the Treaties by using an intergovernmental legal vehicle to which the EU can adhere.[90]

In any case, any regulatory solution should avoid ambiguous formulations, whatever the difficulties in managing various interests and sensitivities. Otherwise, the normative thread could be pulled in a direction that would potentially go against the interests of the stakeholders, amongst which national authorities of the Member States feature prominently. Thus, the wording of the regulation should be clear and concise, to avert the possibility that its scope and application be subjected to the interpretation of the CJEU.[91]

Whatever the avenue, it is without question that the art of compromise has been effectively used in solving complex issues pertaining to security of information, as proven by the relevant provisions of the Defence Procurement Directive, the system of Interinstitutional Agreements and the case-law of the CJEU on denial of access to sensitive information. In this respect, it is useful to note that a possible way towards compromise would be to limit the scope of the prescribed normative instrument to a clearly defined segment or sector. Along these lines, the fact the EURATOM Regulation had a limited sectoral scope – as shown in section 3.1. of this paper – also came as an advantage, thus streamlining each Member States' calculations on the potential strategic and security impact of the new rules.

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[89] JW van Rossem, 'The Autonomy of EU Law: More is Less?' (2013) in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (Asser Press, 2013) 15-17 and 19.

[90] van Rossem (2013), *op.cit.*, p. 20.

[91] *See, inter alia*, Judgment of the Court (Grand Chamber) of 18 December 2007, *Sweden v. Commission*, C-64/05 P, ECLI:EU:C:2007:802, para. 33.

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- Judgment of the Court (Grand Chamber) of 18 December 2007, Sweden v. Commission, C-64/05 P, ECLI:EU:C:2007:802, para. 33.

EUROPEAN LEGAL INSTRUMENTS FOR GREEN AND DIGITAL TRANSITIONS

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Abstract

The dynamics of the European Union's evolution in recent decades have been influenced by the evolution of society as a whole, the fourth industrial revolution and technological development in parallel with environmental protection being landmarks to which European policies relate.

In this context, the new European Commission sets as priorities A European Green Deal and A Europe fit for the digital age by proposing concrete measures to be taken at Union level or by the Member States.

Such proposed acts and measures must have their legal basis in the Treaties of the Union which define both the objectives of the Union and the types of powers which it has to achieve them.

However, the question that may arise is: is there such a legal basis? What acts can be adopted by the Union institutions for green and digital transitions? Is there a need to extend Union competence?

The analysis of the legal instruments available to the Union at the moment seeks to provide an answer to these questions and to provide a perspective for the development of the specific legal framework; the sources of European Union law and the types of competences that the EU has in the main areas concerned are taken into account.

Keywords: *legal instruments, EU powers, green transition, digital transitions, priority of the EU law.*

1. General remarks

As international intergovernmental integration organization, the European Union acts within the limits of the powers conferred by the Member States in order to achieve the common objectives set out in the Treaties, objectives which diversify and multiply as society itself evolves globally.

The analysis of the powers of the European Union, hereinafter referred to as the EU, is a complex one, although it is stated that the Treaty of Lisbon clarified[1] this aspect by establishing in art. 2-6 of the Treaty on the Functioning of the European Union (TFEU) the types of competences and areas in which three main types of competence apply: exclusive EU competence/power, shared EU-Member State competence/power and Union competence to support, coordinate and complement the action of the Member States.

The principle of conferral provided by art. 5 para. (1) to (2) of the Treaty on European Union (TEU) governs the way in which the Union acts within the powers conferred by the Treaties, stating that" competences not conferred upon the Union in the Treaties remain with the Member States".

Thus, the extension or limitation of EU competences can be achieved by revising the EU Treaties according to art. 48 of the Treaty on European Union.

However, the TFEU contains, in art. 352, a flexibility clause or reservoir of competence that allows the EU to act within the policies of the Treaties if it does not have an express competence, to meet the objectives of the EU. „Thus, the invocation of these provisions may occur when the powers conferred by the treaties in the form of specific attributions (functional competence) may be insufficient to achieve the objectives expressly assigned by the treaties (material competence); but, according to the jurisprudence of the Court, in no case art. 352 TFEU cannot serve as a basis for extending the EU's areas of competence and cannot be used as a "subterfuge" to choose a legal basis leading to a simpler legislative procedure or not involving the European Parliament[2]".

2. Legal instruments for green and digital transitions

2.1. The EU powers

In this framework that defines the competences at Union level, in the current situation marked by the

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[1] Andrew Duff, *Saving the European Union. The Logic of the Lisbon Treaty* (London: Shoehorn Current Affairs & History Books, first published in 2009), 59: " In summary, Lisbon makes good progress in simplifying and in making more transparent the exercise of powers at the Union level".

[2] Mihaela-Augustina Dumitraşcu, *Dreptul Uniunii şi specificitatea acestuia* (Bucureşti: 2015, Universul Juridic, ed. a 2-a, revăzută şi adăugită), 61.

pandemic health crisis[3] and technological evolution[4], the EU aims to develop in the parameters of green and digital, starting the transition in this regard; the question is not whether the EU will succeed but whether it has the legal instruments in terms of powers to achieve this goal, which has, among its beneficiaries, the citizens of the Member States[5].

These goals are mentioned among the new European Commission's priorities for 2019-2024 (Political Guidelines) as following:

"A European Green Deal": Transforming the EU into a modern, resource-efficient and competitive economy, while preserving Europe's natural environment, tackling climate change and making Europe carbon-neutral and resource efficient by 2050";

"A Europe fit for the digital age": "Embracing the digital transformation by investing in businesses, research and innovation, reforming data protection, empowering people with the skills necessary for a new generation of technologies and designing rules to match"[6].

It can therefore be seen that these are priorities that are not explicitly set out in the EU Treaties in force, but involve policies defined by them or actions that have started at EU level. If environment, in which the principle of subsidiarity was first used by the Single European Act (1986, 1987), is included within the shared competences according to the art. 4 para. 2 letter (e) of the TFEU, digitalization issues are not specifically regulated in the EU Treaties[7], but secondary EU law and complementary EU law has recently developed this cross-cutting concept in EU policies and areas of action.

The working legal instruments used par excellence by the EU institutions to achieve the Union's objectives within the limits of the competences set out in the Treaties are "legal acts" (concept used for the first time in the Lisbon Treaty - Part six Institutional and financial provisions, Title I Institutional provisions, Chapter 2 Legal acts of the union, adoption procedures and other provisions, Section 1 the legal acts of the Union of the TFEU) in the category of which have been included:

legislative acts[8] (art. 289 TFEU),

non-binding acts (art. 288 final paragraph TFEU), and

non-legislative acts[9] (art. 290-291 TFEU).

At the same time, the EU institutions use to a significant extent the complementary/ or soft law[10] that does not produce legal effects, but has the ability to do so; in this case, we can mention communications, resolutions, conclusions, white papers or green papers, acts that do not have a legal enshrinement in the EU Treaties. Among those acts only „recommendations and opinions" are mentioned by the final paragraph of the art. 288 TFEU which states that they„shall have no binding force"[11].

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[3] See Valerian Cioclei, "Despre viitorul profesiilor juridice, în contextul principalelor provocări ale următoarelor două decenii", *AUBD – Forum Juridic*, online section of *Analele Universității din București – Seria Drept*, no 3/2020, 11, https://drept.unibuc.ro/dyn_img/aubd/Despre%20viitorul%20profesiilor%20juridice%20INTEGRAL%20rev.pdf : "The pandemic has already "pushed" us towards digitalization and "suggests" a future with fewer lawyers, more adaptable to legislative changes, more efficient in the field of information technology. Artificial intelligence accentuated the tendency to restrict the "labor market" in the field of law, and this process will have to be "controlled" by lawyers, not only better in the field of IT, but also able to understand the advantages and dangers of AI".

Oana-Mihaela Salomia, „Exercitarea profesiilor liberale în condițiile digitalizării", online conference Ziua Profesiilor Liberale din România, 13th edition, 5 November 2020

https://www.universuljuridic.ro/ziua-profesiilor-liberale-din-romania-editia-a-xiii-a-exercitarea-profesiilor-liberale-in-conditiile-digitalizarii/.

[4] Nicolae Dragoș Costescu, „Théories portant sur la jurisdiction compétente sur Internet", Analele Universității din București, seria Drept, (București, C.H. Beck, 2017), 81: „Presque tous les aspects de la gouvernance de l'Internet comportent une dimension juridique, pourtant la formulation d'une réponse juridique aux développements rqpides de l'Internet se trouve encore en retard".

[5] In March 2021, „26 CEOs of companies have signed a Declaration to support the Green and Digital Transformation of the EU and formed a European Green Digital Coalition", which „will help not only the tech sector to become more sustainable, circular and a zero polluter, but also to support sustainability goals of other priority sectors such as energy, transport, agriculture, and construction while contributing to an innovative, inclusive and resilient society" - https://ec.europa.eu/digital-single-market/en/news/companies-take-action-support-green-and-digital-transformation-eu

[6] https://europa.eu/european-union/about-eu/priorities_en

[7] Alina Mihaela Conea, Politicile Uniunii Europene, (București: Universul Juridic, 2019), 191: „With the exception of the field of data protection, the digital policy of the European Union does not benefit from a specific basis, within the primary law".

[8] See Dragoș – Adrian Bantaș, "Considerations regarding the Choice, by the European institutions, of the legal basis of acts, during the legislative procedures overview of the case law of the Court of Justice of the European Union", Challenges of the Knowledge Society, 11th-12th May 2018, 12th Edition, 403-409, http://cks.univnt.ro/articles/12.html

[9] See Oana-Mihaela Salomia, "Delegated acts and implementing acts – new legal acts of the European Union", Challenges of the Knowledge Society, Bucharest, 12th - 13th May 2017, 11th Edition, 551-556, http://cks.univnt.ro/cks_2017.html.

[10] „On the European Union's website, these acts are included in the category of the EU secondary law: „Secondary law comprises unilateral acts, which can be divided into two categories:

those listed in Article 288 TFEU: regulations, directives, decisions, opinions and recommendations;

those not listed in Article 288 TFEU, i.e. atypical acts such as communications and resolutions, and white and green papers".

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14534

[11] CJEU, Salvatore Grimaldi v Fonds des maladies professionnelles, 13 December 1989, case C-322/88, point 13-14: „13 Recommendations, which according to the fifth paragraph of Article 189 of the Treaty are not binding, are generally adopted by the institutions of the Community when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules. 14 Since it follows from the settled case-law of the Court (see, in particular, judgment of 29 January 1985 in Case 147/83 Binderer v Commission ((1985)) ECR 257) that the choice of form cannot alter the nature of a measure, it must nevertheless be ascertained whether the content of a measure is wholly consistent with the form attributed to it" .

For implementing the green and digital transitions, not only legal acts are adopted, but also soft law acts which are, in principle, mandatory for the Member States by virtue of the principle of loyal cooperation enshrined in art. 4 para. (3) of the TEU[12] lacking a specific legal basis in the EU Treaties.

2.2. Green transition

European Green Deal has been adopted by the *Communication from the Commission*, COM (2019) 640 final, Brussels, 11.12.2019 which sets up the following measures:

"*2. Transforming the EU's economy for a sustainable future*

2.1. Designing a set of deeply transformative policies

2.1.1. Increasing the EU's climate ambition for 2030 and 2050

2.1.2. Supplying clean, affordable and secure energy

2.1.3. Mobilising industry for a clean and circular economy

2.1.4. Building and renovating in an energy and resource efficient way

2.1.5. Accelerating the shift to sustainable and smart mobility

2.1.6. From 'Farm to Fork': designing a fair, healthy and environmentally-friendly food system

2.1.7. Preserving and restoring ecosystems and biodiversity

2.1.8.A zero pollution ambition for a toxic-free environment

2.2 Mainstreaming sustainability in all EU policies

2.2.1. Pursuing green finance and investment and ensuring a just transition

2.2.2. Greening national budgets and sending the right price signals

2.2.3. Mobilising research and fostering innovation

2.2.4. Activating education and training

2.2.5. A green oath: 'do no harm'

3. The EU as a global leader".

This Communication does not mention any legal basis for adopting and implementing these measures by the EU institutions and Member States.

It is clear that these objectives and measures cannot be achieved without the Member States taking concrete action in this regard; the phrase used in the action Plan is the following "the Commission will work with the Member States" which involves cooperation between the Union and the Member States, but the action Plan contains also references to the obligation imposed to the national authorities to comply with the Union objectives as set out in the phrase: "The Commission and the Member States must also ensure that policies and legislation are enforced and deliver effectively. The environmental implementation review will play a critical role in mapping the situation in each Member State"; so, it is an obligation for the Member States laid down into a non-binding act. The breach of the EU law leads to an infringement procedure initiated by the European Commission; it will be the case in regard with the non-respect of the action Plan for European Green Deal? In our opinion, the answer is positive." Environmental policy then is a good illustration of the development of the influence of the EU as a body, the addition of environmental powers representing an important marker in the shift of focus from the more limited economic sphere of activity that typified the original Community Treaties to the broader aspirations and ambitions of the organization today"[13].

The Green Deal must be implemented in all related policies in order to achieve the EU goals and thus it will become compulsory for the Member States in the case where that policy is covered by the exclusive or shared competence of the EU. For example, the common agricultural policy where EU has a shared competence will be influenced by the action Plan for European Green Deal and the Member States will be obliged to make reforms for complying with the specific EU law. "Farmers, agri-food businesses, foresters, and rural communities have an essential role to play in several of the Green Deal's key policy areas, including:

- building a sustainable food system through the Farm to Fork strategy;
- adding to the new biodiversity strategy by protecting and enhancing the variety of plants and animals in the rural ecosystem;
- contributing to the climate action of the Green Deal to achieve the goal of net-zero emissions in the EU by 2050;
- supporting the updated forestry strategy, to be announced in 2021, by maintaining healthy forests;
- contributing to a zero-pollution action plan, to be set out in 2021, by safeguarding natural resources such as water, air and soil"[14].

At institutional level, the new European Commission has appointed an executive vice-president "leading the Commission's work on the European Green Deal and its first European Climate Law to enshrine the 2050 climate-neutrality target into EU law"[15].

[12] See Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, "Principiul cooperării loiale – principiu constituțional în dreptul Uniunii Europene", In Honorem Ioan Muraru. Despre Constituție în mileniul III, Ștefan Deaconu, Elena Simina Tănăsescu (coord.), (București: Hamangiu, 2019).

[13] Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'meara (Contributor), European Union Law, (Oxford: Oxford University Press, 2016, 9th Edition), 473.

[14] https://ec.europa.eu/info/food-farming-fisheries/sustainability/sustainable-cap_en.

[15] https://ec.europa.eu/commission/commissioners/2019-2024/timmermans_en.

2.3. Digital transition

The digital transition is also proposed to the Member States and all society through a communication, non-binding act – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Shaping Europe's digital future, COM (2020) 67 final, Brussels, 19.2.2020 without reference to any legal basis in the EU Treaties:

”*For the next five years, the Commission will focus on three key objectives to ensure that digital solutions help Europe to pursue its own way towards a digital transformation that works for the benefit of people through respecting our values:*

.• *Technology that works for people: Development, deployment and uptake of technology that makes a real difference to people's daily lives. A strong and competitive economy that masters and shapes technology in a way that respects European values.*

• *A fair and competitive economy: A frictionless single market, where companies of all sizes and in any sector can compete on equal terms, and can develop, market and use digital technologies, products and services at a scale that boosts their productivity and global competitiveness, and consumers can be confident that their rights are respected.*

• *An open, democratic and sustainable society: (...) A European way to digital transformation which enhances our democratic values, respects our fundamental rights, and contributes to a sustainable, climate-neutral and resource-efficient economy*”.

In line with the European Green Deal and the strategy Shaping Europe's digital future, it has been developed *A New Industrial Strategy for Europe* adopted through a communication - Communication from the Commission, COM (2020) 102 final, Brussels, 10.3.2020 which proposes for European industry[16]:

“2.1 A globally competitive and world-leading industry
2.2 An industry that paves the way to climate-neutrality
2.3 An industry shaping Europe's digital future

The digital transition will include not only the industry and economy but also the education – fundamental sector the developing the society”.

Another policy having impact for the European citizens is the education policy in which the EU can carry out actions to support, coordinate or supplement the actions of the Member States[17]. The education is one of the sectors affected by the pandemic sars-cov-2 in terms of teaching process but also in terms children education by the parents. The digitalization is used in education and it is clear that a new trend will be settled up at all levels of education. In this regard, the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Digital Education Action Plan 2021-2027 Resetting education and training for the digital age*, Brussels, COM (2020) 624 final, 30.9.2020 has as priorities:

“Strategic priority 1: Fostering the development of a high-performing digital education ecosystem
Strategic priority 2: Enhancing digital skills and competences for the digital transformation”.

Digital transition includes also social aspects[18]; ”MEPs (Members of the European Parliament) call for binding social targets to help the EU labour market adjust to the current realities of the digital and green economy.

- Digital and green transition must include a social dimension
- New European Social Agenda to be adopted under the Portuguese presidency
- European Pillar of Social Rights should be properly implemented[19]”.

For ensuring the implementation the European Commission's initiatives in this area, an executive vice-president of the new European Commission is responsible for „A Europe Fit for the Digital Age”:

- „setting the strategic direction of the political priority "Europe Fit for the Digital Age",
- Coordinating work on a European strategy on data and on a European approach to artificial intelligence, including its human and ethical implications,
- Steering work on upgrading liability and safety rules for digital platforms, services and products as part of a new Digital Services Act, ensuring working conditions of platform workers are properly addressed,
- Coordinating the Commission's work to achieve fair digital taxation”[20].

3. De lege ferenda proposal

The new “*Joint declaration on the conference on the future of europeengaging with citizens for democracy– Building a more resilient Europe*” states that “The European Union has to show that it can provide answers to citizens' concerns and ambitions. European policy must provide inclusive answers to our generation-defining tasks: achieving the green and

[16] Art. 6 letter (b) – competence of the EU to carry out actions to support, coordinate or supplement the actions of the Member States.
[17] Augustin Fuerea, Dreptul Uniunii Europene – principii, acțiuni, libertăți, (București: Universul Juridic, 2016), 35-36.
[18] Monica Florentina Popa, ”The subversive effect of utilitarianism on the right to life in eu countries”, Journal of Law and Administrative Sciences, no 14/2020, 87, http://jolas.ro/wp-content/uploads/2014/09/jolas-no.14.pdf: ”The debates on the retirement age, the reforms of state pensions and the steady loss of jobs due to the high levels of automation and digitalisation will challenge in the near future the resilience and strengths of the EU citizens and will put to test the principle of European solidarity, not only between member-states, but also between different categories of citizens belonging to the same country”.
[19] ”Fair transition to digital and green economy: a new social agenda for Europe”, https://www.europarl.europa.eu/news/en/press-room/20201211IPR93637/fair-transition-to-digital-and-green-economy-a-new-social-agenda-for-europe.
[20] https://ec.europa.eu/commission/commissioners/2019-2024/vestager_en.

digital transition, while strengthening Europe's resilience, its social contract and European industry's competitiveness"[21].

In the spirit of this Declaration, we appreciate that, in a future revision of the EU Treaties[22], provisions on the digital transition and the green transition will be introduced at primary EU law level, including the steps and measures to be taken after the transitions are completed.

The provisions of EU primary law would allow the adoption of legislation, binding for Member States whose compliance is monitored by the European Commission.

Digitization has become an EU priority that is pursued at a cross-cutting level and has recently been encountered in the design and implementation of various European policies and areas of action. The same approach can be found with regard to green transition, as it is not limited to environmental policy but also becomes an objective to be met in other policies and actions.

Awareness-raising activities on the digital and green transitions should become a constant concern for the European institutions and the authorities of the Member States for the benefit of European citizens in accordance with the principle of sincere cooperation.

It is obvious that, at the moment, the European Commission's communications can only impose certain conduct for the Member States on the basis of the principle of sincere cooperation[23] which allows them to gradually adapt to the transition, from a legislative, structural and institutional point of view[24].

A future revision of the Treaties may also concern the nomenclature of the EU law sources which could include the complementary EU law like the Commission's communications mentioned above, European Parliament's resolutions and other *sui generis* acts.

The current art. 296 TFEU obliges to respect the principle of proportionality[25] when a specific act will be adopted by the EU institutions:" where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality" which could be interpreted including in regard with complementary EU law because a reference to a legal act is not mentioned. The next statement of this article makes a direct reference to a legal act: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".

«The accession to the EU implies a number of consequences. One of these consequences follows from the judgment of the Court of Justice in Luxembourg ruled in 1978, in which the Court ruled that, under the "principle of the supremacy of Community law, the provisions of the Treaty and the acts of the directly applicable institutions have the effect, with the mere fact of their entry into force, not only to determine the inapplicability of any provision contrary to that of the existing national legislation, but also-to the extent that those provisions and acts form an integrant part, with the national law of the Member States rank higher than the internal rules of the legal order applicable in the territory of each Member State-to prevent the adoption of new national legislation in force in so far as they are incompatible with Community rules"»[26].

In conclusion, at the present, the goals of the green and digital transitions will be implemented by the Member States in compliance with the principle of sincere cooperation[27] and the legislative acts adopted for different policies where green and digital aspects are introduced accordingly.

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[21] https://ec.europa.eu/info/sites/info/files/en_-_joint_declaration_on_the_conference_on_the_future_of_europe.pdf. Declaration signed by the European Parliament, Council and European Commission.

[22] Art. 48 TEU.

[23] Margot Horspool (Author), Matthew Humphreys (Author), Michael Wells-Greco (Author), Siri Harris (Contributor), Noreen O'meara (Contributor), *op.cit.*, 216: "A typical and increasingly popular ground for action by the Commission is breach by the Member State of the Article 4(3) TEU duty of sincere cooperation. Inadequate implementation of the Union law, in particular, is vigorously pursued by the Commission".

[24] In February 2021, the European Commission has proposed „to set up 10 new European Partnerships between the EuropeanUnion, Member States and/or the industry. The goal is to speed up the transition towards a green,climate neutral and digital Europe, and to make European industry more resilient and competitive. The EU will provide nearly €10 billion of funding that the partners will match with at least anequivalent amount of investment."
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_702.

[25] Art. 5.4 TFEU: „*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*".
See Mihaela-Augustina Dumitrașcu, Oana-Mihaela Salomia, *Dreptul Uniunii Europene II*, (București: Universul Juridic, 2020), 27-30.

[26] Roxana-Mariana Popescu, "Interpretation and enforcement of article 148 of the Constitution of Romania republished, according to the decisions of the Constitutional Court", *Challenges of the Knowledge Society*, Bucharest, 17th-18th May 2019, 13th Edition, 713, http://cks.univnt.ro/cks_2019.html.

[27] Augustin Fuerea, „Brief considerations on the principles specific to the implementation of the European Union law", *Challenges of the Knowledge Society*, 20th-21st May 2016, 10th edition, Bucharest, 396, http://cks.univnt.ro/cks_2016.html: „In this way, three obligations are established in the task of Member States: two positive (the adoption of measures to implement EU law and facilitate the exercise of theUnion's mission) and one negative - not to take any action that would jeopardize the objectives of the Union".

European Union*"*, *Challenges of the Knowledge Society*, 11th-12th May 2018, 12th Edition, http://cks.univnt.ro/articles/12.html;

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THE LEGAL CAPACITY OF THE INDIVIDUAL TO INFLUENCE HUMAN RIGHTS INTERNATIONAL LAW

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Abstract

The legal capacity of the individual in international law is of a complex nature. As a subject in the legal field, the natural person has allowed to reframe the prevailing orthodoxy of the international legal order through jurisprudence. Case by case, the individual is contributing to the structural transformation the world is embedded in by standing for their fundamental rights and freedoms before international courts. Drawing on this bottom-up understanding, this article sets out to discuss whether and to what extent are individual's complaints capable of having an impact on human rights legislation through case law. For this question to be answered, this article begins by providing an overview of the evolution that the international capacity of the human person has undergone in the last decades. This is followed by a comprehensive analysis of the individual complaint procedures foreseen by international legal orders, as well as a comparative research aimed at gathering insights on the access to justice granted to natural persons by European, African and American regional human rights protection systems. Next, the paper assesses the dichotomy between monism and dualism in the particular case of Spain, a debate that is gaining ground in the ambit of the direct application of international law in the domestic legislation. Finally, this article casts doubts on the legitimacy and binding power of human rights international treaties: it is hard to perceive these legal texts as mandatory if they are subjected to national authorities' willingness to incorporate international legal dispositions and resolution into internal legislation

Keywords: *Public International Law, Human Rights, Individual's access to justice, Human Rights Treaty Bodies, International Courts.*

1. Introduction

Every human being is vested with inherent fundamental rights that can be asserted before courts and are to be respected by every political organisation including the State.[1] Yet, the acknowledgment of these rights has not been gained without prior struggle. In fact, individual's access to international courts stands out as one of the greatest accomplishments of a collective effort. The relevance of the chosen topic rests on the critical progress that has been made on the development of the '*corpus juris*' with the adoption of regional and international mechanisms that grant individuals the capacity to lodge a claim for human rights' violation.[2]

Important authors such as Philip Alston[3], Dinah Shelton[4] and Stian Oby Johansen[5] have echoed the proliferation of non-state actors' and their increasing leverage capacity. Even if the bulk of these scholars' literature has been particularly devoted to international organisations, these academics' work has paved the way for other non-traditional actors, including the natural person, to access to justice in the international arena. Soundly align with this diversification of power units and bottom-up approaches, Anne F. Bayesky [6], Sarah Joseph, Katie Mitchell & Linda Gyorki[7], among others, targeted natural person with the aim of empowering individuals with the tools and knowledge required to submit their complaints directly to the international accountability mechanism for a violation of their rights.

Using a doctrinal analysis and a qualitative approach, this contribution aims to build on the previously analysed literature and strives to examine individual's effective capacity to influence international human rights law by rising complaints before international courts and committees. To that end, this paper begins by setting forth an overall assessment of the progress that individual's active legitimation has undergone in the last decades. After the general overview of the historical context, the next section addresses the means that international schemes put at natural person's disposal in order to file a human rights' breach; this is followed by a comparative analysis of individual's legal capacity to stand for their

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[1] Antonio Augusto Cançado Trindade, "Chapter X: The Legal Capacity of the individual as Subject of International Law", in *International Law for Humankind towards a New Jus Gentium* (Netherlands: Martinus Nijhoff Publisher, 2010), 243.

[2] Soledad García Muñoz, "La capacidad jurídico-procesal del individuo en la protección internacional de los derechos humanos", *Revista de Relaciones Internacionales* 17 (1999): 15.

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rights under European, African and American regional human rights law. The fifth section focuses attention on Spain and the conflict that revolves around the direct application of international committees' resolutions. Finally, the last section provides a summary of the main findings and conclusions of my research.

2. Historical evolution

In recent decades, important steps had been taken towards individual complaining procedures. In essence, the development of the individual's direct access to justice reaffirms the position of the natural person as a subject of international human rights law, and provides a set of mechanisms that enable an important shift from classical international law to accommodate the new reality. [8] That said, this section will be looking into the ways in which the right to individual complaints has evolved in the international legal scheme.

Since the adoption of the Universal Declaration of Human Rights in 1948, new regional and international mechanisms for human rights' protection have emerged. The European Convention of Human Rights (ECHR)[9] was one of those initial attempts to ensure the collective protection of human rights in the European region, still, it must be recalled that the enforcement of the Convention lies in the willingness of the Member states of the Council of Europe to comply. After the entry into force in 1953 of the ECHR, the safeguarding of fundamental rights kept gaining ground in the international agenda and up to 11 protocols to the Convention were adopted with the only propose of envisaging an all-inclusive protection and a wider range of unalienable rights under the Council of Europe and its European Court of Human Rights (ECtHR).[10]

Classical protection mechanisms were grounded on treaty commitments to which states were subjected. This traditional observance to human rights gradually shifted from 'weak' forms of protection, such as state report submissions, to a more comprehensive judicial implementation machinery that foresees the active and direct legitimation of the individual to report a human right violation against a contracting Member state.[11] The development of human rights protection mechanisms was also evidenced by the incorporation of new actors. A decade ago, non-state actors' presence in the legal domain was essentially residual and scholars' interest on the subject low. Nevertheless, this category has become increasingly powerful in a very short time frame, and for the foreseeable future, non-state actors are here to stay.[12]

The irruption of emerging global players in the legal picture urged the international community to work towards non-treaty-based methods including customary law and general principles, to ensure a far-reaching protection of human rights.[13] An example of these non-traditional instruments specifically targeted to unalienable rights was provided by the procedure foreseen in ECOSOC resolution 1503. The complaint system developed under this resolution was aimed at putting a halt to "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission"[14]. To that end, the 1503 procedure stipulated a complaint mechanism characterised by the following three features: first, every State, including those States who were not parties of the UN, could be subject of a complaint submitted on the basis of a human right violation; second, a far-reaching and, therefore, flexible interpretation of the 'human right' construct was promoted; and, third, individuals alleging to be victims of a human right violation were entitled to file a complaint. [15]

The 1503 procedure was only the point of departure for individual complaints. Ever since, the procedural capacity to internationally and regionally claim a violation of fundamental rights has only been strengthened. In view hereof, individual complains remain today as a key control mechanism to ensure the effective functioning of the human right protection system, since it provides to those who allege to be victims of a human right breach the entitlement to confront the State party of such violation by submitting a complaint under international law. In essence, individual direct access to justice entails a full-scale legal revolution.[16]

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[8] Ana Gemma López Martin, "La reclamación individual como técnica de control del respeto a los derechos humanos: ¿Comité de Derechos Humanos de Naciones Unidas o Tribunal Europeo de Derechos Humanos?", in *Cursos de Derechos Humanos de Donostia-San Sebastián,* (Bilbao: Universidad del País Vasco, 2005), 227.

[9] Council of Europe, "European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14", ETS 5 (4 November 1950).

[10] Frederik G. E. Sundberg, "Control of Execution of Decision Under the ECHR – Some Remarks on the Committee of Ministers' Control of the Proper Implementation of Decisions Finding Violations of the Convention", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller,* eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 561.

[11] August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in *Non-State Actors and Human Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2005), 37-89.

[12] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 5.

[13] Reinisch, "The Changing International", 37-89.

[14] Economic and Social Council Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) at 8, U.N. Doc. E/4832/Add.1 (1970).

[15] Maxime E. Tardu, "United Nations Response to Gross Violations of Human Rights: The 1503 Procedure Syposium International Human Rights", *Santa Clara Law Review* 20 no.3 (January 1980): 561.

[16] Lopez Martin, "La reclamación individual", 227.

Individual complaints mechanism offers a unique opportunity for natural persons to stand for their rights. Yet, the excess of lawsuits filed to date has limited individual's access to international jurisdictions. The Council of Europe has attempted to address this problem through the adoption of a set of modifications included in Protocol nº 14 of May 13, 2004. Nevertheless, these measures have been subject of criticism as they may hinder individual's access to the ECtHR and therefore compromise the credibility of the European human rights protection system. Therefore, it should be born in mind that despite important advancements have been made in the field of human rights and their protection, there is still a lot to work on.[17]

3. How to file a human rights complaint through current international mechanisms

In spite of significant and positive developments in the safeguarding of fundamental rights, additional mechanisms are called for in order to guarantee a comprehensive framework that foresees the lodging of individual complaints.[18] Since the 1970s, the legal capacity of the individual has wound its way within international law to the point of being a matter of active concern among scholars in the legal field.[19] In the following, this section examines under which circumstances are natural persons entitled to formulate, directly, complaints before international and regional courts and committees.

3.1. Universal protection of human rights

The UN provides to individuals a set of mechanisms to vindicate their human rights under international law. Once national remedies have been exhausted, an individual has the legal capacity to bring a complaint before a UN Treaty Body or the UN Human Rights Council.

To begin with, the UN Human Rights Council has developed a special procedure for individuals who allege patterns of gross human rights violations to submit a complaint against a UN Member state. This procedure adopted by resolution 5/1 of 18 June 2007 is grounded on the previously analysed 1503 mechanism and is characterised by the principles of impartiality, objectivity and efficiency. This improved and victim-oriented mechanism consists of four stages. After an initial examination of the facts that allegedly constitute a human rights breach, the complaint is handed to the concerned State to respond. This first analysis is followed by a deeper examination carried out by the Working Group on Communications, which analyses if there are substantive grounds to consider a pattern of gross violations of human rights. Building on the information gathered and the recommendations made by the Working Group on Communication, the Working Group on Situations is responsible for presenting a report on the matter that will help the Council to determine how to proceed. Finally, the Council has to decide whether or not to continue considering the complaint and if further evidences or monitoring mechanisms are required. The Council may also recommend to OHCHR to lend technical assistance to the relevant Member state. [20]

A universal alternative mechanism to submit a complaint for human rights violation is the one foreseen in the UN Treaty Bodies. Provided that a country has accepted the competence of these committees to consider individual communications, a national of a State party who alleges to be a victim of a violation by a Member state, is entitled to lodge or formulate a complaint invoking the protection that these Treaty Bodies grant.

- International Covenant on Civil and Political Rights (ICCPR): This Convention foresees, in the first article of its Optional Protocol, the competence of this Treaty Body to receive communications from individuals.[21] According to 2016 data, the Committee counts with the highest number of communications received by the UN Human Rights Treaty Bodies (2,932 cases) since taking effect in 1976.[22]

- International Convention on the Elimination of all Forms of Racial Discrimination (CERD): The Committee on the Elimination of Racial Discrimination recognises in article 14 of the Convention that rules its activity, the CERD, the entitlement of this second body to consider individual communications.[23] Even if this Convention was adopted just a year after the ICCPR, it was not until the ten Member states agreed on the individual complaint procedure that the article 14 of the CERD became operative. [24] Since it went into operation

[17] José Manuel Sanchez Padrón, "El Recurso Individual ante el Tribunal Europeo de Derechos Humanos: Evolución y Perspectiva", *Revista Europea de Derechos Fundamentales* 18, (second semester 2011): 169.

[18] García Muñoz, "La capacidad jurídico-procesal", 15.

[19] Oficina del Alto Comisionado de Naciones Unidas, "Procedimientos para presentar denuncias individuales en virtud de tratados de derechos humanos de las Naciones Unidas", *Folleto informativo* 7, no. 2. (2013): 1.

[20] UN Human Rights Council, "Frequently asked questions", accessed February 2, 2021, https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/FAQ.aspx

[21] UN General Assembly, "Optional Protocol to the International Covenant on Civil and Political Rights", *United Nations Treaty Series*, vol. 999 (19 December 1966).

[22] Marc Limon, "Part II: Where are we today?" Policy Report: Reform of the UN Human Rights Petitions System, *Universal Rights Group* (January 2018): 20.

[23] UN General Assembly, "International Convention on the Elimination of All Forms of Racial Discrimination", *United Nations Treaty Series* vol. 660, (21 December 1965).

[24] Limon, "Part II", 12.

in 1982, and up until 2018, the CERD had only adopted final opinions on the merits on 36 complaints.[25]

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT): In its article 22, the Convention contends that this Committee has the authority to examine complaints submitted by individuals.[26] According to the data published in the 2019 Report of the Committee against Torture, since the CAT entered into force in 1989, the Committee has registered 1003 complaints, 192 of those complaints are pending and in 158 cases the Committee found a violation of the Convention[27].
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): The Optional Protocol to this Convention envisages on its article 2 a communication procedure that provides individuals the opportunity to stand for their rights via the formulation of an individual complaint to the Committee.[28] Based on the data published in 2016, with 40 more State parties than committees such as the CAT, only 110 communications have been received by the CEDAW since its entry into force in December 2000.[29]
- Convention on the Rights of Persons with Disabilities (CRPD): The first article of the Optional Protocol to the Convention recognises the competence of the Committee to receive individual communications.[30] Despite being one of the latest Committees becoming operational (2008), it is endorsed by a large number of Member states (92); yet, in its first eight years functioning it only dealt with 40 communications.[31]
- The following three committees are the last procedures brought into operation: The Committee on Enforced Disappearances (CED); the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of the Child (CRC). Three committees may consider communications lodged by natural persons that allege to be victims of a violation. The individual complaint procedure is foreseen in article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance [32]; article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights[33]; and article 5 of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure[34]. Based on the data published in 2016, these three committees received the lowest number of total communications: 20, 29 and 21 respectively. [35]
- Finally, although it has not yet entered into force, it is worth mentioning that complaints can be brought by an individual before the Committee on Migrant Workers (CMW). In this regard, article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides the CMW the competence to consider individual communications. Yet, in order to bring the analysed provision operational, a declaration from ten States parties recognising the individual complaint proceeding is required.[36]

Despite the formal process that the UN Human Rights Treaty system made available to individuals, it must be noted that the decisions that emanate from the obligations contained in the UN Treaty Bodies are not legally binding. UN resolutions cannot be enforced in internal courts and there is no international enforcement police that can guarantee the implementation of the decisions. Therefore, the fulfilment of the UN resolutions lies on the willingness of each contracting State to do so.[37]

3.2. European regional protection of human rights

At the emergence of the then called European Communities, now known as the EU, the regional organisation ability to perform was limited and targeted to economic cohesion and growth. The economic driving force behind the creation of the European Communities, as well as the presumption that the belonging of its Member states to the ECHR was enough guarantee of human rights protection, explains the failure to mention any norm related to fundamental rights in the original constitutional treaties of the EU.

[25] UN General Assembly, "Report of the Committee on the Elimination of Racial Discrimination", *Seventy-fourth Session* Supplement no. 18 (August 2019), 18 A/74/18.

[26] UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *United Nations Treaty Series* vol. 1465 (10 December 1984).

[27] UN General Assembly, "Report of the Committee against Torture", *Seventy-fifth Session* Supplement No. 44. (2020),11 A/75/44

[28] UN General Assembly, "Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women", *United Nations Treaty Series* vol. 2131 (6 October 1999), 83.

[29] Limon, "Part II", 21.

[30] UN General Assembly, "Optional Protocol to the Convention on the Rights of Persons with Disabilities", *Treaty Series*, vol. 2518 (13 December 2006), A/RES/61/106.

[31] Limon, "Part II", 21.

[32] UN General Assembly, "International Convention for the Protection of All Persons from Enforced Disappearance", Treaty Series, vol. 2716 (20 December 2006), 3, A/RES/61/177.

[33] UN General Assembly, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly" (5 March 2009), A/RES/63/117.

[34] UN Human Rights Council, "Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council" (14 July 2011), A/HRC/RES/17/18.

[35] Limon, "Part II", 21.

[36] UN General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families", (18 December 1990), A/RES/45/158.

[37] Anne F. Bayefsky, "Chapter II. Introduction to Complaints procedures", in How to Complain to the UN Human Rights Treaty System (New York: Transnational Publisher, 2002), 37-38.

Yet, the declaration of the principle of direct effect and the prevalence of the Union law over those domestic legislations, where, unlike in the EU legal order, fundamental rights were envisaged, casted doubts on whether this primacy could lead to human rights violations.[38] In this regard, the Court of Justice of the European Union (CJEU) ruled in the landmark case Erich Stauder v City of Ulm – Sozialamt, judgment of the Court of 12th of November 1969, that the fundamental human rights are "enshrined in the general principles of Community law and protected by the Court".[39]

In view hereof, there are two regional binding legal texts in the EU, both competent to intervene in human rights matters: ECtHR, responsible for enforcing the ECHR; and the CJEU, in charge of guaranteeing the implementation of the Charter of Fundamental Rights of the European Union (CFREU).[40]

As previously mentioned, EU Member states are contracting parties of the ECHR; yet, the EU is not a member itself. Nevertheless, the accession of the Union to the Convention of the Council of Europe has been a subject of ongoing debate and visible steps have been taken towards this accession[41]: the Lisbon Treaty included in article 6 of the TEU that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." It is, however, worth drawing attention on the sentence that concludes the referred legal disposition and states that "such accession shall not affect the Union's competences as defined in the Treaties." On account of the subjection to the ECtHR's resolutions that would imply the accession of the EU to the Convention, the relevant authorities deemed right to submit a preliminary ruling to the CJEU. The Court filed against the accession of the EU in its Opinion 2/13, arguing a set of incompabilities between the two legal texts that need to be addressed.[42]

One of the incompatibilities alleged by the CJEU to oppose the accession of the Unión to the ECHR is that contained in articles 33 of the ECHR and 344 of the Treaty on the Functioning of the European Union (TFEU)[43]. The first of the mentioned legal precepts provides that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party". In this regard, article 55 of the same legal body adds an "exclusion of other means of dispute settlement" and states that "the High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

The CJEU interprets these cited dispositions as a possibility for the ECtHR to disregard the exclusive jurisdiction that according to the article 344 of the TFUE, the CJEU holds when deciding on any dispute between Member states on subjects of EU law that may, occasionally, interfere on ECHR related matters. A possible solution of the analysed incompatibility could be contained in a legal precept directly correlated with the object matter of analysis in this paper: the active legitimation of the individual. Article 35.2.b) of the ECHR stipulates on the admissibility criteria of the individual application, and states that the Court shall not deal with any application submitted under article 34 that "is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information." This last legal precept lays out the subsidiary jurisdiction of the ECtHR, which can only be invoked once national remedies have been exhausted, and provided that the case has not been brought to another legal international proceeding. In accordance with the terms set forth in article 344 of the TFEU and the subsidiarity foreseen in article 35 of the ECHR, the disputes that arise between EU Member states could continue to be solved by the CJEU. [44]

On account of relevant authorities' inability to bring to realisation EU's accession to the ECHR, contemporary mechanisms provide individuals with the capacity to vindicate their rights before the CJEU and the ECtHR. With regard to the CJEU, the so-called Van Gend en Loos case acknowledged "that community law has an authority which can be invoked by their nationals before those courts and tribunals".[45] To do justice to this claim the EU developed a set of

[38] Ottavio Marzocchi "The protection of fundamental rights in the EU", European Parliament, accessed January 25, 2021, https://www.europarl.europa.eu/factsheets/en/sheet/146/la-proteccion-de-los-derechos-fundamentales-en-la-union-europea.

[39] Court of Justice of the European Union, "Erich Stauder v City of Ulm - Sozialamt.", (C-29/69), judgment of 12 November, 1969, ECLI:EU:C:1969:57.

[40] CARISMAND: Culture and Risk Management in Man-made and Natural Disasters, "Report on European fundamental rights in disaster situations", Horizon 2020 Programme Secure societies – Protecting freedom and security of Europe and its citizens Collaborative and Support Action (August 2016): 23.

[41] Isiksel Turkuler, "European Exceptionalism and the EU's Accession to the ECHR", European Journal of International Law 27, no. 3, (October 2016): 566.

[42] Court of Justice of the European Union, "Opinion 2/13 pursuant to Article 218(11) TFEU", judgment of 18 December, 2014, ECLI:EU:C:2014:2454.

[43] European Union, "Consolidated version of the Treaty on the Functioning of the European Union" (13 December 2007), 2008/C 115/01.

[44] Alexandros-Ioannis Kargopoulos, "ECHR and the CJEU: Competing, overlapping, or Supplementary Competences?", in *Eucrim the European Criminal Law Associations' Forum, 3*, (2015): 98.

[45] Court of Justice of the European Union, "Van Gend en Loos v. Nederlandse Administratie der Belastingen", (C-26/62), judgment of 5 February, 1963, ECLI:EU:C:1963:1.

protection mechanisms that entitle individuals to file human right complaints, including the action for annulment (article 263 TFEU), the action for failure to act (article 265 TFEU) and the action for damages (article 268 TFEU). Nevertheless, it is important to underline that an individual does not have the capacity to take action neither against another natural or legal person nor a Member state of the Union before the CJEU.[46]

The fourth paragraph of the cited article 263 of the TFEU provides that any natural or legal person may "institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.". In view hereof, the Case European Union Copper Task Force v Commission states that the cited legal precept "must be interpreted in the light of the fundamental right to effective judicial protection" as it is framed within "a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the European Union judicature".[47] It is yet to mention that according to a study published by Takis Tridimas and Gabriel Gari, between 2001 and 2005, from a total of 340 appeals for annulment, only 30 of these actions were filed by natural persons; moreover, of these 30 actions, only 2 were successful. That said, it is worth noting that those two actions that were estimated were filed by a scholar and a former MEP. This evidences that the chance of a proceeding instituted by a natural person with no specific knowledge and previous experience in the EU being successful is very low.[48]

Opposite to article 263 of the TFEU, which demands a direct or individual concern from "non-privileged applicants", article 265 of the TFEU provides a broader locus standi by stipulating that any natural or legal person may "complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion". To conclude with the litigation before the CJEU by private parties, the judgment of the Court of 10th of July, 1985 (CMC Cooperativa muratori e cementisti and others v Commission of the European Communities) ruled that any person who claims to have been injured by acts or conducts of an EU institution must "have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the community"[49]. Even if this right cannot be deduced from the wording of articles 268 and 340 of the TFEU, it can be derived from the manner these dispositions are foreseen in the Treaty and the CJEU case-law.[50]

As far as the ECtHR is concerned, the ECHR stipulates in its article 34 that "the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto."[51] In this regard, the case-law of the ECtHR has established that complaints grounded 'in abstracto' violations of the ECHR are not admissible.[52] Yet, there may be exceptions to the general rule, this was evidenced in the case Klass and Others v. Germany, where the ECtHR accepted "that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him."[53]

Further limitations to individual complaints before the ECtHR are foreseen in article 35 of the Charter which enumerates a set of admissibility criteria: first, the Court requires to the domestic remedies being exhausted before bringing the case to the ECtHR; second, the Court will not deal with any application that is either anonymous or it has been already considered by the ECtHR or other international court; third, the Court must declare inadmissible an individual application if it is in breach with the Convention or the applicant has not suffered prejudice; and, finally, the ECtHR is competent to reject, at any stage of the proceeding, an application that is estimated to be objectionable under this article 35 of the ECHR.

4. Individual complaints before different regional jurisdictions

In the previous section, the evolution of the most effective human rights protection system was analysed: the European system. The effectiveness of this regional scheme is largely due to the ECtHR, a judicial body with compulsory jurisdiction. Although the ECtHR is not the only European Court that issues binding judgements, it is, without a doubt, the regional body

[46] "Derechos fundamentales", Portal Europeo de e-Justicia, accessed January 18, 2021, https://e-justice.europa.eu/content_fundamental_rights-176-es.do.

[47] Court of Justice of the European Union. "Case European Union Copper Task Force v. Comission" (C-384/16 P), judgment of 13 March, 2018, ECLI:EU:C:2018:176.

[48] Takis Tridimas and Gabriel Gari, "Winners and Losers in Luxembourg: A Statical Analysis of Judicial Review before the European Court of First Instance (2001-2005)", *European Law Review* 2, (April 2010): 159-160.

[49] Court of Justice of the European Union, "Cooperativa muratori e cementisti and others v Commission of the European Communities" (case C-118/83), judgment of 10 July, 1985, ECLI:EU:C:1985:308.

[50] Directorate General for International Policy, "Analysis of locus standi before the CJEU", *Standing up for your right(s) in Europe. Locus Standi. European Parliament* (August 2012), 35.

[51] López Martin, "La reclamación individual", 249.

[52] European Court of Human Rights, "Practical Guide on Admissibility Criteria", *Council of Europe* (April 2020), 10.

[53] European Court of Human Rights, "Case of Klass and Others v. Germany", (Application no. 5029/71), judgment of 6 September 1978.

that provides the greatest human rights protection mechanisms in the judicial domain.

In accordance with the terms set forth in previous sections, this part provides a comparative analysis of the American and African human right protection systems in relation to the European counterpart, with special attention given to the individual complaint procedure foreseen by each regional system.

4.1. American human rights protection

The American Convention on Human Rights (ACHR) is the pillar that upholds the Inter-American system for the protection of human rights. The first article of the Convention obliges every States subscribing to the Pact of San José (November 1969) to respect the rights and freedoms recognised in the Convention, and to guarantee that every human being subjected to the jurisdiction of State parties holds, without any discrimination, the ability to exercise the rights and freedoms provided therein.[54] The supervisory and surveillance bodies of the Inter-American protection system are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (IACtHR), both bodies share competence with respect to matters relating to the fulfilment of the commitments made by the contracting parties of the Convention.[55]

Framed within these control mechanisms, individual complaints lie at the heart of the scheme. Article 44 of the Convention provides that any person "may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."[56] Unlike the ECHR, the ACHR does not require to certify the status of victim in order to submit a communication; hence, this legal provision offers the opportunity to any individual to file a complaint against a contracting State party.[57] Although it provides a broader entitlement than the Convention of the Council of Europe, communications submitted under the ACHR are still subjected to the admissibility requirements of the American Convention's article 46, criterions that are very similar to the ones established in the previously anlaysed article 35 of the ECHR.

Once an individual complaint has been lodged and a decision in this regard is ruled by the IACtHR, the judgment is binding not only among the parties involved in the dispute but also 'erga omnes partes', with national authorities, ex officio, being subjected to it. The binding character of the jurisprudence responds to the role that the Court plays as the preeminent interpreter of the ACHR and guarantor of the effective protection of human rights in the American region.[58] In this regard, the IACtHR states that those judgments that have the force of res judicata "should necessarily be complied with since it entails a final decision, thus giving rise to certainty as to the right or dispute under discussion in the particular case, its binding force being one of the effects thereof."[59]

4.2. African human rights protection

The Charter of the Organization for African Unity (OAU) does not assign a primary role to the promotion and protection of human rights. Thus, on June 27, 1981, the African Charter on Human and Peoples' Rights (ACHPR) was adopted in Banjul, with the aim of guaranteeing a human rights protection framework in the African region. Almost two decades later, the OAU aimed to enhance the African Charter establishing a judicial body capable of adopting binding decisions: the African Court of Human and Peoples' Rights (ACtHPR). [60] With 31 State parties having ratified the protocol that established the ACtHPR, this judicial organ was brought into operation in 2004. [61]

As with the previously analysed two regional human rights safeguarding systems, ACPHR envisages in its article 55 an individual complaint proceeding by which members of the Commission may consider "communications other that those of States Party".[62] Nevertheless, the consideration of these communications is subjected to what is established in article 56 of the Charter: the communication cannot be anonymous or be written in "disparaging or insulting language"; it must be consistent with the Charter of the Organisation; it cannot be "based exclusively on news disseminated through mass media" or deal with "cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter"; and, finally it has to be submitted once local remedies are exhausted and within the period of time set by the

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[54] Eduardo Ferrer Mac-Gregor Poisot and Carlos María Pelayo Möller, "Capítulo 1: Enumeración de deberes", in *Convención Americana sobre Derechos Humanos*, ed. Christian Steiner and Marie Christine Fuchs (Berlin: Konrad Adenauer Stiftung, 2019), 54-55.

[55] Felipe Gonzalez Morales, "La Comisión Interamericana de Derechos Humanos: antecedentes, funciones y otros aspectos", *Anuario de Derechos Humanos* (2009): 35.

[56] Organization of American States (OAS), "American Convention on Human Rights, Pact of San Jose", (22 November 1969).

[57] Michelo Hansungule, "Protection of Human Rights Under the Inter-American System", in *International Human Rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, eds. Gudmundur Alfredsson, Jonas Grimheden, Bertrand G. Ramcharan, and Alfred Zayas (The Hague: Kluver, 2001), 700.

[58] Sergio García Ramírez, "The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions", *Notre Dame Journal of International & Comparative Law, 5*: Iss. 1, Article 5. (2015): 136.

[59] Inter-American Court of Human Rights, "Case of Acevedo-Jaramillo et al. v. Peru", judgment of February 7, 2006.

[60] Lopez Martin, "La reclamación individual", 253.

[61] "The African Court in Brief", African Court on Human and People's Rights, accessed January 25, 2021, https://www.african-court.org/wpafc/basic-information/#establishment.

[62] Organization of African Unity (OAU), "African Charter on Human and Peoples' Rights (Banjul Charter)", 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

Commission. In this regard, articles 6 and 34.6 of the Court's Protocol add further admissibility criteria and establish the requirement of States making a declaration agreeing on the competence of the ACtHPR to cases brought by an individual before the Court be considered. As of 2011, only 11 African countries accepted the competence of the Court to examine natural persons' complaints.[63]

To conclude with this section, it is key to analyse the compliance of the analysed regional mechanisms in order to evaluate the effective impact of individual complaints. Data evidences disparities between the three examined regions: ECtHR's decisions enjoy the highest rates of implementation, 56%; second is the IACtHR with 20% of its decisions being implemented, and, finally, in third place, is the African region, with a mere 14 %. Yet, this data cannot be fully interpretated without taking into account the flexibility that each court provides in the field of remedies. The ECtHR, for example, dispenses a wide scope of action for internal systems to redress the violation; opposite, the IACtHR lays out specific remedies that hinder the full implementation of the solution.[64]

5. Case Study: Spain - monism and dualism

Since international law broadens its scope of application, it should not come as a surprise an increase of tensions between national and international legislations.[65] As a means to address these problems, the academia has developed two major theoretical perspectives to approach the incorporation of international law into domestic legal order: monism and dualism. On the one hand, monism is grounded on the principles of unity and subordination. This first category postulates that both legal systems belong to a single body of law where legal norms are subordinated in a hierarchical order and the international law prevails. On the other hand, dualism is based on the premise that international law and domestic law are two equal, independent and separate systems. Unlike in the monist approach, there is no relationship of dependence or subordination, hence, in order to an international norm being applied in the domestic field, a prior incorporation is required.[66]

The Spanish Constitution foresees in the first paragraph of its article 96, that international treaties shall form part of the internal legal order on the condition that they are validly concluded and officially published.[67] Given the fact that publication of an international treaty is an essential requirement for international treaties to be directly applicable in Spain, it has been long discussed whether the system of national implementation is either monist or dualist. Professor Araceli Mangas Martin stands for a middle ground between these two models of integration and advocates a moderate monism. This approach is based upon the position that international treaties bind Spain from their entry into force in the international order and do not require transposition to be part of domestic law, only their publication.[68]

There is a constant caselaw of the Spanish courts which argues in favour of the automatic reception of international treaties.[69] A different, albeit related, matter is the internalisation of resolutions and opinions that emanate from international committees such as the Human Rights Committee. The relevance of these Committees rests on the role they play in treaty interpretation. When it comes to addressing the nature and scope of the dispositions foreseen in the treaties these Committees are grounded on, the contribution of these bodies is key. It is, thus, difficult to understand Spanish legal authorities' reluctance to frame these Committees' opinion and resolutions under article 10.2 of the Spanish Constitution.[70]

Article 10.2 of the Spanish Fundamental Norm complements the integrating role provided in article 96 of the same legal body. The tenth article of the Constitution establishes that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain." This disposition involves an obligation as to the result to be achieved: the meaning and extent attributed to constitutional rights and freedoms by the Spanish Public Powers must align or correspond to the ones attributed by international treaties. In this line, Cesareo Gutiérrez, Professor of International Law and International Relations in the University of Murcia, lays down the dichotomy of the obligation of result: Gutiérrez argues that this imperative relates to a negative strand or prohibition, as it bans any restricting interpretation of constitutional rights and freedoms that is not compatible with what has been stated in the

[63] "About us", African Commission on Human and Peoples' Rights, accessed January 25, 2021, https://www.achpr.org/afchpr/.

[64].Vera Shikhelman, Implementing Decisions of International Human Rights Institutions – Evidence from the United nations Human Rights Committee. *The European Journal of International Law*, 30, 3 (2019): 758.

[65].Mattias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", *The European Journal of International Law* 15, no.5, (2004): 915.

[66].Yezic Carrillo De La Rosa and Oscar Manuel Ariza, "Teorias aplicables al derecho internacional e interamericano de derechos humanos", *Revista Jurídica* 11, no. 21 (April 2018), 116-119.

[67].Spain. Cortes Generales. "The Spanish Constitution". *BOE*, 311, 1978.

[68].Araceli Mangas Martin, "La Recepción del Derecho Internacional por los ordenamientos internos", in *Instituciones de Derecho Internacional Público*, ed. Manuel Diez de Velasco (Madrid: Tecnos, 2013), 251.

[69].Mangas Martin, "La Recepción del Derecho Internacional", 256.

[70].Maria Eugenia Torres Costas, "Nacimiento de artículo 12 de la Convención de Naciones Unidas sobre Derechos de las personas con dicapacidad: El cambio de paradigma", in *La capacidad jurídica a la luz del artículo 12 de la Convención de Naciones Unidas sobre los Derechos de las personas con Discapacidad* (Madrid: Agencia Estatal Boletín Oficial del Estado, 2020), 109.

international human right treaties ratified by Spain; yet, the obligation introduced by article 10 also demands public authorities to agree on the most favourable interpretation, the one that guarantees the greatest effectiveness of international regulations.[71]

The reticence of Spanish legal authorities to assimilate under the analised article 10.2 the decisions and opinions of important international committees is evidenced in verdicts such as the Resolution number 141/2015, of February 11, of the Spanish Supreme Court, ruling that states that the UN Human Rights Committee "does not have a jurisdictional nature, so that its resolutions or opinions lack the ability to create a doctrine or precedent that could bind this Criminal Chamber of the Supreme Court". A similar line of interpretation was adopted by the Constitutional Court in its resolution number 70/2002 of the 7th of April, and by the Spanish Supreme Court among which the following judgements are noteworthy: the resolution of the 9th of March of 2011 (cassation appeal number 3862/2009), the resolution of the 25th of July of 2002 (revision appeal number 69/2001) and the resolution of the 9th of November of 2001 (cassation appeal number 28/2001). [72]

However, the 17th of July of 2018, the Supreme Court adopted the resolution number 1263/2018 and broke with the previous trend of jurisprudence by agreeing on the application of an opinion dictated by a committee of which Spain is a contracting party. The Supreme Court ruling argues that "the decisions of the international bodies that are related to the execution of the decisions of the international control bodies, whose competence Spain has accepted, once they are received in the terms of article 96 of the Fundamental Norm, form part of our internal legislation and enjoy the hierarchy that this article -supralegal rank- and article 95-infra-constitutional rank- confer on them "[73].

The Spanish court built this last resolution on the argument that the refusal to comply with the committee's opinion would entail a violation of the applicant's human rights, and added that "although neither the Convention nor the Protocol regulate the executive nature of the Opinions of the CEDAW committee, it cannot be doubted that they will be binding / mandatory for the State party that recognized the Convention and the Protocol, since Article 24 of the Convention provides that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.' " The Supreme Court also invoked articles 1[74] and 7.4[75] of the Optional Protocol to reinforce the competence of the committee recognised by Spain.

The arbitrariness of the Spanish Supreme court regarding the assimilation of these committees' decisions and opinions jeopardises the right to a fair trial, and hinders the confidence of the public in the judicial system. In this regard, the ECtHR argued in the case Beian v. Romania (No. 1) that this lack of consistency "is in itself contrary to the principle of legal certainty, a principle which is implicit in all the articles of the Convention and constitutes one of the basic elements of the rule of law".[76] Further, the same court added in the case Nejdet Şahin and Perihan Şahin v. Turkey that "if justice is not to degenerate into a lottery, the scope of litigants' rights should not depend simply on which court hears their case." [77] Therefore, a clear set of guidelines is fundamental in order to guarantee a coherent approach and avoid any disassociation between State's internal and external activity. [78]

For the sake of human rights protection, these action guidelines should align with the examined last ruling of the Supreme Court, the resolution of the 17th of July of 2018. It is important to bear in mind that as analysed in a previous section (third section), most of the mechanisms provided by the UN are grounded on a group of international committees that are responsible for monitoring compliance with human rights treaties. Therefore, it can be concluded that if the Spanish legal authorities do not agree on a line of interpretation that favours first, the internalisation of Treaty Body decisions within domestic legislation, and, second, their capacity to set precedent, the individual complaint procedures lose its raison d'être.

6. Conclusions

Upon closer analysis, this paper concludes that the capacity of the individual to influence human rights international law is rather limited. Despite positive advancements in the field of human rights, the

[71] Cesáreo Gutiérrez Espada, "La Aplicación en España de los Dictámenes de Comités Internacionales: La STS 1263/2018, un Importante Punto de Inflexión", *Cuadernos de Derecho Transnacional* 10, no. 2 (September 2018): 847.

[72] Torres Costas, "Nacimiento de artículo 12", 110.

[73] Original text: "las decisiones de los órganos internacionales relativas a la ejecución de las decisiones de los órganos internacionales de control cuya competencia ha aceptado España forman parte de nuestro ordenamiento interno, una vez recibidas en los términos del artículo 96 de la Norma Fundamental, y gozan de la jerarquía que tanto este artículo -rango supralegal- como el artículo 95 -rango infraconstitucional- les confieren".

[74] Article 1 of the Optional Protocol "A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Elimination of Discrimination against Women ("the Committee") to receive and consider communications submitted in accordance with article 2".

[75] Article 7.4 of the Optional Protocol "The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee."

[76] European Court of Human Rights, "Case of Beian v. Romania (No. 1)" (Application no. 30658/05), judgment of 6 December 2007.

[77] European Court of Human Rights, "Case Nejdet Şahin and Perihan Şahin v. Turkey" (Application no. 13279/05), judgment of 20 October 2011.

[78] Mangas Martin, "La Recepción del Derecho Internacional", 250.

complexity that entails reporting a breach of fundamental rights and the incongruencies that arise in the assimilation of these decisions within domestic law, call for further developments in the guarantee of those inherent rights of which every human being is holder.

Building on the Universal Declaration of Human Rights (1948), the world has gradually evolved to accommodate a new era characterised by a growing awareness of the human rights field, and a greater presence of the natural person as a subject of international law. Classical schemes are progressively shifting towards comprehensive mechanisms that are better at delivering protection by envisaging the participation of the natural person in the law-making process.

That said, the UN as well as the European, American and African conventions offer to every human-being means to vindicate their rights through individual complaints, yet, all these mechanisms are subjected to the initial willingness of the State to commit to these conventions, as well as the prior exhaustion of domestic remedies. That said, it is important to bear in mind that the lack of an international enforcement body and the reluctancy of national courts to assimilate international committees' opinions weakens the strength of many international resolutions, leaving, once again, to the discretion of nation-states the observation of the obligations that emanate from these international decisions. Thus, although significant steps have been made in favour of the natural person, much needs to be done, at both regional and global level, to improve the access to justice of every individual in line with the principle of equity of arms.

Central to meet this need of improvement is the development of a common consistent approach in the national reception of international resolutions and decisions. Spanish authorities' lack of consensus leads to inconsistencies on law-making and may lead to a breach of the right of a fair trial. Hence, the findings of this research evidence the relevance of setting a clear and stable criterion that favours the direct assimilation of international committees' opinions. This agreed line of interpretation would grant greater congruency and therefore, further protection.

The legal capacity of the individual is a matter of an active concern, therefore future research is needed to address the many questions that arise as the debate moves forwards. Will, in the future, individuals themselves be able to claim their legal capacity by vindicating their role before international courts? Or will they always be constrained by an international structure that favours the State? Given the progress that the natural person has made in the global legal scheme, will individuals be granted access to the International Court of Justice? And in a regional level, will the adhesion of the EU to the ECHR limit the discretion in the enforcement of the ECtHR's resolutions by assimilating this court's judgments within EU law, and, thus, reinforcing their binding character? If this adhesion does not occur, will the individual be entitled to bring a case against a Member state before the CJEU? All these questions that emerge from the challenging nature of the subject are issues for future research to explore.

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THE COORDINATION OF SOCIAL SECURITY SYSTEMS AFTER BREXIT - DISPOSITIONS APPLICABLE FROM 1 JANUARY 2021 AND POTENTIAL LEGISLATIVE CHANGES

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Abstract

The European Union's secondary law includes several regulations and dispositions concerning the social security rights enjoyed by nationals of the EU Member States, nationals of Iceland, Norway, and Liechtenstein (as states which are part of the European Economic Area), Switzerland, stateless persons, and refugees who reside in one of these states, as well as citizens from third-party states, if they legally reside on the EU's territory and have exercised their freedom of movement.

As a consequence of the United Kingdom's withdrawal from the EU, it has become necessary to clarify the legal status and social security rights that individuals falling into one of the aforementioned categories enjoy, whether they be British citizens whose contributions have been paid in an EU Member State, or citizens of an EU Member State whose contributions have been paid in the UK. The Withdrawal Agreement concluded between the United Kingdom and the European Union covers the cross-border situations in existence at the end of the transition period, which concluded on 31 December 2020. The Trade and Cooperation Agreement between the EU, Euratom, and the UK, which was signed on 30 December 2020, contains provisions regarding the coordination of social security systems between the parties to the Trade and Cooperation Agreement, largely borrowing from the existing EU legislation on the matter, but also diverging from it in some aspects. This article will analyse the relevant provisions of the Withdrawal Agreement, those of the Trade and Cooperation Agreement, as well as potential legislative changes concerning the coordination of social security systems.

Keywords: *Social security – Brexit – Regulation (EC) no. 883/2004 on the coordination of social security systems – Trade and Cooperation Agreement – Withdrawal Agreement.*

1. Introduction

The free movement of persons is one of the four fundamental freedoms of the European Union's internal market, alongside the free movement of goods, capitals, and services,[1] and it represents a key aspect of the European citizenship.[2] When a person works in a state that is different from their state of origin, or when they're detached or posted to another state, an issue of particular interest is that of the social security system they will contribute to, with the obvious risk being that of having to contribute to two (or more) such systems. The coordination of social security systems is thus essential to ensuring that the persons exercising their freedom of movement are guaranteed social security protection when moving from one Member State to another, and that they don't lose accrued benefits. To that purpose, EU law on the subject matter follows four principles: non-duplication (persons in cross-border situations are subject to the legislation of a single state), non-discrimination (they must enjoy the same rights as the citizens of the state to whose legislation they are subject), aggregation (periods of work carried out in different EU Member States all count towards contributory benefits), and exportability (benefits earned in one Member State carry over to another, when the beneficiary moves).[3]

As long as the United Kingdom was a Member State of the European Union, it complied with the organisation's legislation in this matter, following the four principles, but the British state's departure from the Union means that EU law will no longer apply to it. 1 January 2021 marked the end of the transition period introduced by the Withdrawal Agreement[4] concluded between the EU and the UK. The contents of said Agreement ensure that citizens finding themselves in a cross-border situation at the end of the transition period will continue to be protected in accordance with EU legislation on the matter of social security, for as long as the cross-border situation continues without interruptions. In the case of cross-border situations

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[1] EU law provisions regarding the four freedoms of movement also apply to the three states (Norway, Iceland, and Liechtenstein) that are part of the European Economic Area alongside the EU Member States, as well as in Switzerland's case, by way of a series of bilateral agreements concluded between the state and the EU. For more on the free movement of persons, see Augustin Fuerea, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic, Bucharest, 2016.

[2] Introduced through the Treaty of Maastricht, which was signed in 1992 and came into force in 1993. For more on this subject, see Augustin Fuerea, *Manualul Uniunii Europene*, Sixth Edition, Universul Juridic, Bucharest, 2016, p. 68, and Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015.

[3] Meghan Benton, 'Reaping the Benefits? Social Security Coordination for Mobile EU Citizens,' *Policy Brief Series*, Issue No 3, Migration Policy Institute, Brussels, 2013, p. 3.

[4] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12019W%2FTXT%2802%29 (accessed on 20 March 2021).

occurring, between the EU and the UK, from 1 January 2021 onwards, the applicable provisions are those contained in the Trade and Cooperation Agreement,[5] signed on 30 December 2020 by the two parties, which includes a Protocol on the matter of social security, governing newly occurred cross-border situations.

2. Historical aspects and current EU secondary legislation on the matter of social security coordination

The UK's position on the matter of free movement of workers (and, implicitly, aspects related to the social security awarded to cross-border workers) and border control has been one influenced, in part, by its status as an island state,[6] a status which was invoked to explain its decision to opt out of the Schengen acquis. At the time, the UK's argument was that the possibility of strictly controlling its borders, a possibility awarded by it being an island, was too valuable to forego in favour of joining the Schengen Area. The UK's objection was solely focused on the issue of the elimination of border controls on persons, and the risk it would supposedly pose, while considering the elimination of internal frontiers with respect to goods, services, and capitals a desirable and advantageous development.[7] Despite signing the Single European Act,[8] which 'contributed to the Community's competence to adopt legislation in the field of social policy' and set the stage for the future adoption of the Community Charter of the Fundamental Social Rights of Workers in 1989, the UK chose not to adopt the Charter, and later chose to opt out of the Social Chapter annexed to the Maastricht Treaty, in the form of a Protocol which 'provided the EU with greater legislative competences and enhanced the role of the social partners and collective agreements at EU level'.[9] The UK started following the EEC's legislation on this matter in the late 1990s, when the Treaty of Amsterdam[10] consolidated all the existing dispositions on Social Policy in a single title.

At present, according to the UK's national provisions, employees and employers both are liable to pay UK National Insurance contributions (NICs), if they are resident, present, ordinarily resident, or have a place of business (in the case of employers) on the UK's territory. While the UK was a member of the European Union, employees who were nationals of an EU Member State, Norway, Iceland (as members of the EEA), or Switzerland had their social security rights protected under EU legislation. After the UK's withdrawal from the EU, this must naturally change.

At the supranational level, there have been provisions on the coordination of social security systems ever since the European Economic Community (today, the European Union) started its existence, with the signing of the Treaty of Rome, in 1957.[11] At the time, the Council (the legislative institution) adopted two regulations concerning the matter of social security for cross-border workers: Regulations No 3/1958 and 4/1958.[12] Ever since, dispositions on this subject matter have expanded, with the EU's institutions aiming to adopt legislation that would offer as thorough protection as possible for the persons exercising their right to freedom of movement. The EU legislation does not replace national legislation on the matter of who is insured, what benefits they receive, and under what conditions, focusing on aspects like the cumulation of periods when the person has been insured on the territory of a Member State, when calculating benefits.

The two 1958 regulations were replaced by Regulation (EEC) No 1408/71[13] and its corresponding Implementing Regulation (EEC) No 574/72.[14] The most recent legislative acts on the matter, which replaced the ones adopted in the 1970s, are Regulation (EC) No 883/2004[15] and its implementing act,

[5] Trade and Cooperation Agreement between the European Union and European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG (accessed on 20 March 2021).

[6] Yves Jorens, Grega Strban, "New Forms of Social Security for Persons Moving Between the EU and the UK?", in Nazaré da Costa Cabral, José Renato Gonçalves, Nuno Cunha Rodrigues (Eds.), *After Brexit. Consequences for the European Union*, Palgrave Macmillan, 2017, p. 271.

[7] Elspeth Guild, "The Single Market, Movement of Persons and Border", *The Law of the Single European Market*, Catherine Barnard, Joanne Scott (eds.), Hart Publishing, 2002, p. 298.

[8] The Treaty was signed in 1986 and came into force in 1987.

[9] Yves Jorens, Grega Strban, *op. cit.*, p. 273.

[10] The Treaty was signed in 1997 and came into force in 1999.

[11] The Treaty came into force in 1958, alongside the Treaty establishing the European Atomic Energy Community, which had also been signed in 1957, in Rome.

[12] Regulation No 3 concerning the social security of migrant workers and Regulation No 4 establishing the methods of implementation and completing the dispositions of Regulation No 3 concerning the social security of migrant workers.

[13] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

[14] Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

[15] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems. The regulation also applies with regards to the EEA and Switzerland.

Regulation (EC) No 987/2009,[16] which came into force in 2010.

Regulation (EC) No 883/2004 on the coordination of social security systems in the EU was modernised and implemented through Regulation (EC) No 987/2009 on coordinating social security systems, which repeals Regulation (EEC) No 574/72. According to Regulation (EC) No 883/2004, social security contributions are payable in a single Member State, usually the one where the person is working, thus ensuring that people exercising their freedom of movement are not liable to pay double contributions. Special dispositions apply to detached workers (persons employed in one Member State, but sent to work in another), and multi-state workers (persons working in two or more Member States), as well as other exceptional situations, like those of self-employed workers. The Regulation contains six titles and eleven annexes. Title I, 'General provisions', lists a series of definitions, the persons and matters covered by the act, and the principles upon which the coordination of the security systems is founded – equality of treatment, aggregation of periods of insurance, employment, self-employment or residence, waiving of residence rules, and prevention of overlapping of benefits. Title II, 'Determination of the legislation applicable', states the core principle of the matter – persons to whom the Regulation applies are subject to the legislation of a single Member State of the EU. The text then sets out the rules according to which said legislation is determined. Title III, 'Special provisions concerning the various categories of benefits,' legislates the titular types of benefits, such as sickness, maternity, and equivalent paternity benefits, and pensions. Title IV, 'Administrative Commission and Advisory Committee,' regulates the Administrative Commission for the Coordination of Social Security Systems and other procedural aspects. Title V, 'Miscellaneous provisions', addresses matters such as the cooperation between Member States of the EU, the protection and processing of personal data, the collection of contributions and recovery of benefits (which can be effected in another Member State than that to whose institutions the contributions are due), the rights of the institutions responsible for providing the benefits. Title VI of the Regulation contains 'Transitional and final provisions.'

Regulation (EC) No 987/2009 on coordinating social security systems contains five titles and five annexes. Title I, 'General provisions,' covers definitions of the terms used within the regulation, rules on the cooperation between the institutions responsible for social security at the EU's and the Member States' level, and dispositions concerning the determination of residence, the aggregation of periods of contributions, and the prevention of overlapping of benefits. Title II, 'Determination of the legislation applicable', sets out a list of criteria, so that persons falling under the scope of the regulation will be subject to the legislation of a single Member State. Title III, 'Special rules concerning the various categories of benefits', contains dispositions on matters such as sickness, maternity and equivalent paternity benefits; benefits in respect of accidents at work and occupational diseases; death grants; invalidity benefits and old-age and survivours' pensions; unemployment benefits; family benefits. Title IV, 'Financial aspects', regulates the reimbursement and recovery of the costs of benefits, while Title V, 'Miscellaneous, transitional and final provisions' regulates the entry into force of the act, and issues such as medical examinations, administrative checks, and currency conversion.

3. Provisions of the Withdrawal Agreement and of the Trade and Cooperation Agreement

The Withdrawal Agreement concluded between the European Union[17] and the United Kingdom regulates, in Title III, the matter of the coordination of social security systems post-Brexit. The persons covered by its dispositions[18] include:

a) Union citizens (and their family members and survivours) who, at the end of the transition period, are either subject to the legislation of the United Kingdom, or who reside in the United Kingdom and are subject to the legislation of a Member State at the end of the transition period';

b) United Kingdom nationals (and their family members and survivours) who, at the end of the transition period, are subject to the legislation of a Member State, or who reside in a Member State, and are subject to the legislation of the United Kingdom;

c) Union citizens and United Kingdom citizens (and their family members and survivours), who are employed or self-employed on the territory of the other part to the Agreement, while being subjected to UK law and EU law, respectively;

d) stateless persons, nationals of third countries, and refugees (and their family members and survivours),if they reside on the territory of one of the parts to the Agreement, and are in one the previously mentioned situations, and fulfil the requirements of Council Regulation (EC) No 859/2003 (14), in the case of third-country nationals;

e) persons (and their family members and survivours) who don't fall within any of the previous

[16] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems. The regulation also applies with regards to the EEA and Switzerland.

[17] All relevant dispositions apply similarly in the case of Euratom, as per Art. 7 of the Withdrawal Agreement.

[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), OJ C 384I, 12.11.2019, Art. 30.

categories, but who fall within the scope of Article 10 of the Agreement.

The persons mentioned will be covered by the dispositions of EU law 'for as long as they continue without interruption to be in one of the situations set out in that paragraph involving both a Member State and the United Kingdom at the same time.'

According to the Withdrawal Agreement, the dispositions contained in Article 48 TFEU, Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council will continue applying to the aforementioned categories of persons.[19]

In terms of special situations covered by the Agreement,[20] it is mentioned that the EU's dispositions on 'aggregation of periods of insurance, employment, self-employment or residence, including rights and obligations deriving from such periods' will continue to apply to persons in cross-border situations (and their family members and survivors) if, despite not fitting one of the categories identified in Article 30, they were subject to the legislation of the other party to Agreement, at the end of the transition period. In these persons' cases, the periods completed both before and after the end of the transition period will be aggregated, according to Regulation (EC) No 883/2004.

The EU legislation on social security will continue to apply, even after the transition period, to persons who, before its end, 'had requested authorisation to receive a course of planned health care treatment pursuant to Regulation (EC) No 883/2004, until the end of the treatment,' as well as persons who are on a stay at the end of the transition period in a Member State or the United Kingdom, for the duration of that stay. The Withdrawal Agreement regulates the family benefits awarded, after the end of the transition period, to persons who are in a cross-border situation and who have family members residing on the territory of the other part to the Agreement.[21] The EU's provisions on such benefits will continue to apply for as long as the persons concerned fulfil the conditions of the two regulations on the subject.

EU legislation on the matter of social security will also continue to apply to nationals of Norway, Iceland, Liechtenstein, and Switzerland, provided that those states conclude corresponding agreements with the UK and with the EU, which apply to Union citizens and British citizens respectively.[22]

Concerning the matter of administrative cooperation, the Withdrawal Agreement provides that the UK shall have the status of observer in the Administrative Commission, where it may send a representative, if the items on the agenda concern the British state, and that it shall also take part in the Electronic Exchange of Social Security Information (EESSI).[23] The EU provisions on reimbursement, recovery and offsetting will continue to apply in the case of the persons mentioned in Article 30, as well as those situations which occurred before the end of transition period, or which occurred after but involve the persons covered by Articles 30 and 32.[24]

Should Regulations (EC) No 883/2004 and (EC) No 987/2009 be amended or replaced after the end of the transition period, the new dispositions shall apply wherever the two regulations are mentioned within the Agreement.[25] This means that the UK will be held to enforce regulations that it did not have a hand in elaborating and adopting, and it also means that the persons falling under the scope of the Withdrawal Agreement will enjoy a level of protection similar to that of citizens of EU Member States.

As the dispositions of the Withdrawal Agreement only cover the cross-border situations in existence at the end of the transition period, with small exceptions, it was necessary for the EU and the UK to negotiate and conclude a different agreement concerning situations that would arise from 1 January 2021.

In December 2020, EU and UK negotiators agreed on a Trade and Cooperation Agreement which came into force on 1 January 2021 and which covers several important aspects of the parties' relationship after Brexit. The matter of the coordination of social security systems between the EU's Member States and the UK was addressed through a Protocol annexed to the Agreement, thus ensuring that the UK will apply the same conditions, in this matter, for all EU Member States, avoiding discrimination between their citizens. Titled 'Protocol on social security coordination', and comprising of 5 titles and 8 annexes, it includes provisions regarding the applicable legislation to cross-border situations (maintaining the principle that individuals are to be subject to the legislation of a single state),[26] aggregation of insurance periods, exportability of benefits, and the equal treatment of workers. The Protocol will be in effect for 15 years, or until it is extended by mutual agreement,[27] or terminated by

[19] *Ibidem*, Art. 31.
[20] *Ibidem*, Art. 32.
[21] *Idem*.
[22] *Ibidem*, Art. 33.
[23] *Ibidem*, Art. 34.
[24] *Ibidem*, Art. 35.
[25] *Ibidem*, Art. 36.
[26] Trade and Cooperation Agreement between the European Union and European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L 444, 31.12.2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2020.444.01.0014.01.ENG (accessed on 20 March 2021), Protocol on social security coordination, Art. SSC. 10.
[27] *Ibidem*, Art. SSC. 70.

either party.[28] It must also be noted that the Protocol only covers the UK's relationship with the EU's Member States, while the relationship with the European Free Trade Association states[29] must be regulated through bilateral agreements.

The Protocol mostly replicates the existing rules on social security coordination, and it specifies that affected workers will be subject to the legislation of only one state, determined in accordance with the Protocol, thus avoiding double imposition of taxes and contributions or the lack of a layer of social security. However, there are some differences, compared to the applicable EU regulations, and some protection measures are absent.

In the case of persons working in the UK for EU companies, the Protocol provides that the employers are liable to pay National Insurance contributions and account for their employees' National Insurance contributions. UK companies, regardless of not being resident in the EU, will pay employer social security contributions and account for the social security contributions for all of their EU-based employees. In terms of reciprocal healthcare arrangements, it's stated that persons travelling between the EU and the UK will be covered under their existing European Health Insurance Card (EHIC), or equivalent such as a Provisional Replacement Certificate (PRC), with the UK likely replacing, in the future, EHICs with a UK Global Health Insurance Card (GHIC).

The Protocol also addresses the matter of detached workers.[30] In the case of cross-border situations occurring, between the EU and the UK, from 1 January 2021 onwards, employers will be able to detach workers to the territory of the other party to the agreement and have their contributions paid in the state of origin for up to 24 months. After that point, the social security legislation of the host state will apply, unless the EU Member States and the UK conclude a new agreement on the matter. This means that persons sent by UK employers to work in the EU for periods of up to 24 months, and not to replace another detached worker, will remain liable to contribute to the UK social security system, on the condition that the Member State to which the worker was sent agrees to these rules. If it did not, the person in question would be at risk of dual contribution liability, and employers would become liable to foreign social security, being subject to the legislation in both the UK and the state to which they were sent to work in.

A provision contained by the EU's regulations, but not by the Protocol, is one according to which a detached worker can continue contributing to the social security system of their state of origin, in exceptional circumstances, usually for a period of up to 60 months, on the condition that the other state approves it. In addition, family benefits are excluded from the Trade Agreement, affecting some detached workers.

Different from detached workers, posted workers are sent to work for a different entity (that usually forms part of the same group as the employer in the state of origin); they fall under the legislation regarding the free movement of services, not the free movement of persons, and the Agreement does not cover them. Consequently, a worker posted from the UK to an EU Member State, to work for an EU entity, will pay contributions according to the legislation of the host state, and might continue to be liable to pay contributions in the UK as well. As a transitional measure, Member States of the EU may request to continue the existing posting system for a period of up to 15 years (with the possibility to end it sooner than initially requested), during which the posted workers will contribute to the social security system of the UK. Consequently, the treatment of posted workers will not be uniform, considering the possibility that Member States have to either retain the existing system or not, and if they do retain it, they can do so for different lengths of time.

Another subject covered by the Protocol is that of multi-state workers – persons who conclude most of their work in the UK, but also spend at least 5% of their working time in one or more of the EU Member States, and vice versa. According to the Protocol, that worker contributes to the social security system of the state where they are habitually resident, on the condition that at least 25% of their working time is spent or their remuneration earned in that jurisdiction. If that condition is not fulfilled, there are several tests which will be performed to determine the state where that person will be liable to social security contributions. Unlike the case of detached workers, EU Member States cannot opt out of these dispositions. The Protocol does not extend to Norway, Iceland, Liechtenstein, and Switzerland on this issue, and the matter of multi-state workers must be regulated through bilateral agreements between these states and the UK.

The Protocol doesn't cover all types of benefits that the EU regulations do, and does not, thus, provide the same level of protection. An Annex to the Protocol lists all the benefits that are excluded, divided into special non-contributory cash benefits, long-term care benefits, and payments awarded to meet expenses for heating in cold weather. Each Member State, and the UK respectively, has decides which benefits it wishes to exclude from the scope of the Protocol. For example, Bulgaria has decided to exclude social pension for old age, France has excluded the disabled adults' allowance, and Ireland has excluded jobseekers' allowance. The United Kingdom has excluded, among others, the winter fuel payment, carer's allowance, the

[28] *Ibidem,* Art. SSC. 69.
[29] Iceland, Liechtenstein, Norway, and Switzerland.
[30] *Ibidem,* Art. SSC. 11.

state pension credit, and income-based allowances for jobseekers.

As far as determining which legislation is the one applicable, the Agreement states that people will be subject to the legislation of the state on whose territory they are employed or self-employed. Civil servants are subject to the legislation of the state employing them in its administration. Persons who don't fit in any of the previous categories are subject to the legislation of their state of residence. Special provisions, similar to the ones previously applicable, are also laid in place for persons working on board vessels at sea flying the flag of a different state, and for flight and cabin crew members.

4. Potential legislative changes

On 13 December 2016 the Commission put forward a proposal[31] to revise the current legislation regarding the coordination of social security systems (specifically, Regulations 883/2004 and 987/2009). The Commission's proposal focuses on facilitating labour mobility and cooperation between the authorities of the Member States, and updates the existing provisions in four main areas: unemployment benefits, long-term care benefits, access of economically inactive citizens to social benefits, and social security coordination for posted workers. Under current rules, jobseekers can export their unemployment benefits for a minimum period of 3 months; this period is raised to a minimum of 6 months, in the Commission's proposal, offering better protection to jobseekers. Concerning frontier workers (persons who work in a different state than the one where they live, and who go to their state of residence at least once a week), the proposal states that unemployment benefits would be paid by the Member State where they worked for the last 12 months.

Simultaneously, Member States' interests are protected through a proposed provision regarding a minimum amount of time (3 months) that someone would have to work on the territory of a state, before they could claim unemployed benefits, upon becoming jobless, that take into account previous experience in another Member State. The Commission's proposal also clarifies that 'Member States may decide not to grant social benefits to mobile citizens which are economically inactive citizens – this means those who are not working nor actively looking for a job, and do not have the legal right of residence on their territory. Economically inactive citizens have a legal right of residence only when they have means of subsistence and comprehensive health coverage.'

In the case of posted workers, the proposal provides tighter administrative rules, which are meant to ensure that national authorities can adequately verify the social security status of said workers, and can cooperate with the authorities of the other Member States in order to address potentially unfair practices or abuse.

The Commission's proposal does not introduce any changes to the rules on export of child benefits, with the parent's host state (i.e. the state where the parent works) remaining responsible for paying the child allowances. Despite the fact that social benefits in general, and child benefits in particular,[32] were among the topics raised during the debate which preceded the UK's vote on its withdrawal from the European Union, it can be noticed that the EU Member States and its institutions continue to display support for the coordination of social security systems at an EU level, and for ensuring that all individuals exercising their freedom movement are protected as well as possible.

A provisional agreement, regarding the project, was reached between the Commission and the European Parliament in 2019, under the auspices of the Romanian Presidency of the Council, and the proposal continues to be negotiated between the EU's institutions.

5. Conclusions

The EU's dispositions on the coordination of social security systems constitute a guarantee that citizens of the Union's Member States, as well as other persons covered by its primary and secondary law, can exercise their freedom of movement while having their rights fully protected, and without risking a situation where the legislation of more than one state becomes applicable to them, creating an obligation to contribute to several social security systems. In short, the free movement of people could not function optimally without these EU rules in place. The Union's institutions also make sure to periodically reexamine and revise these rules, so that they accurately reflect the current social, political, and economical context, and offer the highest protection possible, at the time, to the persons falling subject to this legislation.

As long as the UK was a member of the EU, and willing to participate in measures concerning social policy matters, its citizens also enjoyed this level of protection, when working in another Member State, and, simultaneously, citizens from those states also enjoyed the same privileges (and were held by the same obligations) when working in the UK. Despite the UK's initial reluctance to transfer competences in this area to the supranational level, time proved that doing so was advantageous both to its citizens and to its economic operators, both categories benefiting from the clarity and the simplified procedures provided by the EU's

[31] Details at https://ec.europa.eu/social/main.jsp?langId=en&catId=849&newsId=2699&furtherNews=yes (accessed on 20 March 2021). For more on this proposal and its connection to the UK's withdrawal from the EU, see Augustin Fuerea, "Brexit - limitele negocierilor dintre România și Marea Britanie", Revista de Drept Public, nr. 4/2016, Universul Juridic, Bucharest, p. 111-112.

[32] According to the Commission's data, less than 1% of child benefits in the EU are exported from one Member State to another.

applicable legislation. This is confirmed by the fact that, even after having withdrawn from the Union, the UK agreed to prolong the effect of said legislation with regards to cross-border situations already in existence at the end of the transition period (31 December 2020). In addition, the UK agreed to annex the Protocol on Social Security Coordination to the Trade and Cooperation Agreement, a Protocol which largely duplicates EU legislation on the subject. For now, the UK's withdrawal from the Union has not brought any advantages to its citizens, in the area of social policy, and has instead led only to the loss of some benefits and advantages, considering the EU's Member States have the possibility, under the terms of the Protocol, to opt out of certain measures, while other possibilities guaranteed by the EU's Regulations are entirely absent from the Protocol's text. Moreover, if the EU's social policy legislation no longer applies to it, the UK must conclude separate agreements with the three EEA members who are not part of the EU, which gives those states the possibility to negotiate more advantageous terms for themselves, possibly to the detriment of UK citizens.

At a time when cross-border workers are more and more numerous, and such situations are likely to arise with a greater frequency than ever before, the loss of a mechanism that ensures a smooth and efficient coordination of social security systems does not bring any considerable advantages, suggesting that, at least on this specific issue, withdrawal from the European Union is a decisions brings clear disadvantages to the citizens and economic operators of the withdrawing state.

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INTERNATIONAL AGREEMENTS CONCLUDED BY THE UK FOLLOWING ITS WITHDRAWAL FROM THE EU

Maria-Cristina SOLACOLU[*]

Abstract

Following the conclusion of the process of withdrawal from the European Union, the United Kingdom of Great Britain and Northern Ireland must now adopt new legislation to cover the areas that were previously regulated by EU law, which has now become inapplicable with regards to the British state. To this purpose, the UK must not only adopt internal acts, but also must conclude international agreements with a variety of actors, including the EU itself, its Member States (on matters that do not fall within the EU's competences), other international organisations, and third countries. This article shall analyse the EU's competence, as an international organisation with legal personality, to conclude agreements, the UK's international standing before its accession to the European Communities and the transfer of trade-related competences towards the supranational level, and the agreements concluded by the United Kingdom in order to regulate matters that, prior to Brexit, were governed either by the EU's secondary law, or by international agreements negotiated and concluded by the Union itself. In addition, the article shall look at potential international agreements that might be concluded by the UK in the future.

Keywords: *exclusive competences, shared competences, international treaties, trade agreements, bilateral agreements.*

1. Introduction

European Union law has several sources, both written and unwritten. Primary law consists of the EU's treaties[1] and the Charter of Fundamental Rights, whilst its secondary law[2] is comprised of the acts adopted by the Union's institutions as they exercise the competences they are attributed through the treaties. Unwritten sources of EU law include the case-law of the Court of Justice of the EU, and general principles of law. An important written source of EU law, distinct from both primary and secondary law, are the international agreements concluded by the EU with other international organisations and with states, in matters that fall within its exclusive or its shared competences. There is a wide array of subjects on which the EU can conclude international agreements,[3] with bilateral agreements on matters concerning trade occupying a prominent role.[4] As such, there is a growing number of areas where international relations between the EU's Member States and third countries are regulated through the EU, its agreements replacing those that the Member States had concluded in the past, or would have concluded with the third countries in question.

On 31 December 2020 the transition period agreed upon by the United Kingdom and the European Union came to an end, and the process of the UK's withdrawal from the EU was finalised. Consequently, from 1 January 2021 onwards EU law ceases to apply with regards to the UK, and the British state must work towards filling the legislative gap thus created. At a national level, this can be more easily achieved through the unilateral adoption of legislative acts by the competent authorities; in some cases, that is as simple as recreating the dispositions of a secondary source of EU law through internal laws, considering the framework for the implementation of those dispositions exists already. More complicated is the process of replacing the international agreements concluded by the EU in various matters, particularly those related to trade, where the Union is most active and has successfully concluded numerous agreements, using its economic and political power to negotiate advantageous terms for its Member States. As one of them, the United Kingdom was party to over a thousand such agreements - either bilateral or multilateral - with third countries; following its withdrawal from the EU, British authorities indicated that more than 150 agreements would have to be concluded in order to replace the arrangements existing before Brexit.

2. British international relations prior to the UK's accession to the European Communities

A defining aspect of the United Kingdom's foreign policy, until the second half of the 20th century, was that the British state prioritised its relationship with

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[1] These include the Treaty on the EU (TEU), the Treaty on the Functioning of the EU (TFEU), and the Treaty on the European Atomic Energy Community (Treaty on Euratom). Other sources of primary law are all amending and accession treaties, as well as the protocols annexed to any of the aforementioned treaties.

[2] Article 288 of the Treaty on the functioning of the European Union lists regulations, directives, and decisions as legal acts with binding force, and opinions and recommendations as acts without binding force.

[3] See https://eur-lex.europa.eu/browse/directories/inter-agree.html for a repertoire of the international agreements concluded by the EU.

[4] For more, see Augustina Dumitrașcu, *Dreptul Uniunii Europene și specificitatea acestuia*, Second Edition, Universul Juridic, Bucharest, 2015, p. 142-146.

the members of the Commonwealth above its economic and political connections to continental Europe.

World War II represented a massive economic effort for the UK, which had accrued between 1939-1945 a deficit of approximately 10 billion pounds, with its exports being reduced to just 30% of what they'd been prior to the war.[5] The USA agreed to grant the UK a loan, under the condition that the British state would sign the Bretton Woods agreement[6] and would introduce, by mid-1947, a convertibility system for the sterling pound. Despite this economic decline, the United Kingdom wanted to continue projecting a powerful image in the area of foreign policy. Consequently, the British developed an international strategy that focused on three main areas of influence – the Commonwealth, the transatlantic relationship, and the connection to Western Europe. The UK wanted to play an important part with regards to all three areas, and to represent a source of economic and political harmonisation between them,[7] but it openly prioritised the Commonwealth, due to the associated economic benefits, and the relationship with the USA over that with the Western European states, which the UK thought were on a downward economic trend. This positioning of the UK slowed down considerably its process of accession to the European Communities and economic redressing, after the war.

In the 1950s, the states that had suffered the most due to the war dedicated themselves to the process of reconstruction and cooperation, which led to the strengthening of the ties between then and to economic growth. Simultaneously, the fact that the Commonwealth was becoming less significant, from an economic point of view, together with the demands of the General Agreement on Tariffs and Trade (GATT),[8] which forbade the sort of preferential treatment that the Commonwealth countries had enjoyed until then, led to the decline of British wealth. In addition, these same states started looking towards the USA for military protection,[9] whilst the UK itself started relying more and more on it. The phrase 'special relationship' was coined at that time, by Winston Churchill, to describe the rapport between the UK and the USA, and was later used by those who believed that American interests should be given priority over Western European ones, a view even Harold Macmillan, British prime minister between 1957-1963, subscribed to. However, the USA was interested in helping Western Europe to rebuild after the war, and to recoup its economic losses, and also wanted to cooperate on a military level.[10] At the same time, the USA-UK relationship started experiencing economic and trade difficulties. The USA believed that the British should replace its preferential treatment of the Commonwealth with a reorientation towards the other European states. On the other hand, the UK believed that the Western European states would be an economic burden, its exports towards those states accounting for only 25% of the total British exports.[11]

As such, the UK refused to take part in the negotiations regarding the creation of the European Coal and Steel Community and, despite initially joining the discussion surrounding the establishing of the European Economic Community and of the European Atomic Energy Community, held at Val-Duchesse in 1956, the British state decided to withdraw before any decisions were made.[12] The UK's unwillingness to take part in the foundation of the European Communities was predicated on several factors: it was considered that joining the Communities would prioritise their members above the states of the Commonwealth, weakening the UK's relationship with the latter; a cooperation system was preferred by the British, compared to an integration one, where several competences would be transferred towards supranational institutions; the UK wanted to take part in a free trade area, not an international organisation with an economic profile and common policies).[13] However, the UK underestimated Western Europe's capacity to successfully achieve integration in several key areas, such as economy and trade. The founding members of the European Communities chose to create a customs union, with a view to encourage trade, economic growth, and regional stability, and that model quickly proved efficient and advantageous for the Member States.

The UK did participate, in 1960, in the foundation of the European Free Trade Association (EFTA), together with Austria, Denmark, Norway, Portugal, Sweden, and Switzerland. EFTA worked as a classical cooperation organisation, without a customs union and without a transfer of competence towards the supranational level. Whilst this meant that member states didn't have to adopt a common external tariff,

[5] Wolfram Kaiser, Using Europe, Abusing the Europeans - Britain and European Integration, 1945–63, Palgrave Macmillan, 1999, p. 1.

[6] International monetary system which made possible the creation of the International Monetary Fund and of the International Bank for Reconstruction and Development (IBRD), known today as the World Bank.

[7] Wolfram Kaiser, op.cit., p. 3.

[8] The Agreement was signed in 1947, in Geneva, and was intended to promote international trade by means of reducing or even eliminating barriers such as quotas and tarrifs. In 1994 the Agreement was replaced by the World Trade Organisation (WTO), which establishes the rules governing international trade for its member states. The UK is one of the founding members of the WTO.

[9] Wolfram Kaiser, op. cit., p. 5.

[10] To this purpose, the USA, Canada, Belgium, Denmark, France, Iceland, Italy, Luxembourg, Norway, the Netherlands, Portugal, and the UK founded, on 4 April 1949, the North Atlantic Treaty Organisation, in order to ensure mutual assistance in case of aggression. See also Augustin Fuerea, Manualul Uniunii Europene, Universul Juridic, Bucharest, 2016, p. 16.

[11] Wolfram Kaiser, op. cit., p. 8.

[12] Augustin Fuerea, „BREXIT – trecut, prezent, viitor", Curierul judiciar, nr. 12/2016, C.H. Beck, Bucharest, p. 631.

[13] Emmanuel Mourlon-Druol, *The UK's EU vote: the 1975 precedent and today's negotiations*, Bruegel Policy Contribution, Issue 2015/08, p. 2.

allowing the UK to continue practising preferential tariffs with regards to the Commonwealth states. However, despite – or because – of this lack of integration and imposition of common policies, the Association did not have the desired economic and political impact, and the UK continued declining, economically, throughout the 1960s. Simultaneously, the European Communities, supported by the USA, proved to be a success, experiencing a notable economic growth and an increased regional stability.

Due to the EFTA failing to represent a true competitor for the EEC, the national economic decline (including the pound's devaluement in 1961), as well as the fact that the Commonwealth states reorientated towards regional trade partners,[14] to the disadvantage of the UK, led to the British state having to adopt a new foreign policy. Consequently, the British prime minister at the time, Harold Macmillan, decided to prioritise the UK-EEC relationship, with a view to joining it and advancing British interests. Finally acceding to the European Communities, in 1973, stopped the economic decline the UK was experiencing, and meant that the British state was ready to transfer competences related to various matters, but trade in particular, towards the Communities' institutions, including competences regarding the conclusion of international agreements concerning said matters. As such, for more than four decades the UK's international trade relations were predominantly regulated through the European Economic Community, now the European Union.

3. The EU's competence regarding the signing of international treaties

The European Communities,[15] as international organisations with distinct legal personalities, have always had the possibility to negotiate and conclude international agreements in the areas where the Treaties conferred those competences upon them. Regarding this matter, the case-law of the Court of Justice has consistently reaffirmed the fact that once such an agreement enters into force, its provisions form an 'integral part' of EU law (previously Community law), and that Member States which fail to adopt the necessary measures for the implementation of said agreement are 'in violation of their obligations under EU law'.[16]

Following the entry into force of the Treaty of Lisbon,[17] important modifications were introduced with regards to the European Union's functioning and competences, including its role as an international actor. Article 47 of the Treaty on European Union[18] now states that the Union 'shall have legal personality', meaning that it 'enjoys the right to be represented and to receive the representatives of third states and organizations, the right to conclude treaties, the right to submit claims or to act before an international court or judge, the right to become party to international conventions, and the right to enjoy immunities. It is also subject to legal obligations and responsibility under international law'.[19] The right to conclude treaties and to become party to international conventions is now explicitly regulated in the Treaty on the Functioning of the European Union. Article 2 of the Treaty lays out the Union's exclusive competences – those competences where only it can legislate and adopt legally binding acts.[20] The second paragraph states that the EU 'shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.' In addition to the agreements that the EU can conclude on matters falling within its exclusive competences, the organisation can also conclude mixed agreements, which have to be ratified by each of the Member States of the EU, in addition to the Union itself. These latter agreements are concluded in areas of shared competences, where the Member States can still legislate.

According to Article 216, the Union is empowered to 'conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.' The Court of Justice of the EU's case-law is turned into primary law via the next paragraph, which provides that these agreements 'are binding upon the institutions of the Union and on its Member States.' Article 217 states that the EU is competent to 'conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights

[14] Canada was becoming increasingly closer to the USA, whilst Australia redirected its attention towards its Asian trade partners.

[15] The European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EAEC or Euratom).

[16] Paul Craig, Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, Sixth Edition, Oxford University Press, 2015, p. 338.

[17] The Treaty of Lisbon was signed on 13 December 2007 and came into force on 1 December 2009.

[18] The Treaty of Maastricht, which was signed in 1992 and came into force in 1993. At the time, the Treaty established the European Union as a sui generis entity, whilst the legal personality remained with the European Community, who was thus the one competent to conclude international agreements.

[19] Paul Craig, Gráinne de Búrca, *op.cit.*, p. 322.

[20] The Member States can do so if they have been empowered by the Union or if it's necessary for the implementation of Union acts. These exclusive competences include the customs union; the establishing of competition rules necessary for the functioning of the internal market; monetary policy for euro area countries; the conservation of marine biological resources under the common fisheries policy; the common commercial policy.

and obligations, common action and special procedure.'

4. Agreements concluded by the UK in order to regulate its relationships with its international trading partners

Following the UK's departure from the European Union, the most important legislative gap, in terms of international relations, was left in the area of trade, a natural consequence of the fact that the EU, and the European Community before it, focused on international trade as a primary area of focus. The agreements concluded by the EU are estimated to have covered £117bn of UK exports annually, and included free trade agreements, such as the ones concluded with Canada or Japan, agreements covering more specific arrangements,[21] and mutual recognition agreements, covering conformity assessments conducted on products to ensure that they meet the necessary safety standards. All these agreements are part of the EU's legal order, and are legally binding for its Member States; consequently, a withdrawing state must compensate for their inapplicability.

The optimal solution, for the UK, is to conclude new agreements with all the international actors that it had previously worked with as a Member State of the European Union. In cases where it fails to do so, and an agreement is not reached with another country, the rules applicable to the relationship between the two states will be those established by the World Trade Organisation. The UK's position in the WTO was brought into question by the state's withdrawal from the EU, because its WTO commitments were tied to that of the EU,[22] and there was no precedent for an existing member of the WTO to implement a new, personal set of trading terms.[23] However, on 4 January 2021, following the end of the transition period for the UK's departure from the EU, a communication was put out, intended to clarify the UK's position in the WTO.[24] The communication drew attention to the fact that the British State was a founding party to the GATT 1947, and an original Member of the WTO, 'in its own right', and not just as a Member State of the EU. It specified that, for as long at the UK was a member of the European Union, 'the United Kingdom's concessions and commitments on goods and concessions and specific commitments in services were contained within the schedule of concessions and commitments on goods and schedule of concessions and specific commitments in services of the European Union.'

On the matter of goods, the communication noted that the UK had undertaken five rounds of negotiations and consultations with WTO members, between September 2019 and December 2020, with some of them finalising in an agreement or being 'in an advanced stage of discussion.' On the matter of services, it was noted that, following the end of the transition period, an already agreed-upon schedule of concessions and specific commitments would come into force.

On the matter of agreements negotiated and concluded after the establishment of the WTO, to which the UK participated as Member State of the EU and wasn't a party in its own right, the communication announced that, following the expiry of the transition period, the British state had endeavoured to accede to said agreements, or confirm 'its continued acceptance and implementation of these agreements.'

By early 2021, the UK had concluded continuity agreements with the most of the states with which it had previously traded as a Member State of the EU, and whilst not all agreements have been been fully implemented at a domestic level yet, 'bridging mechanisms' have been set in place in order to ensure continuity of trade until they are ratified.[25]

Some of the newly-concluded agreements of particular interest are those between the UK and Turkey,[26] and the UK and Japan,[27] respectively.

As Turkey is part of a customs union with EU, the British state could only conclude a continuity agreement with it once the appropriate measures were provided through the UK-EU Trade and Cooperation Agreement.[28] The UK-Turkey Free Trade Agreement includes provisions regarding agricultural products (tariff-rate quota based) and industrial goods, processed agricultural products, coal and stee. With regards to origin requirements, the products covered by the FTA are traded free of custom duties only when they originate in one of the states party to the FTA. Consequently, the UK and Turkey will only continue to enjoy tariff preferences for goods that originate in one

[21] An example would be the UK-Australia Wine Agreement, covering the matter of labelling requirements and recognition of winemaking techniques.

[22] The UK was already a member of the European Community when the WTO was founded.

[23] Aakanksha Mishra, 'A post Brexit UK in the WTO: The UK's new GATT schedule', in Jennifer Hillman, Gary Horlick (eds.), *Legal Aspects of Brexit. Implications of the United Kingdom's Decision to withdraw from the European Union*, Institute of International Economic Law, Washington DC, 2017, p. 13.

[24] General Council of the WTO, *End of the UK-EU transition period. Communication from the United Kingdom*, WT/GC/226, 4 January 2021, available at *https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/226.pdf&Open=True* (accessed on 10 May 2021).

[25] For a list of the UK's trade agreements with non-EU countries, see *https://www.gov.uk/guidance/uk-trade-agreements-with-non-eu-countries* (accessed on 10 May 2021).

[26] Available at https://www.gov.uk/guidance/summary-of-the-uk-turkey-trade-agreement#uk-turkey-trade-agreement (accessed on 10 May 2021).

[27] Avilable at https://www.gov.uk/guidance/summary-of-the-uk-japan-comprehensive-economic-partnership-agreement (accessed on 10 May 2021).

[28] Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22021A0430(01) (accessed on 10 May 2021).

of the two states. This is a departure from the model a customs union, and is bound to negatively affect the flow of trade.

Another agreement concluded in light of Brexit is the UK-Japan Comprehensive Economic Partnership Agreement (CEPA), which represents a step forward compared to the previously existing EU-Japan Economic Partnership Agreement (EPA), that ruled UK-Japan. Some of the areas where the UK and Japan made progress were financial services (a key domain for the UK) and digital trade (a domain with regards to which the UK has expressed a particular interested, in terms of possibile future agreements with other countries). In this latter area, the CEPA makes notable progress, compared to the EPA, providing improvements such as the prohibition of data localization requirements, better cross-border data flows, and better protection of personal data.

On the matter of goods, the UK-Japan CEPA sets out a timeframe of tariff reduction similar to the one existing under the EU-Japan EPA, with certain tariffs scheduled to be eliminated earlier than the EPA provided.

With regards to origin requirements, EU inputs are set for diagonal cumulation, meaning that they can be counted as originating in either the UK or Japan, and paperwork requirements have been reduced, compared to the EPA, thus easing trade between the two states.

5. Conclusions

With regards to the United Kingdom's relationship with other states and international organisations, Brexit's impact was strongest in the area of trade, due to the EU's focus on that specific domain, and the high level of integration achieved, to a point where matters such as the common commercial policy and the customs union are exclusive competences of the EU, and Member States can no longer legislate in those matters, or conclude international agreements.

The UK's main trading partners have been, for decades, the other Member States of the European Union, and the British state's continued trade with them has, for the time being, been ensured through the conclusion of the EU-UK Trade and Cooperation Agreement, but the UK continues to have a considerable task ahead of it in the form of concluding agreements with third states which are not members of the EU, and which all seek to further their own position, and gain as many advantages as possible. Outside of the EU, without having the backing power of a large, prosperous international organisation focused on trade and the well-being of its citizens, the UK is set to negotiate these new agreementes from a weakened position, which is set to result (and has done so already, in some cases) in less beneficial provisions for the British state, or even in a lack of agreement, meaning a reversion to WTO rules. As such, it is difficult to identify, for now, the profit and better trading conditions that the UK claimed it would achieve once it was able to negotiate and conclude agreements in its own right, as opposed to a Member State of the EU.

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MILITATING IN FAVOR OF INTERNATIONAL HUMAN RIGHTS LAW (EVEN IN TIMES OF COVID-19 PANDEMIC)

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Abstract

Human rights have always been a concern for humanity. Delimitating the protection of human rights from other branches of law is necessary due to the similarity of the legal relations that are the object of certain different legal branches. Through the efforts supported globally by the means of the international jurisdictions, the global justice system can be more efficient.

Although questions are constantly being raised about the fragmentation of law which would threaten the complex legal system created by the subjects of international law, we consider, however, that, at the level of human rights, we are witnessing a process of convergence, characterized by coherence and unity.

The purpose of this study is to offer to the interested legal professionals and to the domestic authorities the information to adequately protect the right of each individual to respect for his or her rights under the international conventions.

The study also tackles certain aspects regarding the application of human rights during COVID-19 pandemic, without alleging to be an extensive analysis of the subject.

Keywords: *COVID-19, human rights, international public law, individual, pandemic, protection, States.*

1. Introductive Remarks

International human rights law represents a discipline that is studied in law schools in Romania since 1990. Because it presents an increased interest for the theoreticians and practitioners of law, numerous publications on the subject have appeared in the Romanian legal literature.

We underline that human rights have always been a concern for humanity, considering that, in their special capacity of human beings, they hold *certain* rights.

The most prolific period for the recognition and protection of human rights was the post-Second World War period when, among others, the United Nations General Assembly adopted the Universal Declaration of Human Rights (on 16 December 1948), and the Council of Europe signed the Convention for the Protection of Human Rights and Fundamental Freedoms[1] (on 4 November 1950).

Given the atrocities of the post-Second World War period, it was emphasized more and more that these rights were inherent to human nature. From a diachronic analysis of the legal systems across the world, it is obvious that human rights do not have an immutable content, evolving with the international relations and established values – not even the fundamental rights (*i.e.* human rights that are essential to the human beings - *e.g.*, the right to life, the right to liberty). Thus, these fundamental rights may evolve or differ from one historical stage to another or from one state to another.

Human rights have also evolved due to globalization, which has left its mark on them, both positively and negatively.

Having in view the current situation in the world, when our lifes have been upset in the last year because of the COVID-19 crisis, we consider important to tackle the problem of human rights respect during this period.

2. Protection of Human Rights Across The Time And Across The World

Delimitating the protection of human rights from other branches of law is necessary due to the similarity of the legal relations that constitute the object of some different legal branches. This is important for the correct application of the law because of the juridical qualification of the legal relationship. We must keep in mind that, in order to properly juridically qualify, the specialized enforcement body will perform a number of preliminary operations (*i.e.* nomination of the legal norm, verification of its authenticity and its legal force, determination of the exact content of the legal norm[2]).

Detaching the international protection of human rights from the public international law branch is obvious (there is a relationship from individual to general between them), this new discipline being based on legal norms of public international law that define and protect fundamental human rights.

The principle of fundamental human rights is placed at the top of the pyramid of law principles. This is obvious even from the purposes of the United Nations mentioned in Article 1 of the UN Charter:

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[1] For an extensive analysis of this living instrument, please see Corneliu Birsan, *Conventia europeana a drepturilor omului. Comentariu pe articole*, second edition, C.H. Beck Publishing House, Bucharest, 2010.

[2] Please see Nicolae Popa coordinator, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spataru-Negura, *Teoria generala a dreptului. Caiet de seminar*, 3rd edition, revised and enlarged, C.H. Beck Publishing House, Bucharest, 2017, pp. 194-195.

"The purposes of the United Nations are:

(...) 3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in **promoting and encouraging respect for human rights and for fundamental freedoms for all** [emphasis added], without any distinction as to race, sex, language, or religion"[3].

At the regional level, in the European Union[4], in Article 6 para. (3) of the Treaty on European Union, it is specified the fact that:

"**Fundamental rights** [emphasis added], as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[5].

Therefore, all human beings, regardless of race, sex, nationality, and social position, must enjoy the respect for their rights. This statement is obvious from the nature of the legal norms of *jus cogens* that characterize the field of human rights and which determine their application everywhere and all of them, from which no derogations are allowed.

Please note that one obstacle to the universality of human rights is the specificity of each people to have its own language, its own traditions, and values, therefore the cultural diversity. Another obstacle could be the different economic and historical developments of each people. Because of these obstacles, the slogan of the European Union is so well expressed - *Unity in Diversity*, which recognizes the diversity of the European identity.

One of the basic rules of human rights is their interdependence. Even if there are several categories of human rights, they can no longer be seen singularly, independently some of others.

Given the obvious importance of respecting human rights, beyond national borders, states must cooperate at the international level. One of the most obvious forms of cooperation in this regard is the cooperation of states to repress the most serious international crimes (*e.g.*, crimes against peace, war crimes) - cooperation that also led to the creation of some special criminal jurisdictions (*e.g.*, International Criminal Tribunal for the Former Yugoslavia, International Criminal Court). From this perspective, it is important to emphasize that due to the common interest of the community to protect fundamental human rights at the national level, the matter of human rights is no longer the reserved domain of competence of the states, but subject to international cooperation.

Having in mind all the information mentioned above, it is obvious that the main source of international protection of human rights is represented by the international treaties. Besides the international treaties (*i.e.* conventions binding on the contracting states), there are also declarations or resolutions, which have political and possibly moral value. Some documents, although they are not international conventions, have acquired a binding legal value over time (*e.g.*, the Universal Declaration of Human Rights).

The subjects of legal relations are, on the one hand, people as beneficiaries of the fundamental rights enshrined in the international instruments, and, on the other hand, the states represented by its institutions that must comply with the fundamental human rights.

The evolution of human rights has been a huge step for the international community entailing an important violation of the state's sovereignty, which in the past had the right to life and death over its people.

Although the states are sovereign and independent, the flagrant violation of human rights could and should attract the international responsibility of the states, according to the international instruments they have executed. The international community is very concerned about promoting a firm attitude on the part of states regarding the respect for rights and fundamental freedoms of the people.

We strongly believe that there is an interdependent relationship between democracy and human rights because the will of the people matters in a democratic regime, while in a totalitarian system the recognition of human rights is only formal. The recognition of human rights entails the existence of a free state, democratic, subject to the principle of separation of powers, and at the same time to the principle of legality.

Please bear in mind that the European Court of Human Rights "has established in such a crystal-clear manner this link between democracy and human rights. That is why the Court remains particularly vigilant when the foundations of democracy are imperilled, including any attempt at undermining the independence of judges."[6].

Thus, based on the international treaties that proclaim the protection of fundamental human rights, concluded by the states, the states must guarantee the protected rights for all individuals found under their

[3] Please see the United Nations Charter, available at https://www.un.org/en/sections/un-charter/chapter-i/index.html.

[4] For information on the specificities of the European Union, please see Augustin Fuerea, *Dreptul Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2016; Mihaela Augustina Dumitrascu, Roxana Mariana Popescu, *Dreptul Uniunii Europene, Sinteze si aplicatii*, second edition revised and enlarged, Universul Juridic Publishing House, Bucharest, 2015; Cornelia Beatrice Gabriela Ene-Dinu, *The Impact Of Preliminary Rulings Pronounced By The Court Of Justice Of The European Union On The Activity Of The Romanian Courts Of Law*, in the Proceedings of CKS eBook, 2017, Pro Universitaria Publishing House, Bucharest, 2017, p. 440 and following.

[5] Please see the Treaty on European Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT.

[6] For further information please see the speech of the President of the European Court of Human Rights, Mr. Linos-Alexandre Sicilianos, on the occassion of the opening of the judicial year, 31 January 2020, p. 6, available at https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf.

jurisdiction, no matter they are their own citizens, foreign citizens, or stateless persons.

Regarding the international consecration and guarantee of the rights, we emphasize that the international human rights law requires a minimum standard of protection, from which, internally, states cannot derogate downwards, but only upwards, being able to ensure greater protection of human rights[7].

This principle also supposes that states are entrusted with the protection of human rights, the domestic courts (together with the executive and with the legislative powers) being required to respect and guarantee individual human rights. If the state authorities fail to protect these rights, the international protection then intervenes (*e.g.*, the European Court of Human Rights, the Inter-American Court of Human Rights).

Thus, the international structure intervenes only *in subsidiary*, after all domestic remedies have been exhausted.

Depending on the domestic law system of each state (monist or dualist), the norm of international law contained in a convention can or cannot be directly applicable in the internal legal order of a state. Thus, in a monist system, the legal norm of international law is not directly applicable, meanwhile in a dualistic system, it is directly applicable, creating directly rights and obligations for the benefit of individuals. However, in order for the legal rule to be applied directly in the internal order of a state, it must have a precise and complete content, without the need for creating documents in application.

The specificity of this international public branch is that, with the adoption of international conventions in this field, individuals have acquired the capacity to be holders of rights and obligations at the international level, being able to be a party to certain jurisdictional and non-jurisdictional proceedings to defend their own rights. Within these proceedings, individuals who consider that their own rights have been infringed, can bring a claim directly to the competent international bodies, if the admissibility criteria are met.

Thus, in the context of legal relations under international human rights law, we meet several subjects of law: states, individuals, and international government organizations. States can have both active and passive procedural capacity within specialized international jurisdictions, in relation to other states, in connection with their citizens, being responsible internationally for their abuses.

Effective promotion and guarantee of human rights are achieved based on the intergovernmental cooperation carried out within international, regional, subregional, and national organizations, as well as with the help of different non-governmental organizations. The media also plays an important role.

Through the United Nations or through the regional mechanism for protection (*e.g.* European, Inter-American, African, Asian), human rights law becomes more effective each day, protecting the individuals that come under its protection.

After carrying out a comparative analysis of the regional protection mechanisms of human rights, we note that the European system of protection within the Council of Europe (*i.e.* the European Court of Human Rights[8]) is the most advanced mechanism in the world. This is also the reason why other regional systems have inspired from it. In addition, this view is supported by the European Union's concern for accession of the Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "*the Convention*").

The efficiency of the European Court of Human Rights is due to its jurisdictional character, as opposed to other protection mechanisms within the United Nations which have a political character system based on state reports presented to committees. It is worth mentioning that the Convention's rights and freedoms have a *horizontal effect*, being directly binding on domestic public authorities[9] and indirectly on private persons or entities. The contracting states have the obligation to protect the victims, otherwise their legal responsibility may be invoked[10].

Through the efforts supported globally by the international jurisdictions, the global justice system can be even more efficient.

Although questions are constantly being raised about the fragmentation of law which would threaten the complex legal system created by the subjects of international law, we consider, however, that, at the level of human rights, we are witnessing a process of convergence, characterized by coherence and unity.

Today, the unprecedented proliferation of the international organizations and jurisdictions acting in the domain of human rights law, determines a trend of their hyperspecialization, which should not be seen as having a negative connotation, because it creates a

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[7] In this respect it is interesting to read the speech of the Chief Justice of Ireland, Mr. Justice Clarke: „*(...) I know that the objective of the Convention and of this Court is not to harmonise human rights law in that strict sense but is to ensure that minimum standards for the protection of human rights across the states of the Council of Europe are maintained whilst respecting the plurality of national and international fundamental rights protections*", p. 2, available at https://www.echr.coe.int/Documents/Speech_20200131_Clarke_JY_ENG.pdf.

[8] For general information on the European system of human rights protection instituted by the Council of Europe, please see Bogdan Aurescu, *Sistemul jurisdictiilor internationale*, second edition, C.H. Beck Publishing House, Bucharest, 2013, p. 211 and following, and Laura-Cristiana Spătaru-Negură, *Protecţia internaţională a drepturilor omului. Note de curs*, Hamangiu Publishing House, Bucharest, 2018, p. 81 and following.

[9] For more details on public authorities, please see Elena Emilia Stefan, *Disputed matters on the concept of public authority*, in the Proceedings of CKS eBook, 2015, Pro Universitaria Publishing House, Bucharest, 2015, p. 535 and following.

[10] For general information on the legal responsability of states, please see Raluca Miga-Besteliu, *Drept international public*, 2nd volume, 3rd edition, C.H. Beck Publishing House, Bucharest, 2014, pp. 29-56.

culture of human rights ... and, implicitly, a *human rights education*, which is essential for every person.

3. Human Rights Protection During COVID-19 Pandemic

Nowadays, since we are facing new challenges brought by the COVID-19 pandemic, we are concerned about the impact of this coronavirus on human rights and the rule of law.

Invoking the preservation of life, the national authorities took exceptional measures such as nationwide lockdowns in order to slower the transmission of the COVID-19 among people. Some individuals may feel like these extensive lockdowns "*can inadvertently affect people's livelihoods and security, their access to health care (not only for COVID-19), to food, water and sanitation, work, education – as well as to leisure*"[11].

In 2020, suddenly, people from all over the world, irrespective the continent they were or their status as citizen or migrant, children or adult, woman or man, young or old, poor or rich, healthy or sick, all were "trapped" in their houses, being powerless in face of the coronavirus. The states and the international organisations had an obligation to make sure that everyone is protected through the proportionate measures taken, by minimising the potential negative consequences.

We agree that three individual rights were, worldwide, the most exposed during this pandemic.

Firstly, *the right to life and the duty to protect life* were invoked by all states when dealing with the measures to be taken during the pandemic. The duty to protect life should be, for sure, the primary focus of all State officials.

Secondly, *the right to health and access to health care* represents a right inherent to the right of life. Each individual has the right to enjoy "*the highest attainable standard of health conducing to living a life in dignity*"[12]. The medical system of many countries (*e.g.* Belgium[13], Brasil[14], Germany[15], Italy[16], Japan[17], Portugal[18], Romania[19], Spain[20], US[21]) has faced and is still facing a high risk of collapse both for coronavirus patients and pacients without coronavirus. The huge caseloads, the increasing number of infections, the impossibility to free beds in due time in the intensive care units, the extreme pressure characterise each medical system nowadays. The hospitals are treating patients beyond their installed capacity, tragedies[22] being able to happen each day everywhere.

Combating the pandemic through preventing the spread of the virus should be thought as a set of measures applicable to everyone, without any discrimination (because the virus does not discriminate!), being recommended to be taken in both public and private sector health care.

Thirdly, *the freedom of movement* has suffered many restrictions especially in case of lockdowns, in the name of controlling the spread of the virus. We agree that "[*t*]*his measure is a practical and necessary method to stop virus transmission, prevent health-care services becoming overwhelmed, and thus save lives*"[23]. Considering that the freedom of movement is crucial in order to enjoy other individual rights (*e.g.* the right to health and access to healthcare).

We salute the concern of the responsible international leaders regarding the respect of human rights during this pandemic.

For example, the Secretary General of the Council of Europe[24], Mrs Marija Pejčinović Burić, has issued on 7 April 2020, a toolkit for the European governments on respecting human rights, democracy, and the rule of law, toolkit that has been sent to all 47 Council of Europe member states[25].

The restrictive measures adopted by the states worldwide must be in accordance with the provisions of the international treaties and conventions adopted by the respective states. For instance, for the contracting states to the Convention, the measures taken in response to COVID-19 pandemic should not violate the provisions of the Convention.

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[11] United Nations, *COVID-19 and Human Rights. We Are All In This Together*, April 2020, p. 2, report available at https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf.

[12] *Idem*, p. 4.

[13] Please see https://www.dw.com/en/belgiums-covid-19-health-care-collapse-it-will-happen-in-10-days/a-55451750.

[14] Please see https://www.bmj.com/content/372/bmj.n800.

[15] Please see https://www.iamexpat.de/expat-info/german-expat-news/german-health-system-danger-collapse-april-rki-warns.

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[17] Please see https://www.theguardian.com/world/2021/jan/19/hospitals-japan-close-collapse-serious-covid-cases-soar.

[18] Please see https://www.reuters.com/article/us-health-coronavirus-portugal-idUSKBN29M0L3.

[19] Please see https://transylvanianow.com/romanian-healthcare-system-on-the-verge-of-collapse-as-covid-19-cases-surge/.

[20] Please see https://www.euronews.com/2020/09/18/the-system-s-collapsed-doctors-alarm-over-covid-s-impact-on-healthcare-in-madrid.

[21] Please see https://edition.cnn.com/2021/01/02/health/us-coronavirus-saturday/index.html.

[22] Please see the cases of Romania (https://www.bbc.com/news/world-europe-54947530), Turkey (https://www.bbc.com/news/world-europe-55376008), Ukraine (https://www.independent.co.uk/news/world/europe/ukraine-oxygen-explosion-hospital-coronavirus-b1808525.html), Russia (https://www.republicworld.com/world-news/rest-of-the-world-news/russia-explosion-rocks-covid-19-hospital-in-chelyabinsk-two-patients-dead.html).

[23] United Nations, *COVID-19 and Human Rights. We are all in this together*, April 2020, p. 4, report available at https://www.un.org/victimsofterrorism/sites/www.un.org.victimsofterrorism/files/un_-_human_rights_and_covid_april_2020.pdf.

[24] Regional organisation established in 1949 to rebuild peace in Europe after the Second World War.

[25] Please see the Information Document SG/Ing(2020)11, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis. A Toolkit for Member States*, issued by the Council of Europe, available at https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40.

Two types of justification for these measures under the Convention can be distinguished:

i. on the ground of the Convention provisions, based on the protection of health [*i.e.* Article 5 para. (1) letter e), Article 8 para. (2), Article 9 para. (2), Article 10 para. (2), Article 11 para. (2), Article 2 para. (3) of the Protocol no. 4 to the Convention];

ii. on the ground of Article 15 of the Convention (derogation in time of emergency) for measures of exceptional nature – this is an important feature foreseen in the Convention allowing the continued application of the Convention. We underline that certain Convention rights no not allow any derogation under Article 15 of the Convention[26]. The severity of COVID-19 pandemic justified the restrictions imposed by the contracting states on public health grounds. It is important to underline that the formal adoption of the state of emergency or any other similar regime in the contracting state invoking Article 15 is not conditional upon. It is, however, necessary that the domestic law has a specific basis for the derogation "*in order to protect against arbitrariness and must be strictly necessary to fighting against the public emergency*"[27]. Moreover, please have in mind that "[*w*]*hile derogations have been accepted by the Court to justify some exceptions to the Convention standards, they can never justify any action that goes against the paramount Convention requirements of lawfulness and proportionality*."[28].

Please note that in the cases brought in front of the European Court of Human Rights, the judges will assess each derogation in part. In this respect states have a large margin of appreciation: "[i]*t falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 (...) leaves those authorities a wide margin of appreciation*."[29].

Moreover, please also note that the United Nations High Commissioner for Human Rights analysed the impact of COVID-19 pandemic of the enjoyment of human rights around the world, including good practices and areas of concern[30].

Thus, despite the restrictions and challenges of the present unprecedented sanitary crisis, in 2020 and 2021, it seems that the international organizations (and the international jurisdictions) had been able to continue their activities with regards to the human rights respect.

4. Concluding Remarks

It is worth underlining that "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings"[31], therefore all individuals have the right to complain in front of competent international jurisdictions, if the domestic authorities[32], natural or legal persons violate their individual rights under the Convention in certain conditions.

It is undisputed that human rights are constantly evolving, and that these rights can and will be respected only to the extent that they are well known by the individuals and by the authorities.

The evolutive interpretation of the international instruments should be the key for the evolution of human rights across the world. For instance, we bear in mind the words of the President of the European Court of Human Rights, Mr Linos-Alexandre Sicilianos, who, at the opening of the 2020 judicial year, emphasised that "[t]his interpretative methodology is clearly in line with the wishes of the founding fathers. They had a perception of human rights which was not static or frozen in time but dynamic and future-oriented. The generic terms used by the Convention, together with its indeterminate duration, suggest that the parties wished the text to be interpreted and applied in a manner that reflects contemporary developments. This viewpoint is backed up by the Preamble to the Convention, which refers to not only the "maintenance" but also the "further realisation of human rights and fundamental freedoms", in other words their development. This

[26] I.e. Article 2 of the Convention – the right to life, except in the context of lawful acts during the war; Article 3 of the Convention – the prohibition of torture and inhuman or degrading treatment or punishment; Article 4 para. (1) of the Convention – the prohibition of slavery and servitude; Article 7 of the Convention – no punishment without law; Protocols nos. 6 and 13 – abolishment of death penalty; Article 4 of the Protocol no. 7 - the right not to be tried or punished twice.

[27] Please see the Information Document SG/Ing(2020)11, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis. A Toolkit for Member States*, p. 3, issued by the Council of Europe, available at https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40.

[28] *Ibidem*.

[29] European Court of Human Rights, *Ireland v. UK* Judgment, 18.01.1978, Series A, no. 25, para. 207.

[30] The report is available at https://reliefweb.int/report/world/impact-coronavirus-disease-covid-19-pandemic-enjoyment-human-rights-around-world.

[31] Augustin Fuerea, Introducere in problematica dreptului international al drepturilor omului – note de curs, ERA Publishing House, Bucharest, 2000, p. 4.

[32] Please note that the domestic authorities can breach individual rights trough juridical acts, material and juridical facts, material and technical operations or political acts; please see, in this respect, Marta-Claudia Cliza, Constantin-Claudiu Ulariu, Drept administrativ, revised edition according to the amendments of the Administrative Code, Pro Universitaria Publishing House, Bucharest, 2020, p. 12, and Marta Claudia Cliza, *Revocation of administrative act*, in the Proceedings of CKS eBook, 2012, Pro Universitaria Publishing House, Bucharest, 2012, p. 627.

evolutive interpretation method has allowed the text of the Convention to be adapted to "present-day conditions", without any need for formal amendments to the treaty"[33].

Over the time, a sustained concern of the international organizations can be seen to adopt common rules in all areas, especially in the field of human rights. The subjects of international law are in a permanent search for solutions.

We strongly believe that, as the promotion of human rights becomes more effective, a true human rights education will be created that will lead to fewer human rights violations.

I personally do not want human rights education to be just a slogan awaiting a universal definition, reason for why we encourage each lawmaker to consider that "the human being is the central area of interest"[34] for it.

The importance of knowing and promoting human rights is more than paramount in these times when speedy decisions taken by the national authorities could be interpreted as having adverse consequences. And human rights are essential in dealing with the pandemic response; they cannot be neglected. This is why "[*w*]*hen we recover, we must be better than we were before*", especially that "*the crisis has revealed weaknesses that human rights can help to fix*"[35].

But did we learn our lessons during the COVID-19 pandemic? Are we capable of becoming better than we were before in respecting human rights? Did we adopt, within our available resources, the fiscal, financial and economic measures to mitigate the negative impact of COVID-19 on our population?

A call to action for human rights[36] is absolutely necessary especially in times of pandemic, because it has showed not only the "*disparities between people's enjoyment of their human rights*"[37].

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[33] For further information please see the speech of the President of the European Court of Human Rights, Mr. Linos-Alexandre Sicilianos, on the occassion of the opening of the judicial year, 31 January 2020, p. 5, available at https://www.echr.coe.int/Documents/Speech_20200131_Sicilianos_JY_ENG.pdf.

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[36] Please see Antonio Guterres, *The Highest Aspiration. A Call to Action for Human Rights*, available at https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The_Highest_Asperation_A_Call_To_Action_For_Human_Right_English.pdf.

[37] Impact of the coronavirus disease (COVID-19) pandemic on the enjoyment of human rights around the world, including good practices and areas of concern - Report of the United Nations High Commissioner for Human Rights, available at https://reliefweb.int/report/world/impact-coronavirus-disease-covid-19-pandemic-enjoyment-human-rights-around-world.

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DRONES, PRIVACY AND DATA PROTECTION

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Abstract

Data protection in the robotics and drone age must be included for an overhaul as technology evolves and offers new ways that could make current laws obsolete.

This paper focuses on showcasing weak points in data protection laws that are generally seen in states such as the ones that comprise the European Union or in the United States of America, which could also be seen in other states, while also analyzing some solutions that have been implemented. To identify the key issues, the paper will take into account major incidents that took place regarding breaches of data privacy, while also trying to distinguish how international law is applicable.

Drones come equipped with different types of equipment that must comply with different sets of rules and regulations, but can hardware alone prevent breaches of data protection or should operators and manufacturers be liable for these breaches? Furthermore, the issue at hand should also be covered with regards to a growing segment of drones that come equipped with artificial intelligence.

Notwithstanding, the paper will analyze if counter-drone systems could help mitigate data protection breaches or rather if they generate an extra issue that lawmakers and manufacturers have to handle.

Keywords: *drones, privacy, international law, European law, comparative analysis.*

1. Introduction

The notion of a drone is a more colocvial termn that describes unmanned vehicles. This termn is widely used to describe any type of unmanned vehicle but the most common types are those outfitted with rotary engines on either quad-propeller based platforms or fixed wings.

This paper will focus mostly on the aerial type of unmmaned vehicles since these are the most commercially available for the general population.

The author acknowledges that camera and audio drones do exist that are based on a wheeled or continuous track, but those are used only in a controlled environment and are yet to be fully accessible to the general population and governmental agencies.

As such, a "*drone*" as a termn is used to describe any aircraft without an on-board pilot. But that is an oversimplification that masks the incredible range in shapes, sizes and capabilities that characterize today's unmanned aircraft.

Another aspect towards identifying a drone as an unmanned vehicle is that it's different than a model airplane/vehicle and a toy.

For this reason, models are largely flown within visual line of sight and in the presence of an operator who watches and maintains control of the airplane during flight. That alone is enough to place model airplanes cleanly outside the boundaries of "*drone*."[1]

The drones that currently have the biggest impact on privacy are the cam-drones since they can record audio, videos and can store both locally and on the cloud.

2. The usage of drones and privacy concerns

Drones or unmanned vehicles have seen their usage grow ever since the 20th Century, when unmanned aerial vehicles were used by the U.S. Army for training purposes and as an experimental straight line rocket[2]. One of the closest equivalent of today's drones would have been the Goliath tracked mine[3] , a small wired controlled tracked vehicle capable of delivering explosives from a long range, but while its idea was revolutionary, the fact that it had a wired connection to the operator meant that it could be easily cut off from commands and rendered inoperable.

Later on, drones got equipped with cameras for spying and got used extensively during the Cold War period to spy on nuclear programs[4]. These drones became a norm in surveillance technology that allowed armies to have eyes on objectives without putting a human in harm's way.

The spy drones were often used against known targets and potential targets, meaning that the unmanned drones were used over the territory of foreign states and captured footage of key locations (military, economy or research). Unfortunately, programs that used drones, such as the US D-21[5] drone information that was declassified with the Freedom of

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[1] John Villasenor, What is a drone, anyaway?, Scientific American, 12.04.2012.

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[3] Military History Matters, Back to the drawing board – The Goliath tracked mine, Military-History.org, 12.07.2012.

[4] David Axe, The Mach 3 D-21 drone was a secret America Cold War spy machine, Nationalinterest.org, 7.11.2019.

[5] See note 3.

Information Act[6], were terminated very early after a few runs because the drones were hard to recover once launched and could fall into a foreign state's influence.

As an answer to the constant threat of foreign spying, the Treaty on Open Skies[7] was adopted to give all parties a direct and legal way of gathering information about military forces and activities with an open surveillance so that it will lower tensions and possibility of military escalation.

Moving towards a civilian usage of unmanned vehicles, drones have begun being a frequent sighting at special events and public gatherings, being used mainly by event organizers, activists or law enforcement agencies.

What this paper will focus on is how privacy is being handled by civilian drones and whether drones equipped with cameras must be handled in the same way as CCTV. Most states inside the Union and outside of it have already accepted that they must comply with the European Union's General Data Protection Regulation[8] for how they handle activities on the internet, but seeing as how the European Union will implement Regulation 947/2019[9] (which deals with the rules and procedures for the use of unmanned aircraft by pilots and operators, defining categories of use and a series of requirements for their use) and Regulation 945/2019[10] (which deals with the requirements of unmanned aircraft systems and the requirements to be met by designers, manufacturers, importers and distributors in order to obtain conformity markings and monitor the market for safety and interest in the competitiveness of it), manufacturers and users must learn to comply with how they handle with how data is being gathered and used by and from the drone.

While these may act as a code of conduit for European states, the latter Regulation is addressed towards third party states who would want to bring drones inside an E.U. state and could contribute towards a global mechanism to protect privacy and data. The most common regulations that cam-drones must follow are those that are similar to surveillance cameras.

The issues that arises from usage of drones can lead to violations of privacy and data protection laws. For example, the U.K. Royal Mail started in December 2020 a delivery program with drones towards remote regions[11] that will expand over time in similar fashion to the U.S. counter-part delivery system where a waiver was allowed by the national administration for drone delivery systems over houses[12].

The aforementioned situations can be seen as a blessing in disguise, mainly because it will allow faster deliveries, but will also raise the issue of how the information that the drone is gathering directly or indirectly when it will fly over a person or building.

Most current drone flights are handled by militaries, law enforcement agencies, and border agencies and have started being used in energy and agriculture infrastructure, but the former fall under a legal waiver where the drones can be handled under certain scenarios, while the latter fall under scenarios where they are used in remote regions where privacy and data protection are not a big issue.

However, one of the fundamental human rights found in the Universal Declaration of Human Rights[13] reads that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." As such, drone flights must be handled in such a way that any intrusion can be blocked or prevented.

Seeing as how the United States of America has had a lot of issues with aerial surveillance and because its law system allows the judicial precedence, it will offer an interesting insight in how drones and their operators can fail to uphold other people's rights.

In the judicial practice of the U.S.A., the most resonating cases regarding privacy breaches in different situations that required or not a warrant are *California vs. Ciraolo*[14], *Katz vs. U.S.*[15] and *Smith vs. Maryland*[16].

To put the cases into context, the Ciraolo case is the most definitive since it involved the use of a police helicopter to do an aerial observation of a person's backyard without warrant, while the images had been used to successfully convict the person. The ruling was later appealed and it was found that the images were taken without a warrant and as such were in violation of the U.S. Constitution.

The ruling stated[17]:"On the record here, respondent's expectation of privacy from all observations of his backyard was unreasonable. That the backyard and its crop were within the "curtilage" of respondent's home did not itself bar all police observation. The mere fact that an individual has taken measures to restrict some views of his activities does

[6] National Reconnaisance Office, USA, information for the how to access information with the FOIA https://www.nro.gov/Freedom-of-Information-Act-FOIA/Declassified-Records/Special-Collections/D-21/.

[7] Entered into force on 01.01.2002, has 34 party states. As of November 2020 the U.S.A. withdrew from the treaty.

[8] Regulation 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

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[11] Charlotte Ryan, Royal Mail brings Scottish Isle closer with drone, Bloomberg, 16.12.2020.

[12] Miriam McNabb, DroneUp's waiver for flight over people is a major step for drone delivery, Dronelife.com, 07.12.2020.

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[14] U.S. Supreme Court, 476 US 207, 1986.

[15] U.S. Supreme Court, 389 US 347, 1967.

[16] U.S. Supreme Court, 442 US 735, 1979.

[17] See note 13, pg. 208-215.

not preclude an officer's observation from a public vantage point where he has a right to be and which renders the activities clearly visible. The police observations here took place within public navigable airspace, in a physically nonintrusive manner.

The police were able to observe the plants readily discernible to the naked eye as marijuana, and it was irrelevant that the observation from the airplane was directed at identifying the plants and that the officers were trained to recognize marijuana. Any member of the public flying in this airspace who cared to glance down could have seen everything that the officers observed. The Fourth Amendment simply does not require police traveling in the public airways at 1,000 feet to obtain a warrant in order to observe what is visible to the naked eye."

The other two cases argued that a warrant is also required when analyzing and intercepting a phone call in public space and inside a person's home. This roughly translates to a requirement that a drone operator has to not use the drone to spy and record people without their consent.

Similar to the Ciraolo case, *Florida vs. Riley*[18] featured a manned aerial vehicle that was used for aerial observation of a greenhouse, while maintaining around 120 meters altitude. The Court established that it was no violation of his property and privacy laws since the greenhouse was constructed in such a way as to promote the idea that it was trying to maintain intimacy. Such a case argues that a drone operator must take into account that processing information gathered by the drone must be censored upon public release, but only if the object or person that was filmed or photographed was even indirectly not doing something to protect the privacy of himself or the property.

In another landmark case, *Dow Chemical vs. U.S.*[19] it was argued that aerial photographs using a "*standard precision aerial mapping camera*" to conduct an investigation under the Clean Air Act can be handled without a warrant if it's in navigable space. The Court also argues that even though there are fewer concerns about privacy in the context of an industrial plant than with respect to a home, intrusion by certain technology unavailable to the public may be prohibited by the US Constitution.

All of these cases highlight that privacy is a very important aspect when flying over someone's property, mostly because the person who may feel that his or her rights are being encroached can even resort to using armed force against the drone. In the case of *Boggs vs. Mereideth*[20] a person shot his neighbors drone that was midair because he felt that the drone was violating his houses airspace.

The case was dismissed on jurisdictional claims, seeing as how the airspace is being handled by the Federal Aviation Administration and it was seen as an anticipated defense derived from federal law.

While the case offers a lot of space for theory crafting, the federal government issued in December 2020 a new Rule[21] entitled Remote ID and it states that*: "Under the final rule, all UA required to register must remotely identify, and operators have three options (described below) to satisfy this requirement. For UA weighing 0.55 lbs or less, remote identification is only required if the UA is operated under rules that require registration, such as part 107".* This new addendum to the existing legislative actions have brought a new ability for operators, that is the ability to fly over people and moving vehicles varies depending on the level of risk a small drone operation presents to people on the ground, both during the day and night.

The final rule requires that small drone operators have their remote pilot certificate and identification in their physical possession when operating, ready to present to authorities if needed. This rule also expands the class of authorities who may request these forms from a remote pilot. The final rule replaces the requirement to complete a recurrent test every 24 calendar months with the requirement to complete updated recurrent training that includes operating at night in identified subject areas.

As for privacy fears, the federal body acknowledges that privacy issues could be a concern with operations over people; however, the proposed performance-based rule focuses on the risk of injury involved with operations over people and does not address privacy issues. They also stated people over whom a small unmanned aircraft flies should receive advance warning, both at public events and in closed or restricted-access sites.

This new ability offered to registered operators could lead to unwanted spying of public events or even illicit third party monitoring of police investigations, to name a few. Sadly, the F.A.A. emphasizes that privacy issues are outside the focus and scope of the rule, however, this rule does not relieve the operator from complying with other laws or regulations that are applicable to the purposes for which the operator is using the small UAS. Drone manufacturers will have 18 months from the moment the Rule was brought to public attention to begin producing drones with remote identification.

The new federal rule brings more issues than it solves, since home owners will try and use different anti-drone technology, which could potentially affect its controls or GPS and crash said drone, causing damage or even harm.

[18] U.S. Supreme Court, 488 US 445, 1989.
[19] U.S. Supreme Court, 476 US 227, 1986.
[20] Debra Cassens Weiss, Does property owner have the right to shoot down hobbyist's hovering drone?, AMERICAN BAR ASSOCIATION JOURNAL, 14.01.2016.
[21] Part 89 issued by the F.A.A., 28.12.2020. The executive summary can be accessed at the following: https://www.faa.gov/news/media/attachments/RemoteID_Executive_Summary.pdf.

The general reaction (regardless of legal system of the state) is that attacking a drone is the equivalent of attacking someone's property, but this is also available for the drone operator as well since he is liable of civil and/or criminal charges (for example trespassing). Compliance with the data protection requires, among other things, that you only gather and use footage fairly and lawfully.

The best solution is to notify the law enforcement agencies, while states must begin drafting no-drone-zones and adopt special law enforcement policies to counter illicit drone actions.

In Europe, the situation is fairly more straightforward, because member states of the European Union and the Council of Europe must comply with Regulation 679/2016 and Treaty no. 108[22], while also have to follow the European Convention on Human Rights and its understanding of private life and property.

In the view of the European Court of Human Rights, GPS surveillance is by its very nature to be distinguished from other methods of visual or acoustical surveillance which are, as a rule, more susceptible of interfering with a person's right to respect for private life, because they disclose more information on a person's conduct, opinions or feelings. Having regard to the principles established in its case-law, it nevertheless finds the above-mentioned factors sufficient to conclude that the applicant's observation via GPS, in the circumstances, and the processing and use of the data obtained thereby in the manner described above amounted to an interference with his private life[23].

The European Union later adopted Directive 2016/680[24] for protecting individuals with regard to the processing of their personal data by police and criminal justice authorities, and on the free movement of such data, and it establishes data protection principles applicable to the processing of personal data in the area of justice, such as fair and lawful processing, proportionality, accuracy, limited conservation time, and responsibility.

Thus, the European legislation is applicable to police drones as well, meaning that justice authorities can have drone footage challenged and even annulled if it was gathered in an illicit manner, while also having to store, handle and delete certain data that was gathered with drones. The same could be applied to situations in other states as well.

However, seeing as how drones are unmanned vehicles but are treated as manned and operated vehicles, it should be noted that they should comply with aviation rules guaranteeing the total aviation safety system and consequently they must be approved by a competent authority, the operator shall have a valid RPAS operator certificate, the remote pilot must hold a valid license[25].

The future of drones was set-up through the Riga Declaration on Remotely Piloted Aircraft[26] with a progressive-risk-based task for regulation of drones, meaning that public acceptance of drones has to be handled with key aspects such as public authorities implementing ways to handle illicit drone handling, geospoofing, cyber security and implementing no-fly zones. To design such a legal and administrative system, the F.A.A. and E.A.S.A. have established a somewhat common regulation[27], both of them having fairly similar rules regarding weight limitations, flight periods and locations, and most importantly, airworthiness certifications for both the drone and its pilot.

To allow them to be operated, drones are normally combined with applications such as cameras or video-cameras (as the remote pilot has to see or detect what is in front of the drone to avoid a collision). They might also record the images, through software to process the video images, which might have further applications. For example, the U.S.A. has developed a mobile phone app entitled B4UFLY[28] that informs the user of no-fly zones (permanent or temporal) and even has a legislation option, so that the user can learn the rules on the go.

Other developers-manufacturers, such as DJI[29], have preinstalled a safety software inside their drones to warn the user of flying over sensitive locations and that in certain areas the user has to upload a special clearance permit or even pass an examination.

This has also become a norm for operators since the U.S.A. have implemented Remote ID, with the E.U. and U.K. implementing Drone Remote Identification Protocol (DRIP)[30] that will enable confidential handling of private information and all information designated by neither cognizant authority nor the information owner as public. It will also, enable selective strong encryption of private data in motion in such a manner that only authorized actors can recover it. If transport is via IP, then encryption must be end-to-end, at or above the IP layer, while notwithstanding it enables selective strong encryption of private data at

[22] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1985.
[23] Uzun vs. Germany, E.C.H.R., Application no. 35623/05, 02.09.2010, paragraph 52.
[24] *OJ L 119, 4.5.2016, p. 89–131.*
[25] Ottavio Marzochi, Privacy and Data Protection Implications of the Civil Use of Drones, European Parliament, Directorate General For Internal Policies, PE 519.221, June 2015, p. 13.
[26] RIGA Declaration On Remotely Piloted Aircraft (Drones) "FRAMING THE FUTURE OF AVIATION" Riga - 6 March 2015.
[27] For reference the F.A.A.'s regulation for small drones is Part 107, and the E.A.S.A.'s equivalent is the EU Regulation 2019/947 and 2019/945.
[28] Link for description and download https://www.faa.gov/uas/recreational_fliers/where_can_i_fly/b4ufly/.
[29] Link for the features of the integrated software https://www.dji.com/flysafe/introduction.
[30] S. Card, Ed., A. Wiethuechter, R. Moskowitz, Drone Remote Identification Protocol (DRIP) Requirements, Ietf.org, 19.11.2020.

rest in such a manner that only authorized actors can recover it.

While the U.S.A. has case laws regarding flight of manned vehicles over properties and its repercussions on privacy, Europe has the benefit of having a better legal safeguard mechanism in the scope of the European Court of Justice and the European Court of Human Rights. This means that under the privacy and private life guarantees offered by these mechanisms.

As such, the E.C.J. case *Rynes vs. Úřad pro ochranu osobních údajů*[31] retained that the application of the right to privacy and data protection to private and public spaces, which implies that EU law applies regardless of the location of the person contesting the dronerelated interference. It also stated in a preliminary ruling related to CCTV that the "*household exception*" does not apply when the personal data is gathered in public spaces.

Also, should such data be shared trough a social network or published on the internet, the exception would not be applicable and the full guarantees provided by the Directive would apply. Furthermore, it is likely that the capturing and processing of personal data carried out by drones in public spaces would not be covered by the "household exemption" and hence such processing would be subject to data protection law.

However, the most common exception to data protection and privacy of drones will remain that of intelligence services, who fall outside of the E.U. competences, including when these imply the collection of data through drones.

Another issue, that legislation does not address, is the fact due to their size, drones can collect data without being recognized and therefore individuals who are being watched or monitored are not aware of this and can not only collect personal data such as videos with or without sound but also transfer the gathered data at the same time as the subject is being watched.

A more dystopian view on the usage of drones was brought up as a possible data protection risk that is the so called ”*profiling*” of personal data[32]. This can roughly mean that a drone can be used for marketing purposes, identifying customers based on their previous purchases.

Moreover, selling companies could use the sold drone, loaded with video-cameras, GPS and face recognition for tracking and identifying their existing and potential customers based on the cars they drive and their addresses, in order to perform targeted advertising. This information could later be sold, traded or transferred in a similar matter to how Google Adware or Facebook uses its information gathered with their algorithms.

Article 8 of the European Convention of Human Rights includes the notion of personal data, this being outlined in the case *S. and Marper v. U.K.*[33] personal data is linked with the right to respect for private and family life are guaranteed by article 8 of the Convention.

As such, states must ensure that personal data is not easily accessible by unauthorized third parties. This means that states must ensure that a household exception can be applied, when private individuals perform personal and family life related activities and that if the data collected is then shared or uploaded on online platforms via the internet, this exception cannot be applied and the rules provided by data protection laws have to be followed.

In the case of drones, operators must be aware that they are not covered by the household exception when they use the drone in public spaces for leisure or hobby activities. If such activities are performed on private property then the household exception is applicable, but it has limitations depending on where it is used or at what altitude. The maximum allowed altitude for leisure/hobby flights is around 400 feet or approximately 120 meters[34].

Furthermore, based on the G.D.P.R., drones must be developed and manufactured with data protection as a core design choice, meaning that manufacturers develop the hardware and software, but the operator is responsible for the way the drone was used.

These specifications that fall under the guidelines for manufacturers, are meant to provide a minimum standard of data protection, which would make the drone industry fall in line with the new regulation and therefore respect privacy and data protection rights of individuals, at least from hardware and software perspective.

The second aspect that drones may have already preinstalled, is that data protection as a default setting thanks to legislative guidelines, but as it stands it fails from a real time sharing aspect, meaning that streaming services from outside of the state where the drone is being handled may require a third party data protection mechanism for protection.

Notwithstanding, in public places, individual privacy is similar to the concept of non-privacy because by entering a public place and remaining there, there is an implication that one is aware they will be seen or recognized, and that one’s behavior may be scrutinized by anyone in that public sphere who may draw inferences from the individual’s behavior[35], meaning that drone operators must apply the *„reasonable expectation of privacy”*[36] where private life

[31] Case C-212/13, 11.12.2014.
[32] Florin Costinel Dima, Drone technology and human rights, University of Twente, 6.07.2017, p. 27-28.
[33] European Court of Human Rights, 30562/04 and 30566/04, 4.12.2008, para. 68-69.
[34] Airmap, The rules you need to know to fly recreational drones, Airmap.com, updated as of 23.07.2019.
[35] European Court of Human Rights, Costello-Robers vs. U.K., 89/1991/341/414, 23.02.1993, para. 35-36.
[36] As seen in the E.C.H.R. in the case of P.G. and J.H. vs. U.K., 44787/98, 25.09.2001.

considerations may arise once a systematic or permanent record of material from the public domain comes into existence.

The most important aspect of data protection introduced by the European Union G.D.P.R. is forbidding automated decision making. Under article 22 of the G.D.P.R.[37], consent is needed when decisions are solely automated and have a legal or similarly significant effect on people and if such automated decision making is not authorized by law. This means that information gathered or generated by drones must be filtered by the operator in such a way that it cannot be shared without consent or without a human review and validation.

In 2019 the U.K. police used an automated facial recognition software in public space and caused an uproar because of it was not clear who can be placed on the watch list, nor was it clear that there are any criteria for determining where the cameras could be deployed[38]. The system was challenged in the case of *R vs. CC South Wales*[39] where the Court ruled that *"too much discretion is currently left to individual police officers"* and the Court also held that the police did not sufficiently investigate if the software in use exhibited race or gender bias.

Such a case argues how easily drones can be placed in public space and cause a privacy problem in which the operator could never be found to be held responsible.

However, the Amsterdam Drone Declaration[40] established a focus on local needs and initiatives and a push towards integrated smart mobility and fair access to all dimensions of public space.

Smart mobility under data protection must be understood as a set of guidelines that any drone operator should know and abide. For example, the U.K.'s independent authority for data protection, the ICO[41], outlined that operators should let others know before they start recording, and also should keep the data in a safe space inside the drone.

While these outlines are general and beneficial to any type of drone operator, the fact that drones have a tendency to malfunction due to hardware or software issues or have accidents due to human errors leads to another possible type of data protection breach.

Civilian drone incidents have been documented by mass-media[42] where drones have crashed on the White House lawn or collided with a small manned aircraft at Quebec's airport. These incidents raised issues where the operator should have been prosecuted, but not all cases can be resolved since not operators are licensed or have their drones registered.

These cases can also lead to the drones being recovered by third parties who may extract the information stored on the drone, information that was not yet filtered by the operator and as such could spell a breach in a person or a company's private data. This also works both ways, since[43] other incidents such as trafficking drugs or terrorism conducted with drones could be intercepted in a way to deter potential high risk crimes.

As such, modern problems require modern solutions.

3. Possible solutions for protecting data and privacy

Solutions vary based on how local administrations and governmental agencies are able to handle and intervene to prevent drones from breaching property and privacy laws.

The most common and useful solution is to declare zone as no-fly zones and as such limit drone access to the designated areas and sanction those who do not commit to respecting said regulations.

For example, the United Kingdom[44] established no-fly zones designated as *danger areas* where it is often used for activities such as fighter pilot training, live ammunition training or weapons and systems testing (including GPS jamming exercises). Other zones are designated as *prohibited* or *restricted* and are clearly established by the air administrative authority. What is important is that person who are interested can request that their property or business area be declared as unsafe spaces for drone flights.

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[37] Article 22 contents:"1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
2. Paragraph 1 shall not apply if the decision:
(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;
(b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests;
(c) or is based on the data subject's explicit consent.
3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.
4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place."

[38] Kate Cox, Police use of facial recognition violates human rights, UK court rules, ArsTechnica, 8.12.2020.

[39] EWCA Civ 1058 C1/2019/2670.

[40] E.A.S.A., Drone Declaration, Amsterdam, 28.11.2018.

[41] Information Commissioner's Office, Your data matters – drones - https://ico.org.uk/your-data-matters/drones/.

[42] Igor Kuksov, Air alert: 8 dangerous drone incidents, Kaspkersky.com, 21.10.2019.

[43] Worldwide drone incidents charted by Dedrone.com, accessible at https://www.dedrone.com/resources/incidents/all.

[44] Applying UK Air Navigation Order CAP393, no fly zones as of 01.01.2021: https://www.noflydrones.co.uk/.

Usually, the air space regulations prohibit drones from flying close to airports, large cities, sensitive industrial sites, nuclear facilities, military bases, prisons and natural reserves.

Administrations can temporary declare no-fly zones[45] while a special event or holiday is being played out. For example, France declared that the area designated for the *Tour de France* be considered a no-fly zone during the event.

In Europe, Eurocontrol[46] allows drone users who are interested in operating their unmanned aerial vehicle on the territory of another state to check the guidelines for safety and no-fly zones via an online tool that showcases 19 states who have submitted updated information in this regard.

From an international point of view, third parties have developed internet tools[47] that follow the I.C.A.O. guidelines, the U.S. F.A.A. guidelines and other states aerial recommendations. The tools allow interested parties to check free use zones and prohibited zones in almost any state around the world, but they must also check with the state they want to fly in or transit with the drone for temporary modifications or drone type bans.

Other solutions to prevent privacy invasions may come in the form of anti-drone devices or systems.

Broadly speaking, counter-drone systems are either fixed on the ground, mobile on a ground vehicle, hand-held by a single person, or mounted on another drone.

Finding a drone by either radar or radio frequencies can be done and such devices are accessible to the general population, but other types of anti-drone systems may be out of reach or illegal. Such devices may include GPS spoofers, anti-drone ammunition, radio jamming, lasers, microwave rays or even kamikaze drones.

For the most part, counter-drone systems are expensive, out of reach of almost all people, most businesses, and some governments. Securing the skies against the possibility of a threat must be weighed against the cost of acquiring and then using the system and as such care must be taken to make sure that the drones targeted pose a threat and are not just errant hobbyists unaware that they are piloting their toy into contested skies[48].

Also, counter-drone systems may cause other collateral damage to authorized users, meaning that for example a radio jammer or GPS spoofing technique could unintentionally interrupt communications of other small airplanes or helicopters or even other drones. This could be interpreted as a criminal conduct regarding laws that prohibits willful or malicious interference to communications.

In the U.S.A., the aviation authority stated in 2016[49] that: „Unauthorized UAS detection and counter measure deployments can create a host of problems, such as electromagnetic and Radio Frequency (RF) interference affecting safety of flight and air traffic management issues. Additionally, current law may impose barriers to the evaluation and deployment of certain unmanned aircraft detection and mitigation technical capabilities by most federal agencies, as well as state and local entities and private individuals. There are a number of federal laws to consider, including those that prohibit destruction or endangerment of aircraft and others that restrict or prohibit electronic surveillance, including the collection, recording or decoding of signaling information and the interception of electronic communications content.”.

Later, the federal aviation authority from the U.S. did a follow-up study in 2018[50] concluded that drone detection systems should be developed so they do not adversely impact or interfere with safe airport operations, air traffic control and other air navigation services, or the safe and efficient operation of the national air service. Also, the study showed that the costs of having a permanent counter-drone system is very high and could become obsolete by the time it’s installed and operational.

Most legislative actions in the U.S. will however be reviewed after 31st of December 2022 when the modernization of law enforcement agencies and military structures will probably end and it will allow a more commercialized defense mechanism to be accessible to the general population[51].

A more current solution is being handled in India with the *Digital Sky*[52] platform that will allow only those drones that comply with the no-fly and no-take-off protocols. These protocols have to be implemented software-wise by the manufacturers and will allow drones to operate in areas demarcated as green and yellow zones, permitting them to fly over most of India.

This means that for green and yellow zones, operators will get automatic clearance from the platform and for red demarcated zones, the security agencies will receive specific clearance request. All data and information is uploaded to the Digital Sky platform so that there is no scope for arguments to the contrary at a later stage.

The platform will also permit state agencies to identify and intercept the drone and to bring the alleged

[45] For example France’s temporary no fly zones: https://dronerules.eu/ro/recreational/news/france-new-map-with-no-fly-zones-and-maximum-altitudes-for-recreational-drones.

[46] A link to the online tool that offers said information: https://www.eurocontrol.int/tool/uas-no-fly-areas-directory-information-resources.

[47] ICAO no fly zones drone world website.
https://www.arcgis.com/apps/webappviewer/index.html?id=9e674cbad86f4f8c86d1854dec6a5fb5.

[48] Kelsey Atherton, Anti-drone tech’s tangled regulatory landscape, Brookings.edu, 02.10.2020.

[49] F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 26.10.2016.

[50] F.A.A. letter to the Office of Airports Safety and Standards in the Department of Transportation, 19.07.2018.

[51] Jonathan Rupprecht, 7 big problems with counter drone technology, jrupprectlaw.com, 5.01.2021.

[52] *Piyush Gupta, Anti*-drone technology – a ‘simple’ answer?, Roboticslawjournal, 12.10.2020.

offender to justice can be left to the discretion of the judiciary.

Analyzing how the counter-drone strategy is being handled in most states where drones play a big part in the economy, it can be concluded that currently only law enforcement agencies (to some extent) and military operators are allowed to use anti-drone systems.

For example, the U.S.A. has adopted a Memorandum Regarding Department Activities to Protect Certain Facilities or Assets from Unmanned Aircraft and Unmanned Aircraft Systems[53]. Under these guidelines agencies will adopt protective measures necessary to mitigate credible threats from unmanned aircraft or unmanned aircraft systems to the safety or security of covered facilities or assets.

Agencies who are interested in obtaining clearance to use counter-drone systems then a request will be issued to the Department of Justice. Other states can lodge requests for their own events on U.S. soil.

The memorandum also addresses privacy concerns and any clearances will only be given after consultation with the official for privacy. A component may only intercept, acquire, access, maintain, use, or disseminate communications in a manner consistent with privacy laws and cannot be issued if its sole purpose is the monitoring activities or the lawful exercise of rights.

A component should consider and be sensitive at all times to the potential impact protective measures may have on legitimate activity by unmanned aircraft and unmanned aircraft systems, including systems operated by the press. State agencies components may maintain records of communications to or from unmanned aircraft or unmanned aircraft systems intercepted or acquired under authority of data protection acts.

If a drone is caught using a counter-drone measure, then that drone is seized alongside any other systems that it was being connected to. The agencies involved can issue warnings, disrupt controls of operators and even resort to the use of force to stop the drone.

Other noteworthy defense mechanisms, which have been used to protect from unwanted drone activities were deployed in Netherlands and the U.K.[54], were in the form of hawks that could be used to hunt drones since they act in a similar fashion to other small birds, but having a hawk at home could be cumbersome for most.

4. Conclusions

Privacy and data protection concerns will remain as long as drones can be easily accessible on the market and also as long as these drones are manufactured without supervision from either a state angency or legal limits established by the state.

Having a control on the quality of drones allows a slew of other mitigating facts that can ensure that privacy and data protection fall in order and will require less intervention from military agencies or law enforcement.

Having mandatory registrations for any audio-camera drones is another way to ensure protection. This is why offering flyer-IDs[55] regardless of age is a way to protect privacy since it allows a person to have a fundamental basic on the rules of flying and data protection.

Also, adding a time valability to this ID is a futureproofing measure as to ensure that the person is always learning about legislative and administrative measures adopted.

Seeing as how basic drone flying laws are common between states, having the operator and/or flyer ID valid in other states is a measure that could develop trust in drone communities.

Basic rules for drone operators should include that if the drone is fitted with a camera or listening device, then the operator must respect other people's privacy whenever the vehicle is being used. Consent must be obtained whenever another person or property is being filmed or photographed, and if that cannot be obtained, then data laws must be applied to how the information will be distributed.

Furthermore, the operator must be clearly seen when he is out with the drone as to be easily be identified both as the operator and the drone owner. The operator must store images safely and delete anything you don't need. If the recorded images are for commercial use, than it will need to meet further specific requirements as a data controller.

While U.S. Supreme Court actions allow persons to secure their properties regarding their airspace columns, other states did not take into account updating property laws in regards to drones, and as such should update their legislative measures on how a person can obtain an administrative measure from a local or national public authority in regards to protecting their privacy and property from unwanted drone flights.

As more and more drone transportations will be green-lighted so will airspace routes be formed over private properties.

Also, legislators should craft simple, duration-based surveillance legislation that will limit the aggregate amount of time the government may surveil a specific individual. Such legislation can address the potential harm of persistent surveillance, a harm that is capable of being committed by manned and unmanned aircraft.

The most lackluster legal measure is that of responsibility of operators and enforcement measures.

[53] U.S. Attorney General, 13.04.2020.
[54] Ben Sampson, Engineers flight test hawks for drone captures, Aerospacetestinginternational.com, 10.07.2019.
[55] For refrence U.K testing for flyer ID regulation as of December 2020: https://register-drones.caa.co.uk/drone-code/getting-flyer-id.

Law enforcement angecies lack the required equipment to protect people from unwanted drone harassment.

The E.U. have more recently been conducting tests of anti-drone weapons that can be used by specialized divisions of law enforcement agencies[56], while having the European airspace agencie's approval. A similar approach had begun in U.K. with the forming of a specialized team inside the national police force that can investigate illicit use of drones[57].

Other measures should require that that technology such as geofencing and auto-redaction, may make aerial surveillance by drones more protective of privacy than human surveillance[58].

From another perspective, drone privacy violations could also translate into new types of witness evidence, but this will also translate to new procedural law provisions that have to permit such feats.

Privacy concerns were raised and had to be handled in how agencies conducted air monitoring during the Covid-19 Pandemic. For example, in the U.S.A. the F.A.A. regulations regarding drone flights do not cover data protection beyond the general rule that it must be protected[5960]. As such, data protection agencies have to adopt regulatory norms for drones and have to enforce these norms.

One such legislative action that could be applied to other states is the Californian Paparazzi Law amendment to their Civil Code[61]. This law declares that drones cannot fly above residences and invade privacy and was adopted in 2014 as a reaction to journalists invading the private life of celebrities while they were in a private environment but with walled gardens.

The journalists often employed drones to take pictures or record videos of said celebrities and this sparked a lot of outcry. The law is applicable to anyone, and can benefit from protection regardless of fame, and will protect the property, regardless of open spaces on the property.

Other mechanics that could protect the data and privacy could be represented by a killswitch built inside the drone, which could delete its storage contents if it crashed, get highjacked or sold, as to ensure that the third party does not access to sensitive information or data.

Regardless of any type of data protection measure, nothing can be enforced without proper equipment and specialized personel in the administrative authorities.

The best way to protect data and privacy can be two-fold: either create guidelines for manufacturers to insert special safety and killswitch related protocols inside the drone, thus shifting the responsibility towards the operator who has to use said protocols to their furthest extent, or the second paradigm, allowing the market to be outfitted with anti-drone technology and equipping state agencies with the required devices to both counter drones and to counter-counter-drone technologies.

Regardless of choice, a state has to adopt legislation for abuses from any side.

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CASE C-648/18 HIDROELECTRICA, CJEU – A PREDICTABLE DECISION

Ionela-Alina ZORZOANĂ*

Abstract

This study proposes a post factum analysis (or rather a final conclusion) of the solution ruled in Case C-648 Hidroelectrica, a case that came before the Court of Justice of the European Union[1], as a preliminary question referred to by the Bucharest Tribunal , as a national court[2]. The case was of real interest in the context in which the preliminary question concerned the interpretation given by a national authority to a rule of domestic law, and not to a rule of European law. Unfortunately, the solution ruled by the CJEU, predictable as of the time of establishing the oral phase in the case, was no surprise, representing a faithful copy of Hidroelectrica's request and adhered to without any reservation by the European Commission.

This study shall be a critical analysis (perhaps too critical in certain places) of the reasoning of the CJEU judgment versus the point of view expressed by the European Commission and the conclusions of the Advocate General of the Court, true defenders of the operator in this case.

Last but not least, an important part shall be devoted to the previous practice of the CJEU in terms of the inadmissibility of the preliminary questions and a sudden change thereof, which leaves deep question marks as to the status of the Court, independent otherwise (or at least so it should be). In the final part, before the conclusions, we shall also refer to the applicability of the principle of proportionality, so much invoked in the CJEU Judgment.

Keywords: *Treaty on the Functioning of the European Union, Preliminary Question, Court of Justice of the European Union, Case-law, European Commission, National Court, National Interest, Advocate General, Proportionality.*

1. WHY SHOULD CJEU HAD TO DISMISS THE PRELIMINARY QUESTION AS INADMISSIBLE, BUT DID NOT

In accordance with the provisions of art. 19 lit. b) of the Treaty on European Union (TEU) "*The Court of Justice of the European Union shall rule in accordance with the treaties: on a preliminary ruling, on the request of national courts, on the* ***interpretation of Union law*** *or the validity of deeds adopted by institutions*".

At the same time, according to the provisions of art. 267 (1) (a) of the Treaty on the Functioning of the European Union (TFEU)[3] " *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:* ***the interpretation of Treaties***". The provisions of par. (2) according to which " *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court to give a ruling thereon*" are of interest in this scientific approach. Thus, it **follows** from those provisions that the referral to the CJEU by a national court **exclusively concerns the interpretation of the Treaties and not the national law**, as has been the case here.

The Bucharest Tribunal, as a national court, precisely approved the question in the form of Hidroelectrica " ***is art. 35 of the TFEU compatible with an interpretation*** *of Article 23 paragraph (1) and Art. 28 letter c) of the Law on Electricity and Natural Gas no. 123/2012, according to which Romanian electricity producers are bound to trade the entire amount of electricity produced, exclusively by a competitive, centralized market in Romania, under the conditions in which there is the possibility of exporting energy, but not directly, but through trading companies*?." However, the question remains as to why the national court has granted the application for a preliminary ruling, in the context in which, on the one hand, the interpretation of national law is the exclusive attribute of that court, the CJEU having no powers in such regard, and on the other hand, there are several situation from the practice of the courts which felt bound to refer the matter to the CJEU, but the cases were solved by admitting the inadmissibility or even withdrawing the applications by their holders.[4]

It can be assessed that the request of Hidroelectrica and of the national court was not for the interpretation of art. 35 of the TFEU (incident in this case) but **whether the interpretation given by the Regulatory Authority** to a legal provision of domestic law, *i.e.* art. 23 par. (1) and art. 28 lit. c) of Law no. 123/2012 is **in accordance with the Treaty**. We would

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[1] CJEU.

[2] I extensively wrote on this subject matter in the article *Dilemmas of a Preliminary Question. Case C-648/18 Hidroelectrica*, published in Legal Studies and Researches (p. 747-757), Universul Juridic Publishing House – Volume of the International Conference of PhD Students in Law, 12th Edition, Timișoara 2020.

[3] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:12016E267

[4] For a documented study on this issue, https://www.juridice.ro/377100/exista-sanctiuni-pentru-incalcarea-obligatiei-instantei-nationale-de-efectuare-a-unei-trimiteri-preliminare-la-curtea-de-justitie.html.

say inadmissible and the Romanian Authority and Government also claimed inadmissible, but the surprise came from the CJEU which not only established the admissibility of the question, but also organized an oral debate with specific questions regarding the technical and regulatory part of the case.

And above all, even admitting the error of the court of first instance, the CJEU also ruled expressly on *the interpretation* of *ANRE* as not being compliant with the treaty.

2. WHY HAS THE *INADMISSIBILITY* BECOME *ADMISSIBLE* IN CASE C-648/2018 - the overwhelming practice of the CJEU denied for a private interest?

The practice of the CJEU has been constant in time in terms of the inadmissibility of requests for preliminary questions, which did not comply with the mandatory requirements of art. 267 TFEU.

Thus, in Case C-368/12, concerning a reference for a preliminary ruling from the Court of Appeal in Nantes, the CJEU rejected by the Ordinance from 18 April 2013 the application as ***manifestly inadmissible***[5].

Concurrently, by the Decision Miasto Łowicz and Prokurator Generalny (related Cases C-558/18 and C-563/18) ruled on 26 March 2020, the Grand Chamber of the Court declared ***inadmissible*** the applications of preliminary decision filed by the Regional Tribunal from Łódź (Poland) and the Regional Tribunal from Warsaw (Poland). By those two applications, the referring courts essentially asked the Court to rule on the issue of the compliance of the new Polish rules on the disciplinary regime of judges with the right of litigants to effective judicial protection, guaranteed in art. 19 par. (1) second indent TEU. Further to confirming its jurisdiction to interpret the art. 19 par. (1) second indent TEU, the Court ruled on the admissibility of the two applications and stated that, according to art. 267 TFEU, the requested preliminary decision has to be "necessary" so as to enable the referring court to "rule a decision". The Court found first that *the main disputes are not related to the EU law and in particular with art. 19 par. (1) second indent TEU to which the preliminary questions refer*. The Court also specified that an answer to such questions did not appear to be such as to enable the referring courts to provide an interpretation of EU law enabling them to resolve procedural issues of national law before they could rule thereon, if necessary, on the merits of the main disputes. As a consequence, the Court has held that it is not apparent from the referral decisions that there would a link between the provision of EU law at issue in the preliminary questions and the main disputes, which should make the requested interpretation necessary, so that the referring courts should be able to rule in the concerned decisions, by applying the conclusions deriving from such an interpretation. Therefore, *the Court considered that the referred questions were of a general nature, so that the applications for a preliminary decision have to be declared inadmissible*[6].

The practice of the CJEU regarding the declaration as inadmissible of the applications for preliminary questions that did not meet the requirements of art. 267 TFEU is overwhelming, but the space assigned to the study does not allow us and we want at this time only to point out the change in case-law of the Court and to show our curiosity about its preservation for future cases.

The question in the title of the chapter was obviously rhetorical and shall remain without a concrete answer, but it indirectly results from the motivation of the CJEU. The Court practically resumed the allegations of the operator in the application for a preliminary question to the national court (which, curiously, did not make any written observations in Case C-648), but its private interest was fully defended both by the Commission and the Advocate General[7].

3. CASE C-648/18. PRELIMINARY QUESTION - the subsequent development of hearing, the conclusions of the Advocate General and the "long-awaited" solution

We start the analysis in this chapter, somehow in the opposite direction, from the solution ruled by the CJEU, then returning to the almost copy-paste link between it and the allegations of the Commission, but also such of the Advocate General.

The decision of the CJEU from 19 September 2020 was that "*Articles 35 and 36 TFEU have to be interpreted so that national legislation which, as interpreted by the authority in charge with its enforcement, requires from national electricity producers to offer the entire amount of electricity available on platforms managed by the sole operator of the national electricity market designated for electricity transaction services is a measure having an equivalent effect to a quantitative restriction on exports, which is not likely to be justified on grounds of public security related to the security of energy supply, insofar as such legislation is not proportionate to the pursued objective*"[8].

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[5] Published in the Electronic Directory (General Directory - Section on "Information on unpublished decisions") https://curia.europa.eu/jcms/jcms/P_106320/ro/?rec=RG&jur=C&anchor=201304C2056.

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Three essential issues result from the operative part of the Decision:

- It refers (again) to the national legislation in the interpretation of the regulatory authority, so not to the conformity of the domestic legislation with art. 35 and 36 TFEU;
- Trading platforms are operated by the sole operator of the national market, but the situation has been previously notified and authorized by the European Commission[9];
- The measure is not likely to be justified on grounds of security of energy supply, if such a measure is not proportionate[10] to the pursued objective.

What we understand (and not really) is the fact that the European court declared the application of a preliminary question admissible, the Court referring in the operative part to the interpretation of the authority, not to the compliance of the articles of national legislation with such of TFEU, practically ignoring the provisions of art. 267 of the Treaty.

In a second issue, although the European Commission has been notified about the existence of a single operator managing the trading platforms, why does the CJEU put such in the same sentence as a measure having an effect equivalent to a quantitative restriction on exports?

And thirdly, the same Court claims that such a situation is not likely to be justified by security of energy supply, as such legislation *is not proportionate to the pursued scope*.

In the written observations but also in the oral conclusions, the European Commission mentioned that the provisions of art. 23 and art. 28 of Law no. 123/2012 represent an export restriction within the meaning of art. 35 TFEU, unless it proves that *there is a public interest* and the national legislation complies with *the principle of proportionality*, *i.e.* the means used are such as to ensure that the pursued objectives are accomplished and that they do not go beyond what is necessary to achieve such objectives[11]. Although it seems more than obvious that ensuring the electricity supply of the Romanian population is a public interest, general, which must be protected, the final consumer having no other leverage in this regard, the Court adhered to the Commission's conclusions. In the same sense were also the conclusions of the Advocate General in his conclusions[12], *that the scope (or one of the scopes) of the legislative measure is to condition the export of electricity upon the prior satisfaction of domestic consumption. Thus, the restriction imposed on domestic producers as regards access to the external market is clearly recognized, as they are prohibited, as indicated above, from direct export. Even if it is applied indiscriminately to all economic operators producing electricity, it affects the exit of products from the market of the exporting Member State more than the marketing of products on the national market of the concerned Member State, precisely because it gives priority to supply on the market and in this respect favours it to the detriment of foreign trade.* The approach of the Advocate General of the Court, who although he recognizes the public interest invoked by the Romanian state in his plea, nevertheless considers that foreign trade prevails, is interesting. We believe that for each individual state, the national interest must prevail, as any other interpretation will deprive of content the much-discussed principle of proportionality and all measures in which an EU state will take measures to protect the national interest shall be automatically interpreted as a violation of such principle.

Compared to the positions expressed in Case C-648, taken *ad litteram* by the Court in the Decision from 17 September 2020, we consider that it was given in violation of the very principles of the Treaty that should guide its activity.

4. THE MIRAGE OF THE PROPORTIONALITY PRINCIPLE - proportionate and not really

The idea behind this chapter is part of the operative part of the Decision - "*it is not likely to be justified on grounds of public security related to the security of energy supply, insofar as such legislation is not proportionate to the pursued objective".*

In a generic way, this principle so invoked by the CJEU (and not only) refers to the fact that any measure ordered by a state should be proportionate to the pursued scope. The principle of proportionality can be probably best illustrated by the phrase of the illustrious professor of administrative law Fritz Fleiner, who noticed that "*the police should not shoot at sparrows with cannons*" [13].

The principle of proportionality is defined in Article 5 par. (1) and (4) of the Treaty on European Union *"(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality (...) 4. Under the principle of proportionality, the content and form of Union action, shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions*

[9] On 14 October 2015, the Ministry of Energy, Small and Medium Enterprises and Business Environment notified the European Commission that, according to Law no. 123/2012, there is only one operator of the electricity market at national level.

[10] We shall detail in the next chapter issues related to the principle of proportionality and its implications, with relevant issues from the case-law of the CJEU.

[11] See also Case C-158/04 Alfa Vita Vassilopoulos and Carrefour Marinopoulos [2006] ECR I 8135, paragraph 22.

[12] http://curia.europa.eu/juris/document/document.jsf?text=&docid=224896&pageIndex=0&doclang=RO&mode=lst&dir=&occ= first& part=1&cid=4594961.

[13] In a rough translation, "*The police should not fire cannons at scarecrows*." Quote by Păşcui Adrian-Gabriel in http://avocatpascui.ro/wp-content/uploads/2018/12/Principiul-proportionalitatii-1-1.pdf.

of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality." The criteria for its application are set out in the Protocol (no. 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaties. According to this rule, EU actions *must be limited to what is necessary to achieve the objectives comprised in the Treaties*. In other words, the content and form of the actions must be compatible with the pursued objective.

The practice of CJEU is constant in regard to the application and applicability of such principle. For example, in the case *Hermann Schräder HS Kraftfutter GmbH* versus *Hauptzollamt Gronau*[14] the plaintiff complained that the application of the cereal production tax also infringed the principle of proportionality. The Court dismissed the plaintiff's request, establishing the content of the concept of proportionality. Thus, in the opinion of the CJEU, the principle of proportionality is a general one indispensable to Community law, by virtue of which the measures adopted by the relevant authorities are to be appropriate and necessary to fulfil the legitimate objectives, as well as less costly in case of an option to choose more appropriate measures; *the taxes imposed further to adopting the concerned measures should not be disproportionate to the aims pursued* (par. 21 of the decision). Interesting Decision, similar to the present case, only that it differs in conclusions.

In another case, in which the national court[15] referred a preliminary question to the CJEU "*whether the principle of proportionality precludes the beneficiary from being denied the right to deduct VAT pro rata to the amount of the overall discount granted by the intra-Community supplier, in the event that the local supplier (member of the same group) has ceased its economic activity and can no longer reduce its tax base on delivery by issuing an invoice with its own VAT code, in view of reimbursement of the difference of additionally collected VAT*", the Court ruled that "*article 185 of the VAT Directive must be interpreted as meaning that a regularization of an initial VAT deduction is required in regard to a taxable person established in a Member State, even when the supplier of the said taxable person has ceased its activities in that Member State and due to such reason the concerned supplier can no longer request the reimbursement of a part of the VAT it paid* ". Why did I choose this case? In order to emphasize the discrepancy of rigor between the case which is the subject matter of this study and the one we referred to, both aiming at a reference to the principle of proportionality. If in Case C-684/18 the Court explained in detail the ruled solution in the concerned case, the Court itself merely stated that the measure has to be proportionate, without explaining what this means. And finally, who decides whether or not it is proportional in relation to the scope explained by the Romanian authorities, *i.e.* to ensure the supply of electricity to the population.

5. IN LIEU OF CONCLUSIONS. CJEU SOLUTION – WHAT'S NEXT?

The decision of the CJEU becomes binding and has to be precisely implemented, recognizing the principle of the prevalence and binding nature of its decisions. And no matter how much we debate them, they must be respected as such. What does this mean for the final consumer in Romania? That Hidroelectrica has no longer any obligation to supply the population with electricity, but can export the entire amount of energy. And if (no) such a situation ***is not a reason for security of electricity supply*** (?!) It was stated by the European Commission and the CJEU.

And in lieu of conclusions, we mention the statement of the representative of the concerned operator, after the ruling of the solution "*I consider that a very important step has been taken towards normality and a reality for which Hidroelectrica has been fighting for many years and that it wants final – the free energy market. Liberalization eliminates the gaps between the prices on the markets in Romania and such in other Member States, the main beneficiary of this correct price being, in the end, the customer"*[16].

Maybe from other EU member states, because as the representative of the European Commission declared in the oral debates - *Why should not all EU states benefit from the cheap energy produced in Romania?*.

And the final consumer in Romania? ... Who takes care of him?

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EVOLUTION AND PERSPECTIVES OF CONSTITUTIONAL JUSTICE IN ROMANIA

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Abstract

The supremacy of Constitution is a reality also due to the role of the Constitutional Court, as defined in article 142 paragraph (1) of the Constitution. The Constitutional Court's powers contribute essentially to the achievement of the lawful state and, therefore, a historical analysis of the evolution of this important constitutional institution is likely to highlight the legitimacy of the constitutionality control of the laws in Romania, but also its perspectives.

In our analysis, we are debating for the concept of constitutional justice, regarded from a historical point of view, which includes the main attribution of a constitutional court, namely that of controlling the constitutionality of the laws. From this perspective, we point out the main evolution moments of the constitutionality control of the laws in Romania, analyzing briefly the particularities of the constitutional regulations during the evolution of constitutional justice in our country. At the same time, we emphasize the contemporary features of the control of constitutionality of the laws in Romania, and we argue that guaranteeing the supremacy of the Constitution, through constitutionality control, must be seen in the broad sense and in terms of the attributions of the courts in this field.

We believe that the role of the Constitutional Court must be amplified by new powers, including through future revisions of the Fundamental Law, as this creates new guarantees regarding the reality of the principle of separation and balance of powers in the state, and obviously the guaranteeing of the supremacy of the Basic Law.

Keywords: *Constitutional justice, control of constitutionality of the laws, historical stages of the control of constitutionality of the laws in Romania, contemporary features of constitutional justice, new proposals for ferenda law*.

1. Introduction

The supremacy of Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the control of constitutionality of laws, represent the main guarantee of the supremacy of Constitution, as expressly stipulated in the Fundamental Law of Romania.

Professor Ion Deleanu appreciated that "the constitutional justice can be considered, in addition to many others, a paradigm of this century."[1] The birth and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: the man, as a citizen, becomes a cardinal axiological reference of the civil and political society, while the fundamental rights and freedoms only represent a simple theoretical discourse, but a normative reality; it is done a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the lawful state and, at the same time, a counterpart to the principle of majority; "the parliamentary sovereignty" is subjected to the supremacy of the law and, in particular, to Constitution, therefore the law is no longer an infallible act of Parliament, yet is it conditioned by the norms and values of the Constitution; and not the least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental foundations of the governed ones and not of the governors, as a dynamic act, in a continuous modeling and act of society".[2]

2. Content

The term "constitutional justice" or "constitutional jurisdiction" are controversial in the literature in specialty, the control of constitutionality of laws being preferred in particular. However, the notion of "constitutional justice" appears in Kelsen's work as "the jurisdictional guarantee of Constitution"[3]. Eisenmann also considers it to be "that form of justice or, more precisely, the jurisdiction that pertains to constitutional laws", without which the Constitution would be but a mere "political program, only binding morally". The same author makes the distinction between constitutional justice and constitutional jurisdiction. The "Constitutional justice" is the form through which the distribution of prerogatives between ordinary legislation and constitutional law is guaranteed, and the

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[1] Ion Deleanu, *Constitutional justice* (Bucharest: Lumina Lex Publishing House, 1995), 5.
[2] Idem., 5-6.
[3] H. Kelsen, *"*La garantie jurisdictionnelle de la Constituion", *Revue de Droit publique* (1928): 197 and next.

"constitutional jurisdiction" refers to the authority through which the constitutional[4] justice is achieved.

In Romanian literature, the notion of "constitutional justice" has come about mainly due to the contribution made by Professor Ion Deleanu[5] in this field. Without a thorough analysis of this concept, we consider that the constitutional justice is a legal category of special significance whose constitutional constituents are as follows:

a) designates all the institutions and procedures through which the Constitution supremacy is achieved.

b) a state body competent to carry it out with the duties provided by the Constitution and the law;

c) a set of technical means and forms of implementation with specific and exclusive features;

d) the purpose of the constitutional justice is to ensure the supremacy of Constitution.

There is no identity between the concepts of constitutional justice and, respectively, the constitutionality control of laws. The latter one is only a part of the first.

In the sense of the above definition, the general features of the constitutional justice can be identified:

- it is a genuine jurisdiction but having some peculiarities over other forms of jurisdiction having in view this one's purpose;
- it may use common procedural rules, but also the own procedural rules consecrated in the Constitution, laws and regulations determined by the nature of the constitutional litigation;
- can be done by a specialized state body (political, judicial, or dual-nature), or by the common law courts;
- it is an exclusive justice because it has the monopoly of the constitutional litigation.
- it is not always concentrated because the common law courts may have perspectives in the area of constitutional litigation:
- the independence of the constitutional justice consists in the existence of a "constitutional statute" of the body implementing this type of jurisdiction, consisting in the independent statutory and administrative autonomy vis-à-vis of any public authority; the verification of its own competence, the prevalence of abuses of constitutional justice over any other judicial decisions: the independence and immovability of the judges and, in some cases, their designation using criteria other than those relating to the recruitment, appointment and promotion of career magistrates;

The control of constitutionality of the laws is the main form of constitutional justice and is a basis for democracy guaranteeing the establishment of a democratic government that respects the supremacy of the law and Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in author's conception is formulated as follows: all the state organs operate on the basis of a lawful order established by the legislator, which one must be respected.

The same author, referring to the supremacy of Constitution, fully affirmed and in relation to today's realities: "When the modern state organizes its new appearance, the first idea that concerns it is to stop the administrative abuse, hence the invcention of the constitutions and by judicial means the establishing of the legality control. Once this abuse is established appears a new one, a more serious one, that of the Parliament. Then are invented the supremacy of Constitution and various systems for guaranteeing it. The idea of legality thus gains a strong strengthening leverage"[6].

An important aspect is also to define the notion of control of the constitutionality of laws. In the legal doctrine[7] was emphasized that the issue of this attribution must be included in the principle of legality. Legality is a fundamental principle of organizing and operating the social and political system. This principle has several coordinates: the existence of a hierarchical legal system on top of which is the Constitution. Therefore, the ordinary law must comply to Constitution in order to fulfill the condition of legality; the state bodies must carry out their duties in strict compliance with the observance of the competences established by the laws; the elaboration of the normative acts should be done by competent bodies, after a predetermined procedure in compliance with the provisions of the higher normative acts with legal force and with the observance of the law and Constitution by all state bodies.

In the doctrine, the constitutionality control of the laws was defined as: "The organized activity for verifying the conformity of the law with the constitution, and from the point of view of the constitutional law it contains rules regarding the authorities competent to make this verification, the procedure to follow and the measures that can be taken after this procedure[8] has been completed."

The analysis of the definition shows the complex significance of the constitutionality control of the laws. This is an institution of the constitutional law, which is the set of legal norms relating to the organization and functioning of the authority competent to exercise the control, as well as the set of legal rules having a

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[4] For development see Ch. Eisenmann, *La Justice constitutionnelle de la Haute Cour Constitutionnelle d'Autriche*, (Paris: PUAM et Economica, 1986), 34.

[5] For developments see Ion Deleanu, *quoted work,* 9-12.

[6] George Alexianu, *Constitutional Law* (Bucharest: Schools' House Publisher, 1930), 71.

[7] On this meaning see Ion Deleanu, *Constitutional institutions and procedures* (Bucharest:: C.H.Beck, 2006), 810; Ioan Muraru and Elena Simina Tănăsescu, *Constitutional law and political institutions*, Vol. II (Bucharest: C.H.Beck 2014), 191; Marius Andreescu and Andra Puran, *Constitutional law. General theory of the State, Second edition* (Bucharest: C.H.Beck, 2017), 205-206.

[8] Ioan Muraru and Elena Simina Tănăsescu, *quoted work*, 191.

procedural nature that regulate which ones may be disposed by a constitutional court.

At the same time, it is also an organized activity guaranteeing the supremacy of Constitution by verifying the conformity of the norms contained in the laws and other normative acts with the constitutional regulations.

In essence, the control of the laws' constitutionality requires the verification of laws' compliance as a legal act of the Parliament, but also of other categories of normative acts with the norms contained in the Constitution. The compliance must exist both formally (the competence of the issuing body and the elaboration procedure) as well as from the material point of view (the competence of the norm in the ordinary law must be in line with the constitutional norm).

There are several factors that explain the emergence and evolution of the constitutionality control of laws, of which we mention:

a) *The inconsistency between Constitution and the laws*. This compliance of the law with the Constitution is not a given or an absolute presumption. Both theory and practice have shown that due to the dynamics and peculiarities of the legislative process, there may be inconsistencies between the law and Constitution. Thus, by giving effect to groups of political interests, which usually belong to the majority, the Parliament can adopt a law that contravenes the constitutional norms. For the same reason, the government could adopt unconstitutional normative acts.

In other cases, the legislative technique regulated by the Constitution may not be respected by the Parliament, which would lead to inconsistencies between the law and Constitution.

b) *The necessity of interpreting the Constitution and the laws in view of establishing the conformity of the right with the constitutional norms.*

The normative law-making activity must be continued with norms implementing work; in view of their application, the first logical operation to perform is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. Therefore, what is the object of interpretation are not the legal norms, but the text itself of the law or Constitution. A legal text may contain several legal rules. From a constitutional text a constitutional norm can be deduced by interpretation. The text of Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. By interpreting are identified and determined the constitutional norms.

It should also underline that a Constitution may contain certain principles which are not clearly expressed *expresis verbis*, but they can be inferred through the systematic interpretation of other norms.

In the sense of the above, the specialized literature stated: "The degree of determination of the constitutional norms through the text of the fundamental law can justify the necessity of interpretation. The norms of the Constitution are well suited to the evolution of their course, because the text is inexorably inaccurate, formulated in general terms. The formal superiority of Constitution, its rigidity, prevents its revision at very short intervals, and then interpretation remains the only way to adapt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact determining depends on the will of the interpreter." [9]

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained both in Constitution and the laws, by means of the institutions which carry out mainly the activity of interpreting the norms enacted by the author.

These institutions are primarily the judging courts and constitutional courts.

Verifying the conformity of a normative act with the constitutional norms, institution that represents the constitutionality control of the laws, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures for interpreting both the law and Constitution.

Therefore, the necessity of interpreting the Constitution is a condition of its application and for ensuring its supremacy. The constitutionality control of the laws is essentially an activity for interpretation of both the Constitution and the law. It is necessary to have independent public authorities that have the competence to interpret the constitution and in this way to examine the conformity of the law with the Constitution. Within the European model of constitutional justice, these authorities are the Constitutional Courts and tribunals.

c) *The applying of the principle of separation and balance of powers in the state*. *Avoiding the abuse of parliamentary power*

The limits of Parliament's power to legislate are determined by the constitutional norms determining the competence and the legislative procedure. Another limit is the need to respect the supremacy of Constitution in terms of the contents of the norms enacted by the Parliament.

Consequently, the constitutionality control of the laws is the practical way for verifying the compliance with the Constitution's supremacy by the Parliament and it constitutes a counterpart to its powers in the legislative matter.

The constituent legislator and the ordinary legislator must find the most appropriate procedures to respond to two major requirements: first, the need not to obstruct the exercise of the legislative function of the

[9] Ioan Muraru and Mihai Constantinescu and Elena Simina Tănăsescu and Mihai Enache and Gheorghe Iancu, *Interpretation of Constitution, Doctrine and Practice* (Bucharest: Lumina Lex, 2002), 67.

Parliament by conferring exaggerated powers in matter to other state authorities, and, on the other hand, the need to ensure, within strictly defined limits, the compulsoriness of the decisions of some constitutional courts for the Parliament.

The necessity of the control of constitutionality of the laws is in fact the expression of the need to guarantee the supremacy of Constitution in relation to the activity of the Parliament.

If the chronological character is concerned, the constitutionality test was first made in England by Eduard Cohe through his judgment decision in 1610 in Bonham case, as chief justice. The usefulness of constitutionality control was then demonstrated by Alexander Hamilton in the U.S. in 1780: "If there were to be a pre- reconcilable difference between the laws and Constitution, it would of course be preferable to the one that has a superior validity and compulsoriness or, in other words, the constitution must be preferred to the law ... No legislation act contrary to Constitution can be valid."[10]

The one who frequently raises the issue of controlling the constitutionality of laws by a political body is the famous French lawyer and politician Siéyes. In his speech in the 1791 Convention of France, he called for the creation of a political body that would cancel out of office or at the request of those concerned, of any act or any law that would be contrary to Constitution. Moreover, this organ even had a Constituent Assembly role.

From a historical perspective, it is of particular importance the judicial control of constitutionality established in the United States at the beginning of the nineteenth century, although the Constitution does not regulate procedural rules.

The evolution of the constitutionality control of the laws in the U.S. can be divided into two periods. The first period begins with the adoption of the Constitution in 1787 and ends in 1886.

During this period, in the matter of constitutionality, the judges verified in particular whether the ordinary legislator respected the competence conferred by Constitution in the sense of not being legally enforced on matters prohibited through constitutional norms. The judges could not annul a law as unconstitutional, but could only to implement its application in the case before the court.

The Supreme Court pronounces in the *Marbury affair vs. Madison*, for the first time in a case of this nature, declaring the federal Constitution to be the supreme law of the state and removing an act of the Congress contrary to the federal Constitution. The decision of the Court is written by Judge John Marshall and forms the basis on which is based the American jurisprudence on constitutionality control.

The reasoning attributed by the American judge is the following: the judge is meant to apply and interpret the laws. The Constitution is the supreme law of a state that must be applied with priority to any other law. The Constitution, being a law, is to be interpreted and applied by the judge, including to a particular case forming the subject of the judgment.

In case the law does not comply with constitutional norms, the latter ones will be applied because of the supreme character of the Constitution.

The second period begins in 1883 with a famous decision of the Supreme Court in Massachussets in the Wiegman litigation. The judges' powers increase in matter of constitutionality. The Supreme Court is no longer confined to verifying a law in terms of respecting the legislature's constitutional competence or in regard to the observance of procedures. Starting with this moment, and until now, the justice in the matter of constitutionality control examines the law in terms of its opportunity, its rationality and its economic and social justification. Thus, through the procedure of constitutionality control, the judiciary power examines the entire activity of the Parliament and removes all measures that are deemed to be contrary to the legal order in the state. In this way, justice is a guarantor of the supremacy of Constitution and of the observance of the principle of separation of powers in the state, "as the control and mutual supervision of the powers are the very essence of the existence of a state"

But the American model of constitutional justice is not without criticism. Among the most significant ones we mention:

a) verifying the compliance of the law with the constitutional norms is a constitutional litigation that differs from the ordinary legal disputes, the latter ones being the object of settling of the common or specialized courts of law. In contrast to these, a constitutional litigation can only be solved by a constitutional judge;

b) the legal effects of the constitutionality control occur only between the parties involved in the process. In the absence of a parliamentary procedure of law reviewing, we reach the paradoxical situation to let in force an unconstitutional law;

c) the ordinary jurisdictional procedure is incompatible with the specificity of a constitutional litigation;

d) There is the danger of transforming the justice into a judges' ruling, and thereby breaking the principle of separation of the powers in the state. "The judiciary authorities become, unwillingly a branch of the legislative power, or even worse, a real governing power, an authority above the others." [11]

Therefore, several theoretical, institutional and political considerations have led to the establishment of a control of constitutionality of the laws through a specialized body, which is the European model in this field.

[10] George Alexianu, *quoted work*, 72.
[11] Ion Deleanu, Constitutional Justice, quated work, 38.

From these considerations, shown in the literature in specialty[12] we can mention two:

a) the political regime of a parliamentary or semi-presidential type existing in most European countries leads to a dominant position of the parliamentary majority, that fulfills the governing. The judicial reviewing of the constitutionality of laws is not a genuine counterpart related to the power of the Parliament. It is necessary to carry out the constitutionality control of the laws through a specialized body, which is, as the case may be, either a counterbalance to a parliamentary majority too strong – expressively, volunteering or a substitute for a non-existent parliamentary majority.

b) the control of constitutionality of the laws through a specialized body ensures the correct acceptance and application of the principle of separation of the powers in the state. In this sense, Hans Kelsen[13] said: "The guaranteeing of the Constitution implies the possibility of canceling the acts contrary to it, and not by the body that adopted them, which is considered a free-creator of law, and not a law-enforcement body, but by another organ, different and independent of the legislative one and any other authority".

The European model of constitutional justice is institutionally characterized in the constitutional courts or tribunals.

In the interwar period, this model was noted in Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).

After the Second World War are established the constitutional courts and tribunals in most European countries: Italy (1948), Germany (1949), Turkey (1961), Portugal (1976), Spain (1978) etc.

Among the Eastern European countries that have this model of constitutional justice we mention: Romania, Poland, Hungary, Czech Republic, Croatia, Macedonia, Russia, Ukraine, Lithuania, etc.

In case of France, the constitutionality control is carried out by a dual, political and judicial body, the French Constitutional Council. This is made up of the former presidents of the republic, still living, as well as of nine members appointed for a 9 years unique mandate. The members of the Constitutional Council shall be appointed as follows: three members by the President of the State, three by the Senate President and other three by the President of the National Assembly. The President of the Constitutional Council is appointed by the decision of the President of the Republic. In the competence of this Council fall other responsibilities outside the control of constitutionality of the laws.

In our country, the control of the constitutionality of laws has developed marked by the national particularities and the successive application of the two models presented above.

Thus, Cuza's statute established in article 12, that the state and constitutional laws are placed under the protection of the weighing body. Therefore, this Chamber of Parliament could verify the conformity of a law with the Constitution.

The 1866 Constitution did not regulate the control of constitutionality of the laws.

However, the provisions of Article 93 of the Constitution, according to which the Lord "sanctions and promulgates the laws" and that, he "may refuse his sanction." Consequently, the head of state could refuse to promulgate a law if he considered it unconstitutional. Obviously, it is not a genuine control of constitutionality of the laws, but it is a precursor to such verification. As long as the 1866 Constitution was in force, the head of state never made use of this procedure.

The control of constitutionality of the laws done by a judging court rather than by a specialized institution, different from the judiciary power, has also been accepted on the European continent. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911-1912, the Ilfov Tribunal and then the High Court of Cassation and Justice had the right to verify the constitutional conformity of the laws in the litigation known as the "trams affair" in Bucharest.

Interestingly, the reasoning used by Ilfov Tribunal and by the High Court of Cassation and Justice in motivation of the possibility to carry out the Constitutionality control on a pretorian basis. In essence, the recitals were the following: 1) The court did not of its own motion take the jurisdiction to rule on the constitutionality of a law and to annul it, since such a procedure would have constituted an interference of the judicial power into the powers of the legislature. As a consequence, the court assumed this competence because it was asked to verify the constitutionality of a law; 2) On the basis of the attributions that are given, the judiciary power has as its main mission the interpretation and application of all laws, whether ordinary or constitutional.

If a law invoked is contrary to the Constitution, the court can not refuse to settle the case; 3) There is no provision in the 1866 Constitution which specifically prohibits the right of the judiciary power to check whether a law is in conformity with the Constitution. The provisions of Article 77 of the Constitution are being invoked, according to which a judge, according to the oath, is obliged to apply the laws and the Constitution of the country; 4) unlike ordinary laws, the Constitution is permanent and can only be revised exceptionally. Being the law with supreme power, the Constitution is imposed by its own authority and therefore the judge is obliged to apply it with priority,

[12] See Ion Deleanu, Constitutional Institutions and Procedures, quated work, 805; Ioan Muraru and Elena Simina Tănăsescu, quoted work, 269.

[13] H. Kelsen, The pure doctrine of the law (Bucharest: Humanitas, 2000), 110-111.

including in case where the law on which the litigation is settled is contrary to the Constitution[14].

The decisions of Ilfov Tribunal and the High Court of Cassation and Justice were well received by the experts of the time. Here's a short comment: "This decision was a great satisfaction for all people of law. It is a great step forward in advancing this country towards progress, because it consecrates the principle that the Constitution of this state, its foundation, the palace of our rights and freedoms, must not be despised by anyone. We are proud that it has been given to our justice the privilege to show even to the justice of the Western countries the true way of progress in the matter of public law."[15]

For the first time, the constitutionality control of the laws was regulated by the Romanian Constitution in 1923, by article 103, adopting the American model. "Only the Court of Cassation in unified sections has the right to judge the constitutionality of the laws and to declare inappropriate those that are contrary to the Constitution. The judgment on the unconstitutionality of laws is limited to the case alone."

Consequently, the control of constitutionality of the laws was the exclusive competence of the Court of Cassation in unified sections. It could be exercised only by way of the exception of unconstitutionality invoked during the trial of the litigation. At the same time, the pronounced ruling had legal effects only between the parties in the trial and had the power of a *rex judecata* only in the case solved.

Also, the constitutionality of laws is judged after the litigation has passed all levels of jurisdiction. This procedure was an extraordinary way to appeal a judgment. The provisions of article 29 of the Law of the Court of Cassation stipulated only one exception when the applicant accepted the suspension of the trial of the case matter so that for the Cassation Court to decide in advance on the constitutionality of the law whose application was required.

At the same time, through these constitutional regulations, the transition from the "diffuse" judicial control, assumed by all courts, to a "concentrated" judicial control, assigned to a single court, namely the Court of Cassation, was made in unified sections. Also, the decision given in that procedure has effects only on the case and between the parties in litigation, and could not have legal effects *"erga omnes*".

The constitutionality control of the laws was governed identically by the Romanian Constitution in 1938, by the provisions of article 75.

In the post-war period, the constitutionality control of the laws was practically no longer regulated. The provisions of article 24 letter j) of the 1952 Constitution stated that the supreme representative body, the Grand National Assembly, has in its competence "the general control over the implementation of the Constitution", which included the right to examine the law's compliance with Constitution.

Similarly, the provisions of Article 43 (point 5) of the Constitution adopted in 1965 established the competence of the Grand National Assembly to exercise general control over the implementation of Constitution, but these provisions regulated more specifically the competence of the supreme representative body in respect of the constitutionality control of laws: "Only the Grand National Assembly decides on the constitutionality of the laws ".

The constituent lawmaker of the post-war period of the totalitarian state renounces the American model, as well as to the principle of separation of the powers in the state and entrusts the constitutionality control to a political body.

The Romanian Constitution in 1991, that restores the values of democracy and of the lawful state, regulates initially the constitutionality of laws in Article 140-145, according to the European model, the competence being entrusted to the Constitutional Court, this one being constituted as an independent public authority.

In Romania, the constitutional justice is carried out by the Constitutional Court. The core of the matter are the provisions of article 142-147 of Constitution and those contained in the Law no. 47/1992 on the organization and functioning of the Constitutional Court[16]. However, as we shall see below, the constitutional justice is not an exclusive attribute of the Constitutional Court, being only its most important component the constitutionality control of laws, to which are added the exclusive competencies conferred by Constitution and special laws.

The constitutional provisions through which the Constitutional Court of Romania became a reality were accepted after extensive parliamentary debates during the discussion of the Constitution draft. It is useful for our scientific approach to succinctly mention the maturity of these parliamentary talks, as a result of which the Constitutional Court has become a reality. The Parliamentary Committee on the Drafting of the Basic Law has made Title IV to be consecrated to the "Constitutional Council" under the influence of the French constitutional system.

The debates in the constituent assembly can be systematized, as shown in the literature in speciality, into four great ideas: "namely, a) the elimination of the institution, without any variant; b) the abolition of the constitutional council, with the entrusting of its controlling mission to the courts; c) entrusting a constitutional review to a commission; d) acceptance of the control of the laws' constitutionality, exercised by

[14] See the *Judicial Courier,* No. 32(April 29th 1912): 373-376.
[15] N.D. Comşa, "The notifications", *Judicial Courier,* No.32, (April 29th , 1912): 378.
[16] Republished in the Official Gazette no. 807 on December 3rd, 2010.

a distinct authority, council, court or constitutional court".[17]

Finally, the Constituent Assembly decided to create a specialized judicial body, namely the Constitutional Court. The essence of the reasoning behind this decision was as follows: "The Constituent Assembly has decided to institutionalize this form of control of constitutionality of the laws. Such control is inherent to the lawful state and democracy. In the post-war period, all the European states that have adopted constitutions have entrusted the control of constitutionality of the laws, not to the courts, but to a special and specialized body, so that the model offered in the project is a European model. By its makeup and its attributions, the Constitutional Court is not a "superpower", nor is it expensive – in relation to other institutions - through its nine members. Entrusting the control of constitutionality of the laws of the Supreme Court of Justice would result in the transformation of the jurisdictional body into a political body, the overordination of the judicial authority, the stimulation of arbitrariness on its part, the return to a form of desuet control, long time outdated in most of the democratic countries world "[18].

The doctrine has synthesized the following features and functions of the Constitutional Court:

a) *It is no other power in the state nor does it take any of the functions of the three powers*. The Constitutional Court is a typical example of non-formal and non-rigid interpretation of the theory of separation of powers in the state. The Constitutional Court cannot formally be classified into any of the three classical powers of the state but it contributes to the balance between them.

b) *It has a dual nature: political and jurisdictional*. The political nature derives from the way of designation of judges and from some attributions concerning the verification of the observance of Constitution in the procedure for appointing the President of Romania, the organization of the referendum, the mediation of the constitutional conflicts between the public authorities, the verification of Constitution's observance by the political parties, or in general, to verify the compliance with Constitution by some public authorities.

It has a jurisdictional nature because the members of the Constitutional Court act as veritable judges. At the same time, in the exercise of its functions, the Court applies a number of jurisdictions governed by the framework law for the organization and functioning which is supplemented by some regulations of the Civil Procedure Code. Also, the jurisdictional nature arises from the attributions of the Constitutional Court, especially in the field of constitutionality control of the laws and other normative acts.

c) *The role of the Constitutional Court as a public authority is to be the guarantor of the supremacy of Constitution*. This feature expressly results from article 142 paragraph (l) of Constitution. The Constitutional Court is not the only guarantor of Constitution, a very broad category that also characterizes the function of the Head of State. Thus, the provisions of article 80 paragraph (2) of Constitution show that the President of Romania is watching over the observance of Constitution. Our Constitutional Court is the guarantor of the supremacy of Constitution, an expression that underlines the foundation of the Court's functions.

d) It is the public authority that supports the good functioning of the public authorities in constitutional relationships, of separation, balance, collaboration and mutual control. In the sense of this feature, by amendments to the Constitution as a result of a new revision a new attribution was introduced to the Constitutional Court, namely: it solves the legal conflicts of constitutional nature between the public authorities [article 146 letter e) of the Constitution]. In order to achieve this, the Constitutional Court is independent of any other public authority; it only obeys the Constitution and its organic law (article l paragraph. (3) of Law no. 47/1992, republished]. The independence of the Court implies its right to decide on its competence and, moreover, the jurisdiction of the Constitutional Court cannot be challenged by any public authority. Therefore, there can be no positive or negative conflict of competence between the Constitutional Court and another public authority.

e) *The Constitutional Court is the only authority of constitutional jurisdiction in Romania* [article l paragraph. (2) of Law no. 47/1992, republished]. The Romanian constituent lawmaker has adopted the European model in the sense that constitutional justice is carried out by a single authority. The courts have some attributions that materialize in the right of appreciation of the admissibility of some unconstitutionality exception, but this does not invalidate the Court's monopoly on the constitutional justice, since only this public authority has the competence to resolve the constitutional disputes.

f) *The organization, operation and exercise of the duties shall be carried out in compliance with the principle of legality*. Our constitutional court exercises exclusively the powers provided by article 146 of the Constitution and those regulated by the organic law. The Court is not a supra constitutional court, its role is to interpret and apply the constitutional and law provisions.

In the same meaning, the provisions of Article 2 of Law no. 47/1992, republished, shows that the Constitutional Court ensures the constitutionality control only of the laws, international treaties, regulations of the Parliament and ordinances of the Government. The unconstitutionality can only be ascertained if the procedures of these normative acts violate the provisions or principles of the Constitution

[17] Ioan Muraru and Elena Simina Tănăsescu (coordinators), *România Constitution. Comments on the article* (Bucharest: C.H.Beck, 2008), 1370.

[18] Idem, 1373.

[article 2 paragraph (2) of the Law no. 47/1992, republished].

g) *The structure of the Constitutional Court is determined by the Constitution and the Law no. 47/1992.* As the Constitutional Court is independent in regard to any public authority, in a particular case only this institution can decide whether or not has the competence to resolve the constitutional dispute. Moreover, its competence cannot be challenged by any public authority (article 3 paragraph (3) of Law no. 47/1992, republished]. The Code of Civil Procedure regulates the resolution of negative or positive conflicts of jurisdiction between the courts. Taking into consideration the normative norms mentioned above between the Constitutional Court of Romania and, on the other hand, a court or other public authority, conflicts of jurisdiction cannot arise, because the exclusive competence in the matter of constitutional verification of the laws is in the right of the Constitutional Court, and this monopoly of constitutional jurisdiction cannot be challenged. The Constitutional Court has the power to decide on its jurisdiction in a specific case, but it cannot decline its jurisdiction in favor of another public authority in case the Constitutional Court is noticed with a request under conditions other than those stipulated by the Constitution or the organic law, the petition will be dismissed as inadmissible.

h) *In the exercise of its powers, the Constitutional Court regulates a work of interpretation of the law and Constitution*. The Constitutional Court cannot amend, complete or abrogate a law.

In its old drafting, before the revision of the Constitution, the Law no. 47/1992 prohibited the Constitutional Court to interpret the normative acts that are subject to constitutionality control. Naturally, the current regulation has removed this ban because the activity of verifying the compliance of normative regulations with the provisions of the Constitution made by the constitutional judge is in essence also a work for the law enforcement based on the interpretation of the legal norms.

The Constitutional Court participates in the achievement of the legislative function in the state, but not as a positive legislator, yet as a negative legislator whose purpose is to eliminate the "unconstitutionality venom" from a normative act. Therefore, by its attributions, the Court is not subrogated to Parliament's activity, because the amending, supplementing or abolishing of a law is an exclusive attribute of Parliament

i) *The Constitutional Court "supports the good functioning of the public authorities in constitutional relationships of separation, balance and mutual control"*. The principle of separation and balance of the powers in the state with all the criticisms expressed by some authors remains the foundation of the democratic exercise of state power and the main constitutional guarantee for avoiding the excess or abuse of power by any state authority.

The relationships between the state authorities are complex, but they must also ensure their proper functioning while respecting the principle of legality and supremacy of Constitution. In achieving this goal, it is very important to maintain the state balance in all its forms and variants, including as a social balance.

The separation and equilibrium of the powers no longer concern only the classical powers (legislative, executive and judicial). To these powers are added others that give new dimensions to this classic principle. The relationships between the participants to the state and social life can also generate conflicts that need to be resolved to maintain the balance of powers. Some constitutions refer to public law litigations (German Constitution - Article 93), to conflicts of jurisdiction between the state and autonomous communities, or conflicts of powers between state powers, between the state and regions and between regions (Constitution of Italy - Article 134).

Romania's Constitution speaks about the legal conflicts of constitutional nature between public authorities [(art. 146 lit. c)] and regulates the mediation function between the powers of the state exercised by the President.

The Constitutional Court is an important guarantor of the separation and balance of state power because it solves the constitutional legal conflicts between public authorities and through its attributions in the matter of the constitutionalilty control previous to the laws and the verification of constitutionality of the Chamber's regulations, it intervenes in ensuring the balance between the majority and the parliamentary minority, assuring effectively the right of the opposition to express itself.

j) *The Constitutional Court is a guarantor of the observance of the fundamental rights and freedoms*. In principle, three are the essential constitutional guarantees of the citizens' rights and freedoms established by Constitution:

a) the supremacy of Constitution;

b) the rigid nature of Constitution;

c) citizens' access to the control of constitutionality of the law and to the control of lawfulness of the acts subordinated to the law.

In Romania, the procedure for the unconstitutionality exception provides the indirect access of the citizens to constitutional justice.

The judicial control is an important way of guaranteeing the supremacy of the fundamental law, because by the nature of the attributions of the courts, it interprets and enforces the law, which also implies the obligation to analyze the conformity of judicial acts subjected to the judicial control with the constitutional norms. The courts therefore have competences in the matter of constitutional justice. We are considering not only the general obligation of the judge to observe and apply the constitutional norms or the powers conferred by the law to notify the constitutional court with an exception of unconstitutionality but in particular the

possibility to censure a legal act in terms of constitutionality.

The recent doctrine and jurisprudence in the matter examines the jurisdiction of the courts to verify certain legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with excess power.

The unconstitutionality of a legal act can be ascertained by a court if the following conditions are met cumulatively:

1. the court to exercise its powers within the limits of competence provided by law;

2. the legal act may be individual or normative, may be mandatory or optional;

3. that in the case does not exist the exclusive jurisdiction of the Constitutional Court to rule on the constitutionality of the legal act;

4. the settlement of the case depends on the legal act that is criticized for nonconformity;

5. there is a reasonable, sufficient and pertinent reasoning of the court regarding the unconstitutionality of the legal act.

In case of the cumulative fulfillment of these conditions, the limits of the courts' attributions are not exceeded, but, on the contrary, the principle of supremacy of the Constitution is applied and efficiency is given to the role of the judge to apply and interpret the law correctly. Such a solution is also justified in relation to the role of the judge in the lawful state: to interpret and enforce the law.

The accomplishment of this constitutional mission, which is particularly important and difficult at the same time, requires the judge to apply the law in accordance with the principle of the supremacy of Constitution, therefore to control the constitutionality of the legal acts that form the subject of the litigation brought to justice or that is applied to the settlement of the case. The application of legal acts shall be carried out by the judge taking into account their legal force and observing the principle of the supremacy of Constitution. In this respect, worth mentioning the provisions of Article 4 paragraph (1) of Law no. 303/2004 obliging the magistrates that through their entire activity to ensure the supremacy of the law .

Another issue is to know what solutions the courts can issue, in compliance with the above conditions, when they ascertain the unconstitutionality of a legal act. There may be two situations: *In a first hypothesis*, the courts may be directly invested in verifying the legality of a legal act, as is case for the administrative litigation. In this case, the courts can determine by decision the absolute nullity of the legal acts on the grounds of unconstitutionality. *The other situation* concerns the hypothesis that the courts are not directly invested with verifying the legal act criticized for unconstitutionality, but that legal act applies to the settlement of the case brought to the court. In this case, the courts can no longer dispose the annulment of the unconstitutional legal act, but they will no longer apply it for the settlement of the case.

3. Conclusions

In our opinion, it is necessary that the role of the Constitutional Court as guarantor of the Fundamental Law to be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature in speciality that a possible improvement of the constitutional justice could be achieved by reducing the powers of the constitutional[19] litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of exercising its attributions in its charge, according to Constitution, by assuming the role of a positive legislator.[20] Reducing the powers of the Constitutional Court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as consequence the elimination of the risk of misconduct of those attributions. Not in this way it is achieved within a lawful state the improvement of the activity of a state authority, but by seeking legal solutions for better performing of the duties that prove to be necessary to the state and social system.

Proportionality is a fundamental principle of the law explicitly consecrated in the constitutional, legislative regulations and international legal instruments. It is based on the values of the rational justice and equity and expresses the existence of a balanced or appropriate relationship between actions, situations and phenomena, being a criterion for limiting the measures disposed by the state authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess power of state authorities. Proportionality is a basic principle of the European Union law being explicitly consecrated in the provisions of Article 5 of the Treaty on the European Union. [21]

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of Constitution, with applying on the restriction of the exercise of some rights, is insufficient to give full meaning to the significance and importance of the principle for the lawful state.

It is useful, in a future revision of the fundamental law that, at article 1 of the Constitution to be added a new paragraph stipulating that *"The exercise of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would constitute as a genuine constitutional obligation for all state

[19] Genoveva Vrabie, "The juridical nature of the Constitutional Courts and their place within the public authorities system", *Journal of Public Law*, no.1 (2010): 33.

[20] We are referring for exemplifying to the Decision no.356/2007, published in the Official Gazette no.322 on May 14th 2007 and to the Decision no. 98/2008 published in the Official Gazette no. 140 on February 22nd, 2008.

[21] For developments see Marius Andreescu, "Proportionality, principile of European Union law", *Judicial Courier* no. 10, (2010): 593-598.

authorities, to exercise their powers in such a way that the measures adopted be within the limits of discretionary power recognized by law. At the same time it is created the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and Government, by the constitutionality control of the laws and ordinances, using as a criterion the principle of proportionality.

In the attributions of the Constitutional Court may also be included the one to rule on the constitutionality of administrative acts exempted from the legality control of the administrative litigation courts. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers to and the provisions of Law no. 544/2004 of the administrative litigation, are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction on the exercise of the fundamental rights and freedoms or with the violation of some important constitutional values. For the same reasons, our Constitutional Court should be able to pronounce on the constitutionality and the decrees of the President for establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any verification of legality or constitutionality, the practice has shown that in many situations the Supreme Court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented the normative acts by acting as a true legislator, violating the principle of separation of powers in the state[22]. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider that it is necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

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[22] For developments see Andreescu Marius, "Constitutionality of appeal in the interest in the name of the law and other decisions pronounced", *Judicial Courier* no. 1 ,(2011): 32-36.

SUPREMACY AND STABILITY OF THE CONSTITUTION. LOYAL CONSTITUTIONAL BEHAVIOR OF PUBLIC AUTHORITIES

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Abstract

The procedure for amending the Constitution is extremely difficult, almost impossible in the current social and political context. The essence of a constitution is its stability over time because only in this way can ensure the stability of the entire normative system of a state, certainty and predictability of the conduct of the legal subjects but also to ensure the legal, political and economic stability of the social system as a whole.

The obligation of the authorities, respectively of the parliament and of the executive to have a loyal constitutional conduct was for the first time stipulated in the jurisprudence of the French Constitutional Council, which is the constitutional court of France.

This obligation is found in the attributions to interpret and apply the constitutional norms that the state authorities have. It is not limited to the simple requirement of legality of the acts and provisions of the rulers, i.e. to the formal observance of the law.

In our opinion, the concern of the political class and state authorities in the current period, in relation to the current content of the Fundamental Law, should be oriented towards its correct interpretation and application and respect for the democratic finality of constitutional institutions.

In order to consolidate the rule of law in Romania, even in the current normative form of the Constitution, it is necessary that political parties, especially those in power, all state authorities act or exercise their powers within the limits of loyal constitutional behavior and the democratic meanings of the Constitution, the Orthodox Christian traditions and values of the Romanian people, the rights and dignity of the person.

In this study we analyze aspects of doctrine and jurisprudence of the concept of loyal constitutional behavior.

Keywords: *The supremacy of the Constitution, constitutional stability, public authorities, constitutional loyalty, guarantees of the obligation of constitutional loyalty*.

1. Introduction

The procedure for amending the Constitution is extremely difficult, almost impossible in the current social and political context, given Romania's integration into the European Union, with the consequence of subordinating the Constitution and the laws of political will of those who lead European Union bodies and legal instruments of this supranational organization but also, in the conditions in which Christianity and especially the right orthodox faith are rejected and even blamed in international legal documents and even in the jurisprudence of some international courts.

This state of affairs determines us to analyze to what extent the current normative content of the Constitution can be interpreted and applied in order to respect human dignity, the requirements of the rule of law, the Orthodox Christian traditions and values of the Romanian people, but also to eliminate excess power of the authorities with the consequence of abusive, unjustified restriction of the exercise of fundamental rights and freedoms, restrictive measures that seriously affect human life and dignity, freedom of communion of Orthodox believers, freedom of the Orthodox Church and other cults.

The governors, respectively the Parliament, the authorities of the executive power but also the courts have the obligation to have a loyal constitutional behavior. Of course, a loyal constitutional behavior must also characterize the activity of other political institutions, such as political parties and organizations, trade unions or employers' associations. In a broader sphere, loyal constitutional behavior must characterize the conduct of any subject of society. In this study we refer exclusively to the activity of state governing institutions.

The significance and content of the concept of loyal constitutional behavior that we formulate for the first time in the Romanian doctrine are analyzed in the context of the principles of the supremacy of the Constitution and the stability of the Fundamental Law.

2. Content

The supremacy of the Constitution expresses the super-ordinated position of the fundamental law. In a narrow sense, the scientific substantiation of the supremacy of the constitution results from its form and content. The formal substantiation is expressed by the superior legal force, by derogative procedures towards the common law on the adoption and modification of the constitutional norms, and the material supremacy

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results from the specificity of regulations, from their content, especially from the fact that the Constitution states premises and rules of organization, functioning and attributions of public authorities.

In connection with this aspect, in the literature it has been stated that the principle of the supremacy of the fundamental law "can be considered a sacred, intangible perception (…) it is at the top of the pyramid of all legal acts. Nor would it be possible otherwise: the Constitution legitimizes power, converting individual or collective wills into state wills; it gives authority to the rulers, justifying their decisions and guaranteeing their implementation; it determines the functions and attributions that belong to the public authorities, consecrating the fundamental rights and duties, directs the relations between the citizens, between them and the public authorities; it indicates the meaning or purpose of state activity, i.e. the political, ideological and moral values under the sign of which the political system is organized and functions; the Constitution represents the fundamental basis and the essential guarantee of the rule of law; it is, in the end, the decisive benchmark for assessing the validity of all legal acts and facts. These are, however, the substantial elements that converge towards one and the same conclusion: *the material supremacy of the Constitution*. But the constitution is supreme and in *the formal sense*. The procedure for adopting the Constitution externalizes a particular force, specific and inaccessible, which is attached to its provisions, so that no law other than a constitutional one can abrogate or modify the provisions of the fundamental establishment, provisions that rely on themselves, postulating their own supremacy"[1].

George Alexianu considered that legality is an attribute of the modern state. The idea of legality, according to the author, is formulated as follows: all state bodies function on the basis of an order of law established by the legislator and which must be respected.

The same author, by referring to the supremacy of the Constitution, stated on full grounds and in relation to current realities: "When the modern state organizes its new apearance, the first idea which preoccupies it is that of ending the administrative abuse, hence the invention of constitutions and, by way of jurisdiction, the establishment of a control of legality. Once this abuse being established, it emerges a new and more serious one, that of the Parliament. The supremacy of the Constitution and various systems for guaranteeing it are then invented. The idea of legality thus acquires a strong strengthening lever"[2].

The basis of the supremacy of the Fundamental Law is national and state sovereignty. This quality of the Constitution to be supreme is absolute as the national sovereignty is absolute and intangible. The cession of some attributes of national sovereignty, even through international treaties signed, ratified or accepted by the rulers on behalf of Romania, raises the issue of legitimacy and constitutionality of these documents because it violates the two fundamental principles, essential for the existence of Romanian society and the Romanian state, namely, the national sovereignty and the principle of the supremacy of the Constitution.

The principle of the priority of European Union law must be understood and applied within the limits of respecting the principle of the supremacy of the Constitution and not superordinated to it, as unfortunately happens now in Romania.

The concept of constitutional supremacy cannot be reduced to a formal and material signification. Prof Ioan Muraru stated that: "The supremacy of the Constitution is a complex notion whose content includes political and legal features and elements (values), which express the superior position of the constitution not only in the legal system, but in the entire socio-political system of a country"[3]. Thus, the supremacy of the Constitution represents a quality or a feature which places the fundamental law on top of the political-legal institutions from a state-organized society and expresses its superior position, both in the legal system and in the entire social-political system.

The legal ground for the supremacy of the Constitution is represented by Art 1 Para 5 of the fundamental law: "In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory". The supremacy of the Constitution is not just theoretical, in the meaning that it could be considered only as a political, legal or moral concept. Due to its express statement in the fundamental law, this principle has normative value, formally being a constitutional norm. The normative dimension of the supremacy of the Constitution implies important legal obligations whose non-compliance can lead to legal sanctions. In other words, as constitutional principle, normatively enshrined, the supremacy of the fundamental law is also a constitutional obligation with multiple legal, political, but also value meanings, for all components of the social and state system. In this meaning, Cristian Ionescu stated that "Strictly formally, the obligation (to comply with the supremacy of the fundamental law) is addressed to Romanian citizens. In fact, the compliance with the Constitution and its supremacy, as well as that of the laws, was a general obligation, whose recipients were all subjects of law – natural and legal persons (national and international) in legal relations, including diplomatic ones, with the Romanian state"4.

The general signification of this constitutional obligation refers to the compliance of the entire legal system with the constitutional norms. By "law" we

[1] Ion Deleanu, Instituţii şi proceduri constituţionale în dreptul roman şi în dreptul comparat (Bucharest: C.H. Beck, 2006), 221-222.
[2] George Alexianu, Drept constituţional (Bucharest: Casei Şcoalelor, 1930), 71.
[3] Ioan Muraru and Elena Simina Tănăsescu, Constituţia României – Comentariu pe articole (Bucharest: C.H. Beck, 2009), 18.
[4] Cristian Ionescu, Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii (Bucharest: C.H. Beck, 2015), 48.

mean not only the component of the normative system, but also the complex, institutional activity of interpretation and application of legal norms, starting with those of the fundamental law. "It was the intention of the Constituent Parliament derived from 2003 to mark the decisive importance of the principle of the supremacy of Constitution compared to any other normative act. There was a signal, in particular, from a public institution with a governing role to strictly respect the Constitution. The compliance with the Constitution is included in the general concept of legality and the notion of compliance with the Constitution imposes a pyramidal hierarchy of the normative acts at the top of which is the Fundamental Law"[5].

The observance of this constitutional obligation and its realization not only in the strict sphere of the normative system, but in the whole dialectic of the movement and evolution of the social and legal order, is the basis for what can be called the constitutionalization of law, but also of the whole social system organized as a state. In order to support this statement, we consider that, constantly, in the literature the principle of the supremacy of Constitution is not reduced only to its normative signification, and the Fundamental Law is also considered from a value perspective, with major implications for the entire social system. In this meaning, the Constitution is defined in the doctrine as being "a fundamental political and social establishment of the state and society"[6].

There is a system of guarantees for the compliance with the supremacy of the Constitution which, in our opinion, has two components. A specific and most important guarantee is the constitutionality control performed by the Constitutional Court. In this meaning, Art 142 Para 1 state that "The Constitutional Court is the guarantor of the Constitution". The Romanian Constitutional Court, since its establishment in 1992 until today has had an important contribution in censoring the excess of power of the Parliament and Government, but also of the political organisms which at a historical moment hold power in the state. Even if certain decisions issued by the Constitutional Court are debatable, it must me mentioned the important contribution brought by this judicial authority in maintaining the state of law, in the correct application and compliance with the constitutional provisions, in the protection and guarantee of the human rights and fundamental freedoms.

The other component of the system of guarantees is represented by the general control of the application of the Constitution conducted by state authorities on the basis and within the limits of the material competences stated by the law. the judicial control represents an important guarantee of the supremacy of the fundamental law, because by the nature of their attributions the courts interpret and apply the law, which implies the obligation to analyze the conformity of the judicial acts subjected to a judicial control with the constitutional norms.

One of the most controversial and important legal issues is represented by the relation between stability and innovation in law. The stability of legal norms is indisputably a necessity for the predictability of the conduct of legal subjects, for the security and proper functioning of economic and legal relations as well as to give substance to the principles of the rule of law and the Constitution.

On the other hand, it is necessary to adjust the legal norm and the law, in general, to the social and economic phenomena that follow one another so quickly. It is necessary for the legislator to be constantly concerned with eliminating everything that is "obsolete in law", of what does not correspond to realities. The relationship between stability and innovation in law is a complex and difficult issue that needs to be addressed carefully taking into account a wide range of factors, which can lead to a favorable or unfavorable position for legislative change[7].

One of the criteria that helps to solve this problem is the principle of proportionality. Between the legal norm the work of interpretation and its application, and on the other hand the social reality in all its phenomenal complexity must be made an adequate relationship, in other words the right to be a factor of stability and dynamism of the state and society, to correspond to the purpose of satisfying as best as possible the requirements of the public interest but also to allow and guarantee for the person the possibility of a free and predictable behavior, to realize himself in a social context. Therefore, the right, including in its normative dimension, to be viable and to represent a factor of stability but also of progress must be adequate to the social realities but also to the purposes for which the legal norm is adopted, or as the case may be interpreted and applied. This is not a new finding. Many centuries ago, when Solon was called upon to draw up a constitution, he asked the leaders of the city the question, "Tell me for what time and for what people", because later the same great sage would say that he did not give the city a perfect constitution, but only one appropriate to time and place.

The relation between stability and innovation has a special importance when it is raised the issue of maintaining or modifying of a Constitution because it represents the political and judicial settlement of a state[8] based on which it is structured the entire scaffolding of the state and society is structured.

The essence of a constitution is its stability over time because only in this way can ensure to a large extent the stability of the entire normative system of a

[5] Ionescu, Constituţia României. Titlul I. Principii generale art. 1-14. Comentarii şi explicaţii, 48.
[6] Ioan Muraru and Elena Simina Tănăsescu, Drept constituţional şi instituţii politice (Bucharest: C.H. Beck, 2013), 85-88.
[7] Victor Duculescu and Georgeta Duculescu, Revizuirea Constituţiei (Bucharest: Lumina Lex, 2002), 12.
[8] Ion Deleanu, *Drept constituţional şi instituţii politice,* 1st Volume (Bucharest: Europa Nova, 1996), 260.

state, certainty and predictability of the conduct of legal subjects but also to ensure the legal, political and economic stability of the social system, as a whole[9]. Stability is a requirement to guarantee the principle of the supremacy of the Constitution and its implications. In this meaning, Prof. Ioan Muraru stated that the supremacy of the Constitution does not represent strictly a legal category, but also a politico-juridical one underlining that the fundamental law is the result of the economic, political, social and judicial realities. "It marks (defines, outlines) a historical stage in the life of a state, it enshrines victories and gives expression and political and legal stability to the realities and perspectives of the historical stage in which it was adopted"[10].

In order to ensure stability for the Constitution were used various technical means for guaranteeing a certain degree of rigidity for the fundamental law, of which we mention: a) the establishment of special conditions for the performance of the initiative to revise the Constitution, such as the limitation of subjects who may initiate such initiative, constitutional control over the initiative to revise the Constitution; b) the interdiction to revise the Constitution by the normal legislative assembly or, in other words, the recognition of the competence to revise the Constitution only in the favor of a constituent assembly; c) the establishment of a special procedure for debate and adoption of the initiative for constitutional revision; d) the necessity to solve the constitutional revision by referendum; e) the establishment of material limitations for the revision, especially by establishing constitutional regulations which cannot be subjected to revision[11].

On the other hand, a Constitution is not and cannot be eternal or immutable. From the emergence of the constitutional phenomenon, the fundamental laws have been seen as subjected to changes irrevocably imposed by time and dynamics of statal, political, economic and social realities. This idea was stated by the French Constitution of 1791 according to which "A people shall always have the right to revise, reform or modify its constitution" and in modern times both the "International Covenant on Economic, Social and Cultural Rights", as well as the one regarding the civil and political rights adopted by the UN in 1996 state in Art 1: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

Esteemed Prof. Constantin G. Rarincescu stated in this meaning: "Although a constitution is meant to regulate in the future for a more or less long time, the political life of a nation it is not destined to be immovable, or forever perpetual, because, on the one hand, a constitution over time show its imperfections, and no human work is perfect, imperfections that need to be changed, on the other hand a constitution must be up to date with social needs and new political conceptions, which can change more frequently within a state or a society"[12]. Underlining the same idea, Prof Tudor Drăganu stated: "The Constitution cannot be conceived with a perennial monument destined to withstand the vicissitudes of centuries and not even decades. Like all other legal regulations, the constitution reflects the economic, social and police conditions existing in a society at some point in history and aims to create the most appropriate organizational structures and forms for its further development. Human society is constantly changing. Which is valid today, tomorrow may become obsolete. On the other hand, one of the features of the judicial regulations consists in the fact that they foreshadow certain paths meant to channel the development of society in one direction or another. Both these directions and ways of achieving the goals pursued may, however, prove to be confronted with inappropriate realities. Precisely for this reason, constitutions, like other legal regulations, cannot remain unchanged, but must adapt to social dynamics"[13].

In the light of these considerations, we appreciate that the relation between stability and constitutional revision must be interpreted and solved according to the principle of proportionality[14]. The fundamental law is viable as long as it is appropriate to the realities of the state and a certain society at a certain historical moment. Moreover – according to Prof Ioan Muraru – "a Constitution is viable and efficient if it acquires the balance between citizens (society) and public authorities (state) on the one hand, and on the other hand, between the public authorities and even between citizens. It is also important that constitutional regulations ensure that public authorities are at the service of citizens, ensuring the protection of the individual against arbitrary attacks by the state against his freedoms"[15]. In situations where such a relationship of proportionality no longer exists either due to imperfections in the Constitution or due to the inadequacy of constitutional regulations to the new

[9] Elena Simina Tănăsescu in *Constituţia României, Comentarii pe articole*, ed. Ioan Muraru and Elena Simina Tănăsescu (Bucharest: All Beck, 2008), 1467-1469.

[10] Ioan Muraru and Elena Simina Tănăsescu, *Drept constituţional şi instituţii politice*, 11th Edition (Bucharest: All Beck, 2003), 80.

[11] Muraru and Tănăsescu, *Drept constituţional şi instituţii politice*, 52-55; Tudor Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, 1st Volume (Bucharest: Lumina Lex, 1998), 45-47; Marius Andreescu and Florina Mitrofan, *Drept constituţional. Teoria general* (Piteşti: Piteşti University Press, 2006), 43-44; Duculescu and Duculescu, *Revizuirea Constituţiei*, 28-47; Deleanu, *Instituţii şi proceduri constituţionale în dreptul roman şi în dreptul comparat*, 275-278.

[12] Constantin G. Rarincescu, *Curs de drept constituţional* (Bucharest, 1940), 203.

[13] Drăganu, *Drept constituţional şi instituţii politice. Tratat elementar*, 45-47.

[14] Marius Andreescu, *Principiul proporţionalităţii în dreptul constituţional* (Bucharest: C.H. Beck, 2007).

[15] Ioan Muraru, Protecţia constituţională a libertăţilor de opinie (Bucharest: Lumina Lex, 1999), 17.

state and social realities, there is a legal and political need for constitutional revision.

However, in the relation between stability and constitutional revision, unlike the general relation between stability and innovation, in law these two terms do not have the same logical and judicial value. It is a report of vexation (and not of contradiction) in which the stability of the constitution is the dominant term. This is justified by the fact that the stability is an essential requirement for the guarantee of the principle of the supremacy of the Constitution, with all its consequences. Only through the primacy of stability over revision initiatives, a constitution can exercise its functions and role in ensuring the stability, balance and dynamics of the components of the social system, the increasing assertion of the principles of the rule of law.

The supremacy of the Constitution conferred also by its stability represents a guarantee against the arbitrariness and discretionary power of the state authorities, through the pre-established and predictable constitutional rules, which regulate the organization, functioning and attributions of the state bodies. Therefore, before raising the issue of revising the Constitution, it is important that the state authorities make the correct interpretation and application of the constitutional normative provisions in their letter and spirit. The work of interpreting constitutional texts carried out by constitutional courts but also by other state authorities in compliance with the powers conferred by law is likely to reveal the meanings and significations of the principles and regulations of the Constitution and thus contribute to the process of adapting these rules to social, political and state rules whose dynamics must not be neglected. The justification of the interpretation is found in the need to apply a general constitutional text to a concrete factual situation[16].

Guaranteeing the supremacy of the Constitution and stability of the fundamental law are the premises for what we call "a loyal constitutional behavior".

According to our opinion, the preoccupation of the political class and of the state authorities nowadays, in relation to the actual content of the Constitution, should be oriented towards the correct interpretation and application of it and towards the compliance with the democratic finality of the constitutional institutions.

In order to consolidate the rule of law in Romania, even in the current normative form of the Constitution, it is necessary that political parties, especially those in power, all state authorities act or exercise their powers within the limits of loyal constitutional behavior involving respect for meaning and the democratic significations of the Constitution, the Orthodox Christian traditions and values of the Romanian people, the rights and dignity of the person.

The obligation of authorities, namely of the Parliament and the executive to have a loyal constitutional behavior was for the first time stated in the jurisprudence of the French Constitutional Council, which is the constitutional court of France.

This obligation is found in the attributions that state authorities have to interpret and apply the constitutional norms. It is not limited to the simple requirement of legality of the acts and provisions of the rulers, i.e. to the formal observance of the law.

The normative activity of drafting the law must be continued with the activity of applying the norms. In order to apply, the first logical operation to be performed is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. What is represented as an object of interpretation are not the legal norms, but the text of the law or of the Constitution. A text of law may contain several legal norms. From a constitutional text may be deduced a constitutional norm through interpretation. The constitutional text is drafted in general terms which influence the degree of determination of the constitutional norms. Through interpretation the constitutional norms are identified and determined.

It should also be emphasized that a Constitution may contain certain principles which are not clearly expressed *expressis verbis* but may be inferred from the systematic interpretation of other rules.

In the sense of those shown above, in the literature it was specified that "The degree of determination of the constitutional norms through the text of the fundamental law can justify the need for interpretation. The norms of the Constitution are best suitable to an evolution of their course, because the text is by excellence imprecise, formulated in general terms. The formal superiority of the Constitution, its rigidity, prevents its revision at very short intervals and then the interpretation remains the only way to adopt the normative content, usually older, to the social reality that is constantly changing. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact determination depends on the will of the interpreter"[17].

The scientific justification of the interpretation results from the need to ensure effectiveness to the norms stated both in the Constitution and in the laws, through institutions that carry out mainly the activity of interpreting the rules enacted by the author. These institutions are mainly the judicial and constitutional courts.

Verification of the conformity of a normative act with the constitutional norms, an institution that represents the constitutionality control of the laws, does not mean a formal comparison or a mechanical

[16] Ioan Muraru, Mihai Constantinescu, Elena Simina Tănăsescu, Marian Enache, Gheorghe Iancu, Interpretarea Constituției (Bucharest: Lumina Lex, 2002), 14.

[17] Ioan Muraru, Mihai Constantinescu, Elena Simina Tănăsescu, Marian Enache, Gheorghe Iancu, Interpretarea Constituției. Doctrină și practică (Bucharest: Lumina Lex, 2002), 67.

juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures of interpreting both the law, as well as the Constitution.

Therefore, the necessity for the interpretation of the Constitution is a condition for its application and of the insurance of its supremacy. The constitutional control of the law is essentially an activity of interpretation both of the Constitution and of the laws.

Constitutional jurisprudence through the work of interpretation and application of the norms of the Constitution can contribute to revealing the meanings and meanings of the content of the norms of the Constitution, some of these being explicitly included in the content of the interpreted norm and others only implicitly. The contribution of the constitutional jurisprudence in the construction of the norms of the fundamental law, we consider it to be a work of legal construction of the content of the interpreted norm consisting in the new revealed valences of the explicit and especially implicit form of the norms. Of course, the work of constructing the content of the constitutional norms does not represent an addition to the legal norm of some elements that exceed the intention of the constituent legislator or are contrary to his will. The Constitutional Court, considering the features of our legal system, cannot create legal norms, cannot substitute the legislator. Our constitutional court is, as it is constantly stated by the legislature, a "negative legislator" because it does not have the competence to create legal norms, but only to ascertain the unconstitutionality of the analyzed legal norm. The Constitutional Court, as any other court, does not create the law, it simply "tells the law", expresses through its decisions the explicit or implicit content of the interpreted and applied constitutional norm.

In our opinion, the Constitutional Court cannot be characterized only by the phrase "negative legislator", but has an important positive role through the jurisprudential work in the construction of the normative content of the Constitution and especially the construction of the content of certain general principles of law explicitly or implicitly formulated by the norms of the fundamental law.

The relations between the state authorities have a complex feature, but which must also ensure their proper functioning in compliance with the principle of legality and the supremacy of the Constitution. In order to achieve this desideratum, it is very important to maintain the state balance in all its forms and variants, including as a social balance.

The separation and balance of power no longer refers only to classical powers (legislative, executive and judicial). To these powers are added others which give new dimensions to this classical principle. The relations between the participants to state and social life may generate conflicts that must be solved to maintain the balance of powers. Some constitutions refer to litigations of public law (German Constitution – Art 93), to conflicts of competence between the state and autonomous communities or conflicts of attributions between state powers, between state and regions or between regions (Italian Constitution – Art 134). The Romanian Constitution speaks about legal conflict of constitutional nature between public authorities [Art 146 Let c)] and promotes the mediation conducted by the President between state powers.

The Constitutional Court is an important guarantor of the separation and balance of state powers, because it solves legal conflicts of a constitutional nature between public authorities and through its powers in constitutional review prior to laws and verifying the constitutionality of chamber regulations interferes in insuring the balance between the parliamentary minority and majority, effectively ensuring the right of the opposition to speak.

The Constitutional Court is a guarantor of respect for fundamental rights and freedoms. This fundamental role of the constitutional court in a state of law is performed through the jurisprudential interpretation of the Constitution and the laws. In principle, there are three essential constitutional guarantees regarding the civil rights and freedoms established by the Constitution: a) the supremacy of the Constitution; b) the rigid character of the Constitution; c) the access of the citizens to the control of the constitutionality of the law and to the control of the legality of the acts subordinated to the law.

In Romania, the procedure of the exception for unconstitutionality insures the indirect access for citizens to constitutional justice.

The constitutional obligation that the rulers have to have a constitutional behavior loyal to the normative content but also the purpose of the Constitution is also an expression of the requirement of legitimacy that the normative acts must fulfill, as well as the governmental measures and dispositions adopted. In order to be an expression of a loyal constitutional behavior, legal and political acts issued by the Parliament and the executive, must be not only legal, i.e. be formally in line with the Constitution, but also legitimate. The legitimacy of a legal act, individual or normative reveals the requirement according to which the act must correspond not only to the letter of the law (the Constitution), but also to its spirit.

The legality of the legal acts of the public authorities implies the following requirements: the legal act to be issued in compliance with the competence provided by law; the legal act to be issued in accordance with the procedure provided by law; the legal act to respect the superior legal norms as a legal force.

The legitimacy is a complex category with multiple significations representing the object of research for the general theory of the law, the philosophy of the law, sociology and other disciplines. The significations of this concept are multiple. We mention a few: the legitimacy of power; the legitimacy of the political regime; the legitimacy of a governance; the legitimacy of the political system etc. The concept of legitimacy may be applied also for the legal acts

issued by public authorities being related to the "margin of appreciation" recognized for them in the performance of their attributions.

The application and compliance with the principle of legality in the activity of state authorities is a complex matter, because the performance of the state functions refers also to the discretionary power invested in the state organs or in other words, the authorities' right to assess the timing of the adoption and the content of the measures ordered. What is important to underline is the fact that the discretionary power cannot oppose the principle of legality, as dimension of the state of law.

In our opinion, legality is a particular aspect of the legitimacy of legal acts of public authorities. Thus, a legitimate legal act is a legal act, issued within the margin of appreciation recognized for public authorities, which does not generate discriminations, privileges or unjustified limitations of the subjective rights and it is appropriate to the factual situation which determines it and the purpose of the law. Legitimacy differentiates between the discretionary power recognized to state authorities and the excess of power.

Not all legal acts fulfilling the conditions for legality are also legitimate. A legal act fulfilling the formal conditions for legality, but which generates discrimination or privileges or unjustifiably restricts the exercise of subjective rights or is not appropriate to the factual situation or the purpose pursued by law, is an illegitimate legal act. Legitimacy, as feature of the legal acts issued by public administration authorities must be understood and applied in relation to the principle of the supremacy of the Constitution.

At the current stage of the Romanian legal system, the requirement of legitimacy of laws cannot be verified by the constitutionality control of the Constitutional Court. It is sad to note that at present, in the exercise of governing powers, the state power is often concerned not so much with the requirements of legality, the formal correspondence of a legal act adopted with constitutional rules and very little or no fulfillment of the requirement of legitimacy. The consequence of such behavior in the performance of the governing attributions, which violate the obligation of loyalty for the Constitution, but first of all towards the Romanian people is the excess and abuse of power with serious consequences on respecting, defending and promoting the Orthodox traditions and values of faith of the Romanian people, asserting the public interest and not personal, exercising important fundamental rights and freedoms.

The obligation for a correct interpretation and application of the Constitution and of the law belongs also to rulers, namely to the President, Parliament and Government, in relation to the attributions they have. The interpretation of the constitutional norms and generally of the legal norms performed by the rulers must correspond to some minimum formal imperatives:

- the obligation to respect the supremacy of the Constitution;
- the obligation to respect the principles of stability and security of the legal relations in the activity of governing;
- clarity and predictability of the adopted normative acts;
- limiting the practice of legislative delegation in governing activity, especially in the form of emergency ordinances;
- restricting the exercise of certain rights and freedoms shall have an exceptional feature, without affecting the substance of the law and with a rigorous compliance with the principle of proportionality;
- the prohibition not to add by interpretation the interpreted normative text;
- the obligation to comply with the meaning and finality of the constitutional norm;
- the obligation to give efficiency to the interpreted legal norm;
- the obligation to strictly comply with the competence and constitutional procedures and those established by the law in the performance of the attributions;
- avoiding as far as possible conflicts of a constitutional and political nature between state authorities.

These are, in our opinion, formal requirements that are part of the notion of loyal constitutional behavior.

The loyal constitutional behavior of the public authorities is mainly a requirement of the state of law which the Constitutional Court has expressed in its jurisprudence. Even if the Constitutional Court does not explicitly use the notion of "loyal constitutional behavior", some jurisprudential aspects are part of the content of this concept.

We exemplify with some aspects of jurisprudence:

The jurisprudence of the Constitutional Court expresses the main requirements of the state of law. It is significant in this sense Decision No 17 of January 21, 2015[18], by which the Constitutional Court gives a pertinent explanation to the character of the rule of law, stated by Art 1 Para 3, 1st thesis of the Constitution: "The requirements of the rule of law concern the major purposes of its activity, foreshadowed in what is commonly referred to as the rule of law, a phrase involving the subordination of the state to the rule of law, the provision of those means to allow law to censor political choices weigh any abusive, discretionary tendencies of state structures[19]. The rule of law insures the supremacy of the Constitution, the correlation between the laws and all normative acts with it, the existence of a separation between public powers which must act within the law, namely within the limits of a law expressing the general will. The rule of law enshrines a series of guarantees, including

[18] Published in the Official Gazette of Romania, No 79/30 January 2015.
[19] Published in the Official Gazette of Romania, No 334/19 July 2000.

jurisdictional ones, which ensure the observance of citizens' rights and freedoms through the self-limitation of the state, respectively the inclusion of public authorities in the coordinates of law".

The principle of stability and security of legal relations in not expressly stated by the Romanian Constitution, but, like other constitutional principles, it is implied by the constitutional normative provisions, namely by Art 1 Para 3, which states the feature as rule of law. In this way, our constitutional court accepts the deduction, by way of interpretation, of some principles of law implied by the express norms of the Fundamental Law. In this sense, in the Decision No 404 of 10 April, 2008[20], the Constitutional Court has stated that: "The principle of stability and security of legal relations, though it is not expressly stated by the Romanian Constitution, this principle is implied both from the provisions of Art 1 Para 3, according to which Romania is a state of law, democratic and social, as well as from the Preamble of the European Convention on Human Rights and Fundamental Freedoms, as it has been interpreted by the European Court of Human Rights in its jurisprudence[21]. Moreover, our constitutional court has considered that the principle of security of civil legal relations represents a fundamental dimension of every rule of law[22].

The Constitutional Court constantly rules for the clarity and predictability of the law, these being requirements of the rule of law. Thus, "the existence of certain contradictory legislative solutions and the cancelation of some legal provisions through other provisions stated in the same normative act lead to the violation of the principle of security of legal relations, as effect of the lack of clarity and predictability of the norm, principles representing a fundamental dimension of the rule of law, as it is expressly stated by Art 1 Para 3 of the Fundamental Law[23].

Regarding the rule of law, the Constitutional Court has stated that freedom and social democracy are supreme values. In this context, militarized authorities, such as the Romanian Gendarmery, performs according to the law, specific responsibilities for the protection of public order and peace, the fundamental rights and freedoms of citizens, public and private property, the prevention and detection of crime and other violations of the laws in force, and the protection of fundamental state institutions and the fight against acts of terrorism. Consequently, the constitutional court has ruled that: "Through the possibility of militarized authorities to ascertain the contraventions committed by civilians, Art 1 Para 3 of the Constitution, regarding the Romanian state, as a democratic and social rule of law"[24].

Human dignity, along with the freedoms and rights of citizens, the free development of the human personality, justice and political pluralism, are the supreme values of the rule of law (Art 1 Para 3). In the light of these constitutional regulations it has been stated in the jurisprudence of the Constitutional Court that it is forbidden for the state to adopt legislative solutions which may interpreted as disrespectful of the religious or philosophical beliefs of parents, which is why the organization of school activities must achieve a fair balance between the process of education and teaching of religion, and on the other hand with respect for the rights of parents, to ensure education in accordance with their own religious beliefs. Activities and behaviors specific to a particular attitude of faith or philosophical beliefs, religious or non-religious, must not be subject to sanctions that the state provides for such behavior, regardless of the reasons of faith of the person concerned. "As part of the constitutional system of values, to the freedom of religious conscience is attributed the imperative of tolerance, especially with human dignity, guaranteed by Art 1 Para 3 of the Fundamental Law, which dominates as supreme value the entire system of values"[25].

It is also interesting to underline the fact that our constitutional court considers human dignity as being the supreme value of the entire system of values constitutionally stated, value also found in the content of all human rights and fundamental freedoms. Also, an important aspect imposed to all public authorities is that in their activity to first of all respect the human dignity.

It should be noted that in its jurisprudence, the Constitutional Court also identifies the content components of human dignity, as moral value but in the same time, constitutional and specific to the rule of law: "Human dignity, from a constitutional point of view, presupposes two inherent dimensions, namely the relations between people, which refers to the right and obligation of people to be respected and, correlatively, to respect the rights and fundamental freedoms of their fellows, as well as the human relationship with the environment, including the animal world"[26].

3. Conclusions

Compared to the excessive politics and acts that represent a clear excess of power of the executive contrary to the spirit and even to the letter of the Constitution, with the consequence of violating some

[20] Published in the Official Gazette of Romania, No 347/6 May 2008.
[21] Decision No 685/25 November 2014, published in the Official Gazette of Romania, No 68/27 January 2015.
[22] Decision No 570/29 May 2012, published in the Official Gazette of Romania, No 404/18 June 2012. Decision No 615/12 June 2012, published in the Official Gazette of Romania, No 454/6 July 2012.
[23] Decision No 26/18 January 2012, published in the Official Gazette of Romania, No 116/15 February 2012.
[24] Decision No 1330/4 December 2008, published in the Official Gazette of Romania, No 873/23 December 2008.
[25] Decision No 669/12 November 2014, published in the Official Gazette of Romania, No 59/23 January 2015.
[26] Decision No 1/11 January 2012, published in the Official Gazette of Romania, No 53/23 January 2012; Decision No 80/16 February 2014, published in the Official Gazette of Romania, No 246/7 February 2014.

rights and fundamental freedoms, manifested during the last three decades of original democracy in Romania, we consider that the scientific approach and not only in the area of the constitutional revision must be oriented towards finding solutions to guarantee the values of the rule of law, of the fair Orthodox belief, of limiting the violation of the constitutional provisions, mainly to guarantee the loyal constitutional behavior of the state authorities. We propose some legislative solutions:

1. Art 114 Para 1 of the current text states that: "The Government may assume responsibility before the Chamber of Deputies and the Senate, in joint sitting, upon a program, a general policy statement, or a bill".

The commitment of the Government has a political feature and is a procedural means by which the phenomenon of "dissociation of the majorities"[27] is avoided in the situation when in Parliament the majority necessary to adopt a certain measure initiated by the Government could not be met. In order to determine the legislative forum to adopt the measure, the Government, through the procedure of assuming responsibility, conditions the continuation of its activity requesting a vote of confidence. This constitutional procedure guarantees that the majority required for the dismissal of the government, in case of filing a motion of censure to coincide with that for the rejection of the bill, program or political declaration to which the Government links its existence.

The adjustment of the laws as effect of assuming the political responsibility of the Government has as important consequence the absence of any parliamentary debates or discussions on that bill. If the Government is supported by a comfortable parliamentary majority, through this procedure it may obtain the adoption of the laws "bypassing the Parliament", which may generate negative consequences for the compliance with the principle of separation of state powers, but also for the role of the Parliament, as it is defined by Art 61 of the Constitution.

Therefore, the use of this constitutional procedure by the Government in the adoption of a bill must be exceptional, justified by a political situation and a social imperative very well defined.

This particularly important aspect for the observance of the democratic principles of the rule of law by the Government was well highlighted by the Romanian Constitutional Court: "This simplified way of legislating must be reached *in extremis*, when the adoption of the bill in the ordinary or emergency procedure is no longer possible or when the political structure of the Parliament does not allow the adoption of the bill in the current or emergency procedure"[28].

The political practice of the Government for the past years has been contrary to all these rules and principles. The executive has frequently resorted to liability not only for a single law, but also for packages of laws without a justification in the sense of those shown by the Constitutional Court.

The politicism of the Government clearly expressed by the high frequency of recourse to this constitutional procedure seriously affects the principle of political pluralism which is an important value of the legal system enshrined in the provisions of Art 1, Para 3 of the Constitution but also the principle of parliamentary law which shows that "The opposition is expressing itself and the majority is deciding"[29]; "Denying the right of the opposition to express itself is synonym with the denial of the political pluralism which, according to Art 1 Para 3 of the Constitution represents a supreme value and it is guaranteed…the principle majority decides, opposition expresses itself assumes that in all the organization and functioning of the Chambers of Parliament it is ensured, on the one hand, that the majority is not obstructed especially in the conduct of the parliamentary procedure, and, on the other hand that the majority decides only after the opposition has expressed itself"[30].

The censorship of the Constitutional Court has proven insufficient and inefficient in determining the Government to comply with these values of the rule of law.

In the context of these arguments, we propose that in the organic law on the organization and functioning of the Government, but also in the Regulations of the Parliament, the right of the Government to resort to incurring its responsibility for a single bill in a parliamentary session be limited. At the same time, it is useful to expressly provide in the same normative acts that this procedure does not apply to organic laws.

In our opinion, these provisions can be included in normative acts subsequent to the Constitution, without the need for a revision of the Fundamental Law, because the regulations in question do not contradict the provisions of Art 114 of the Constitution, but they are a concretization and explication of them.

2. All post-December governments have massively resorted to the practice of government ordinances, widely criticized in the literature. The conditions and interdictions inserted by the Law for the constitutional revision in 2003 on the constitutional regime of the emergency ordinances, proved insufficient for the limitation of this practice of the executive, also the control of the Constitutional Court proved insufficient and inefficient. The consequence of such practice is the violation of the role of Parliament as "sole legislative authority of the country" (Art 61 of the Constitution) and the creation of an imbalance between executive and legislative by emphasizing the discretionary power of the Government, which has often turned into an excess of power.

[27] Gheorghe Iancu, *Drept constituţional şi instituţii publice* (Bucharest: All Beck, 2010), 482.
[28] Decision No 1557/18 November 2009, published in the Official Gazette of Romania, No 40/19 January 2010.
[29] Ioan Muraru and Mihai Constantinescu, *Drept parlamentar românesc* (Bucharest: All Beck, 2005), 55-69.
[30] Muraru and Constantinescu, *Drept parlamentar românesc*, 55-69.

It is gratifying that our constitutional court, recently changing the judicial practice in this matter, has ruled that emergency ordinances cannot affect the legal regime of rights and fundamental freedoms, more precisely, the exercise of these rights cannot be restricted.

In order to limit the excess of power of the Government through emergency ordinances, we propose, without being necessary the revision of the Constitution, that by organic law to define the emergency situations and to enumerate strictly and limitingly these cases.

3. In the current conditions characterized by the tendency of the executive to take advantage of obvious politics and to force impermissibly and dangerously the limits of the Constitution and democratic constitutionalism, it is necessary to create mechanisms to control the activity of the executive able to really guarantee the supremacy of the Constitution and principles of the rule of law.

It is necessary that the role of the Constitutional Court as guarantor of the fundamental law be amplified by new attributions with the purpose of limiting the excess of power of state authorities. We do not agree with those stated in the literature that a possible improvement of constitutional justice could be achieved by reducing the powers of the constitutional court[31].

Without being necessary the revision of the Constitution, among the attributions of the Constitutional Court may be included that of ruling upon the constitutionality of the administrative acts excepted from the control of legality performed by the courts of administrative contentious. This category of administrative acts, to which Art 126 Para 6 of the Constitution and the Law No 544/2004 on the administrative contentious refers to are extremely important for the entire social and state system. Therefore, a constitutionality control is necessary because in its absence the discretion of the issuing administrative authority is unlimited with the consequence of the possibility of excessive restriction of the exercise of fundamental rights and freedoms or violation of important constitutional values. For the same reasons, our constitutional court should be able to review constitutionality and Presidential decrees on exceptional circumstances.

At the same time, the Organic Law on the Organization and Functioning of the Constitutional Court proposes to stipulate the competence and obligation of the constitutional court to rule ex officio on the constitutionality of Government ordinances, but also of all normative acts on the establishment and regime of exceptional states to enter into force.

Some brief explanations are needed: The Constitutional Court, like any court, operates according to the principle according to which it cannot notify itself for the fulfillment of its attributions, but a notification is required from one of the subjects of law to which the provisions of Art 146 of the Constitution strictly refers to. Nevertheless, as an exception, the Constitutional Court has the competence to verify *ex officio* the constitutionality of the drafts regarding the revision of the Constitution. By virtue of this precedent, we consider that it is possible to extend this competence of our Constitutional Court also for Government's ordinances, for the normative legal acts issued in consideration of an exceptional state or for those exempted from judicial control.

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[31] Genoveva Vrabie, "Natura juridică a curţilor constituţionale şi locul lor în sistemul autorităţilor publice", *Revista de Drept Public*, 1, 2010, 33.

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INVOLVEMENT OF THE OMBUDSMAN INSTITUTION IN THE MECHANISM OF CONSTITUTIONAL JUSTICE

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Abstract

The Romanian Constitution adopted in 1991 establishes, in a concise form, the fundamental principles regarding the organization and functioning of the People's Advocate / Ombudsman institution, specifying the role, the appointment procedure, the attributions of the People's Advocate and the ways of exercising them, the relationship with public authorities and Parliament. Also, the Constitution establishes that the Ombudsman is organized and operates on the basis of an organic law (art. 58 - art. 60). Thus, the Constitution reconfigured the constitutional order, creating new state structures, such as the Constitutional Court and the Ombudsman, called People's Advocate.

A second stage in creating the institution is related to the adoption, by the Parliament, of the organic law regarding the organization and functioning of the People's Advocate institution - Law no. 35/1997. Since the adoption of the law, the People's Advocate is organized and operates in Romania exercising a general mandate to defend the rights and freedoms of individuals in their relations especially with public administration authorities, borrowing the experience of the classic Western European ombudsman.

Year 2002 marks a new stage in the evolution of the People's Advocate institution, by adding to the existing competencies the possibility of involvement in the mechanism of constitutional justice. Thus, by Law no. 181/2002, the People's Advocate acquires the right to formulate points of view on the exceptions of unconstitutionality, at the request of the Constitutional Court.

The revision of the Constitution in 2003 finalizes the process started in the previous year, by amending the organic law, the competences in the matter of constitutionality control being extended from the formulation of points of view, to the possibility to directly notify the Constitutional Court with the objection of unconstitutionality of laws, as well as with the exception of unconstitutionality of laws and ordinances.

Keywords: *constitutional, Constitutional Court, point of view, exception of unconstitutionality, objection of unconstitutionality, law, Government ordinance, independence*.

1. Introduction

As Professor Ioan Muraru[1] pointed out, the examination of the powers of the institution of Ombudsman, of the means and procedures of exercise must be performed in the light of the constitutional provisions that define the function of this institution.

According to art. 58-60 of the Constitution and art. 1 para. (1) of Law no. 35/1997, the role of the Ombudsman is to defend the rights and freedoms of individuals in their relations with public authorities. In order to achieve this goal, the Ombudsman was invested with a series of prerogatives, among which, after the revision of the Constitution in 2003, and under the possibility to notify the Constitutional Court, the exception of unconstitutionality of laws and ordinances, under art. 146 letter d) of the Constitution, in connection with art. 15 para. (1) letter i) of Law no. 35/1997.

By means of this important power, the Ombudsman has available a serious and efficient lever for fulfilling his constitutional role. The Ombudsman can be involved, by own constitutional and legal means, in the control of constitutionality of laws and ordinances, carried out in Romania by the Constitutional Court.

Therefore, the Ombudsman can refer to the Constitutional Court on objections of unconstitutionality regarding the laws adopted by the Parliament, before their promulgation by the President of Romania. Furthermore, he can refer to the Constitutional Court on exceptions of unconstitutionality of laws and ordinances in force. Moreover, the Ombudsman formulates, at the request of the Constitutional Court, points of view on the exceptions of unconstitutionality of laws and ordinances which concern the rights and freedoms of citizens.

In addition to the duties in the field of constitutionality, the Ombudsman can refer to the competent court of contentious administrative, as well as to the High Court of Cassation and Justice, by way of referral in the interests of the law.

2. Content

2.1. Objections of unconstitutionality

According to art. 146 letter a) of the Constitution of Romania, republished, "the Constitutional Court adjudicates on the constitutionality of laws before the promulgation thereof, upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of

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[1] Ioan Muraru, *Avocatul Poporului – instituție de tip Ombudsman*, All Beck Publishing House, Bucharest, 2004, page 63.

Cassation and Justice, the Ombudsman, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution".

The constitutional provisions were transposed in the legislation regulating the institution of Ombudsman, in the content of art. 15 para. (1) letter h) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman, republished, according to which "the Ombudsman can refer to the Constitutional Court on the unconstitutionality of laws, before the promulgation thereof".

We are in the field of the a *priori* constitutionality control, and the introduction of the Ombudsman among the topics of seisin is justified by the ability of the institution to identify, based on the institutional relations with the Parliament and of the permanent contact with civil society, the legal situations that would violate, in terms of regulation, the constitutional provisions. In this case the procedural rules of both the parliament and those of the constitutional jurisdiction are applicable. These are found in Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished. According to this law, the notifications must be in writing and substantiated.

2.2. Direct exceptions of unconstitutionality

According to art. 146 letter d) of the Constitution of Romania, republished, "The Constitutional Court decides on objections of unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection of unconstitutionality may also be brought up directly by the Ombudsman".

According to art. 15 para. (1) letter i) of Law no. 35/1997, republished, "The Ombudsman can refer directly to the Constitutional Court on the exception of unconstitutionality of laws and ordinances". In this case, the Ombudsman refers directly to the Constitutional Court by way of exception of unconstitutionality, and there is no need to go through a preliminary stage before the courts of law. Therefore, we are in the field of the posteriori constitutionality control.

In what concerns the applicable procedure, we note that the exception is not brought before the court of law, but directly before the Constitutional Court. Although the specialized literature pointed out that, in the light of the constitutional and legal provisions regarding the role of the institution of Ombudsman, the exception can be raised only when laws and ordinances violate the rights and freedoms of individuals, thus becoming a guarantee of the exercise thereof, the Constitutional Court established, by Decision no. 336/2013[2], that the Ombudsman can initiate constitutionality control by way of the exception of unconstitutionality regardless of the issues addressed by it, but direct raising of exception of unconstitutionality is and remains at the exclusive discretion of the Ombudsman, who cannot be forced or prevented by any public authority to raise such an exception[3].

Because not infrequently the decision of the Ombudsman to raise or, as the case may be, not to raise an exception of unconstitutionality, created dissatisfaction, we will further detail the considerations of Decision no. 103/2020, whereby the Constitutional Court resolved the exception of unconstitutionality of the provisions of art. 2 para. (1) - (3), of art. 13 para. (1) letter f) and of art. 30 of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman. Therefore, the exception of unconstitutionality was raised by the plaintiff when resolving a contentious administrative action, the scope of which was the ascertainment of the unjustified refusal of defendant Ombudsman to resolve a request for referral to the Constitutional Court, as well as the obligation of the defendant to refer an exception of unconstitutionality to the Constitutional Court.

The criticized legal texts regulate the status of the institution of Ombudsman of autonomous public authority and independent from any other public authority and provide that, in the exercise of his powers, the Ombudsman does not substitute himself for public authorities. Furthermore, the Ombudsman cannot be subject to any mandatory or representative mandate. No person may compel the Ombudsman to obey instructions or orders.

Furthermore, the duty of the Ombudsman according to which he can directly refer to the Constitutional Court for the exception of unconstitutionality of laws and ordinances is claimed; as well as the legal provisions establishing that the Ombudsman and his assistants are not legally liable for the opinions they expressed or for the acts they fulfilled, in compliance with the law, in the exercise of the powers provided by this law.

The plaintiff's complaints in support of the unconstitutionality of these legal provisions are mainly the following: the notification of the Constitutional Court is at the discretion of the Ombudsman; the decision of the Ombudsman not to refer to the Constitutional Court cannot be subject to a judicial control, as it is an autonomous public authority and independent of any other public authority and no person may compel the Ombudsman to obey instructions or orders, which would violate the provisions of art. 1 para. (3)-(5) of the Constitution; the right of access to justice cannot be sacrificed as an excuse to the independence of the institution of Ombudsman, especially since it aims the verification of the constitutionality of certain legal provisions that are in the interest of the citizens.

[2] Decision no. 336/2013 regarding the exception of unconstitutionality of the provisions of art. 13 para. (1) letter f) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman.

[3] For a detailed analysis of the juridical concepts, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar, Edition 2*, C.H. Beck Publishing House, Bucharest, 2014.

The point of view expressed by the Ombudsman emphasized that the direct notification of the Constitutional Court, without granting the Ombudsman the possibility to assess the fulfillment of the admissibility conditions established by the law, as well as to assess the inconsistency of the criticized legal provisions with the provisions of the Fundamental Law, would infringe its status of independent institution, by setting a dangerous precedent, within the reach of anyone seeking to achieve a political goal by using the mechanism of the exception of unconstitutionality. The regulation of the Ombudsman's obligation to refer directly to the Constitutional Court would be meant to annihilate any possibility of advisable analysis of constitutionality issues, in this case, the implication of the Ombudsman in the constitutionality control being limited only to the "referring" to the Constitutional Court of the substantiated request received.

On the grounds of the aforementioned legal regulation, the Ombudsman can exercise his powers only within the constitutional and legal limits established in order to fulfill his role of defender of the individuals' rights and freedoms, without being substituted for other public authorities which, in their turn, must fulfill their own duties, as regulated by the legislation in force. It is remarkable that the oath to be taken by the Ombudsman, on the occasion of his investiture, includes the obligation to defend the citizens' rights and freedoms and to fulfill his duties in good faith and impartiality. In what concerns the possibility of the citizens to benefit from the protection of their rights and freedoms, the current legislation regulates a series of means meant to ensure the protection of citizens against the application of unconstitutional legal provisions. Furthermore, natural persons have the possibility to request the Ombudsman to assess the constitutionality of a legal provision, in order to refer directly to the Constitutional Court[4].

By analyzing the filed complaints, the Constitutional Court pointed out that, both in case of laws before promulgation (art. 146 letter a) first thesis), and in case of the exception of unconstitutionality of laws and ordinances (art. 146 letter d) second thesis), the constitutionality control exercised by the Ombudsman is an abstract one, unlike the actual constitutionality control performed by the Constitutional Court at the notification of the courts with an exception of unconstitutionality, under art. 146 letter d) first thesis of the Constitution.

In this respect, we reaffirm those provided by the Constitutional Court by Decision no. 64/2017: "art. 146 letter d) of the Constitution consists of two theses. In what concerns the first thesis of this constitutional text on the exception of unconstitutionality referred to a court of law or to a court of commercial arbitration, the Court ruled that, once notified, it is bound to control the constitutionality of the acts of primary regulation, without conditioning this control on the elimination, in any way, from the active substance of the legislation of the act claimed to be unconstitutional, therefore «the laws or ordinances or the provisions of laws or ordinances the legal effects of which continue to be produced even after the expiry of the validity thereof are also subject to constitutionality control » (Decision no. 766/2011). Therefore, this thesis regulates an actual constitutionality control, which entails sine qua non the existence of a pending litigation where the exception of unconstitutionality of certain normative acts of primary regulation related to its settlement to be claimed (Decision no. 338/2013). Instead, in what concerns the second thesis of art. 146 letter d) of the Constitution, the Court established that the phrase «in force» within art. 29 para. (1) of Law no. 47/1992 «cannot be construed in the same way as in the case of Decision no. 766/2011, since the settlement of the exception of unconstitutionality raised directly by the Ombudsman is performed within an abstract constitutionality control» (see Decision no. 1167/2011, admitted and maintained by Decision no. 549/2015, paragraph 16), which means that *the Ombudsman raises an exception of unconstitutionality distinctly from any judicial procedure, therefore, in the absence of any litigation, he has no subjective right to defend* "[5].

The Constitutional Court also noted that, according to his constant case-law, the Ombudsman can initiate constitutionality control by way of the exception of unconstitutionality regardless of the issues addressed by it, but direct raising of exception of unconstitutionality is and remains at the exclusive discretion of the Ombudsman, who cannot be forced or prevented by any public authority to raise such an exception. Therefore, the Court noted that the Ombudsman has the exclusive right to decide on referring an exception of unconstitutionality, part of the institutional and functional independence he benefits from.

Although neither the Constitution nor its organic law regulates the cases where the exception of unconstitutionality is raised, it can be concluded that the possibility of notifying the Constitutional Court did not aim at the transforming of the institution of Ombudsman into an arbitrator between state institutions or its substitution for the Constitutional Court or the Parliament. Precisely for this reason, the Ombudsman has the possibility to establish the cases in which he can intervene.

The Constitutional Court pointed out that, in case the Ombudsman were obliged to refer to the Constitutional Court with an exception of unconstitutionality, upon the request of the natural

[4] See Decision no. 103/2020 on the exception of unconstitutionality of the provisions of art. 2 para. (1), (3) and (4), of art. 15 para. (1) letter i) and of art. 52 of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman.

[5] In what concerns the abstract nature of the control exercised under the terms of art. 146 letter d) second thesis of the Constitution, see Decision no. 163/2013, and on the conditions and implications of a mutatis mutandis abstract constitutionality control, see Decision no. 260/2015, paragraph 33.

persons or legal persons, the constitutionality control performed by way of the exception of unconstitutionality would be converted into a genuine *actio popularis*, an instrument not regulated by the Constitution in the Romanian system of the control of constitutionality of laws.

For all these grounds, the court of contentious constitutional dismissed as unsubstantiated the exception of unconstitutionality referred and found that the objected legal provisions of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman are constitutional in relation to the formulated objections.

2.3. Formulation of points of view on the constitutionality of laws and ordinances regarding human rights

According to the provisions of art. 22 of Law no. 35/1997, republished, "*In case of referring the exception of unconstitutionality of laws and ordinances regarding human rights, the Constitutional Court shall also request the point of view of the institution of Ombudsman*."

A similar provision is found in art. 30 of Law no. 47/1992, republished, according to which "the president of the Constitutional Court, after receiving the notification ruling from the court of law, he will communicate it to the Ombudsman, by indicating the date until which he can deliver his point of view on the exception of unconstitutionality claimed within actual trail proceedings".

We hereby point out that other normative acts (Government resolutions, regulations and orders of ministers etc.) cannot be subject to the constitutionality control, but only Government laws and ordinances.

The Contentious Constitutional Service, referral in the interests of the law, contentious administrative and legal, normative acts review, external relations and communication, which analyze the petitions on the request of raising an exception of unconstitutionality regarding laws or ordinances in force operate within the institution of Ombudsman, under the direct subordination of the Ombudsman. These requests are reviewed, under the coordination of the Head of Department, by the advisers of the Contentious Constitutional Department and Referral in the Interests of the Law Department in relation to the constitutional provisions claimed by the petitioner.

The procedure of referring to the Constitutional Court is a procedure entailing judicial matters, so that the petitions in this subject area must meet certain specific requirements. Therefore, for the direct referring of the exception of unconstitutionality by the Ombudsman, it is required to properly observe the procedural rules on the performance of the constitutionality control, referred to in art. 29 of Law no. 47/1992, republished, as well as the substantive rules. A certain structure inherent in any exception of unconstitutionality has been enshrined in the case-law of the Constitutional Court. The unconstitutionality notification shall consist of 3 elements:

a) the legal text in force challenged in terms of the constitutionality, provided that, by means of Decision no. 64/2017, the Ombudsman was granted the possibility to raise the exception of unconstitutionality on the emergency ordinances which, despite the fact they were published in the Official Gazette of Romania, Part I, are not yet in force due to the fact they provide a later date of entry into force;

b) the constitutional text of reference alleged to be violated;

c) the motivation of the relation of opposition existing between the two texts, in other words, the argumentation of the unconstitutionality of the challenged text.

The aforementioned conditions are required in the context in which according to art. 10 para. (2) of Law no. 47/1992, republished, "the notifications delivered to the Constitutional Court, in addition to the fact that they must be made in writing, they must also be substantiated".

3. Conclusions

The implication of the Ombudsman in the constitutionality control intervenes when, in the exercise of its duties according to its organic law, identifies the violation of certain rights and freedoms of individuals, by way of provisions of laws and ordinances. Therefore, in this respect there are *also the principles stated by the Venice Commission which established, in the document entitled "Principles on the protection and promotion of the institution of Ombudsman (The Venice Principles)", that "Following an investigation, the Ombudsman shall preferably have the power to challenge the constitutionality of laws and regulations or general administrative acts (Principle no. 19)*[6].

By awarding the Ombudsman the competence to raise directly the exception of unconstitutionality of laws and ordinances, the principal law maker did not seek to transform the Ombudsman into an authority with the role of regulating/verifying the constitutional relations between the Parliament and the Government, his role being to protect the individuals' rights and freedoms.

An essential feature of the Ombudsman's institution functional independence is set out, as principle, in item 7.2 of Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe, namely: "guaranteed independence from the subject of investigations, including in particular as regards receipt of complaints, decisions on whether or not to accept complaints as admissible or to launch own-initiative investigations, decisions on when and how to pursue investigations, consideration of

[6] The Venice Principle were adopted by the Venice Commission at its 118th plenary session (Venice, March 15th -16th 2019).

evidence, drawing of conclusions, preparation and presentation of recommendations and reports, and publicity."

The Ombudsman's position towards the other public authorities is established by art. 2 para. (1) and (3) of Law no. 35/1997 on the organization and functioning of the institution of Ombudsman, republished, according to which the institution of Ombudsman is an autonomous public authority and independent of any other public authority, under the terms of the law.

In the exercise of his powers, the Ombudsman does not substitute himself for public authorities. On the grounds of the aforementioned legal regulation, the Ombudsman can exercise his powers only within the established constitutional and legal limits, without being substituted for other public authorities which, in their turn, must fulfill their own duties, as regulated by the legislation in force.

The need for additional guarantees of independence was pointed out in Opinion no. 685/2012 of the European Commission for Democracy Through Law (Venice Commission), which stated that "in order to be effective in the protection of human rights, the Ombudsman has to be independent, including from Parliament, which elects the office holder".

In what concerns the activity in the field of the constitutionality of laws and ordinances, we have to understand that not every normative act, assessed in terms of various interests as immoral, inconvenient or socially and economically inappropriate, contains elements that would call its unconstitutionality. Therefore, the Ombudsman must have the possibility to assess the fulfillment of the admissibility conditions established by the law, as well as to assess the inconsistency of the criticized legal provisions with the provisions of the Fundamental Law.

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THE EVOLUTION OF CONTRACTS IN ROMAN LAW

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Abstract

One cannot understand an institution today without researching its entire historical thread, how it evolved until it became what it is through the vicissitudes of the past. On this, our law has very deep and distant roots, partly directly in the custom of the land and in the written laws we had, partly through the influence of the laws of the Occident, and especially the French ones, with Roman law. We cannot easily realize how much we live without knowing by tradition based on the past; the scientist's job is to dig up these past influences and bring them to light in order to understand today's institutions".

Following the path shown by Professor Mircea Djuvara, in this study I propose to "dig" in order to highlight the boundless influence of Roman law in the field of contracts. Because it is this influence that explains a unique phenomenon in history, namely the fact that this legal system did not die with the people who created it, but survived for millennia, imposing itself on foreign peoples and vigorously shaping their legal spirit.

Therefore, if we want to understand the physiognomy of today's contract, we must dig for its origins, and they will be found in Roman law, where the contract was originally a convention that produced legal effects only if he wore the heavy coat of formalities required at the moment of its conclusion. The essential element of the contract was therefore not the agreement of will, but the formal elements required for its preparation.

Keywords: *contract, Roman law, formalism, influence, the essential elements of the contract.*

1. Introduction

Roman law is, to a large extent, the classic legal expression of life relationships, of the relationships within a society where private property assumes its enduring form, as none of the following legislations has succeeded in making substantial improvements in this area. The historical interest of Roman law consists in the fact that it shows us the way in which legal institutions are created and how they change in relation to the economic basis and the other forms of social life.

Roman law has created the legal language and Rome has created the alphabet of law. Thanks to this alphabet, we can formulate any legal ideas. Most of the current legal notions have largely appeared in Roman law. When Rome went down in history, the ancient world knew several legislative codes.

This legal system is not only of historical importance, but it represents a great advance in the field of legal technique. The precision and clarity of the definitions, the severe reasoning and consistency of the legal thought, combined with the vitality of the conclusions, highlight the great art of the Roman legal advisers, who played a great role in the development of the law. As Professor Emil Molcuț points out, the legal advisers of the Modern era[1] have borrowed many constructions and legal categories from the arsenal of the Roman law, as well as a series of categories and general principles that they have laid the basis for the entire regulation[2].

The subject matter of obligations and contracts has known a great development in Roman law, by taking hold of a particularly important position. This position is imposed by the exceptional vitality of the institutions related to the subject matter of obligations and contracts, which represent the first universal system of rules of a society. The institutions of the obligations exceeded the order that created them and were applied, with certain adjustments, in the social formations that followed.

2. Content

Many of the current legal concepts find their origins in Roman law, which has managed to confer them a precise wording[3]. The Romans achieved such performances, especially in the field of contracts, as they remained, to a large extent, unchanged in terms of the formation of elements and effects.

For a long time, the contract in Rome was just a convention under a certain form. The word "*contractus*" was used to mean contract, as follows: originally, contract meant reunion. Due to the fact that, in ancient times, the sale was performed by means of two separate documents, a document of purchase and a document of sale, the word appeared later[4]. The word was generalized and also used for other legal

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[1] This is applicable even for modern organisations such as European Union. For a perspective on contractual obligations in EU law: Conea Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Editura Universul Juridic, București, 2019, pp. 130-142.

[2] Emil Molcuț, *Drept roman*, Edit Press Mihaela S.R.L. Publishing House, Bucharest, 2002, page10.

[3] For a detailed analysis of the juridical concepts, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

[4] Cornelia Ene-Dinu, *Istoria statului și dreptului românesc. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2020, page 26.

operations. Thus, if not any convention is a contract, any contract "*contractus*" implies a convention, therefore an agreement. In ancient times, this agreement was formal because only the parties were on an equal footing. The owner of the means of production imposes his will on the one who lacks the means of production, who could do nothing but follow the conditions of the owner.

In what concerns the evolution of Roman law, we can start the study in the ancient times, when the contract was a convention the obligation of which resulted from the formalities and solemnities performed on the occasion of its conclusion. The essential element of the contract was not the agreement of will, but the formal elements required on the occasion of its draw up[5].

According to Professor Molcuț, in ancient Roman law, in order for a document to produce effects, it had to be veiled under certain forms; the mere manifestation of will was devoid of legal value[6].

The first forms of contracts that we know were distinguished by a rigorous formalism. *Sponsio*, verbal contract, was concluded by the utterance of certain solemn words, and the so-called literal contract (*litteris*), by certain entries made in the register (codex) of the creditor, under the consent of the debtor.

As production and trade increased, the old forms were abolished by new social needs which were brought to life. However, their removal was gradual, only insofar as contractual forms corresponding to the new social relations were created. Along with the old formal contracts, new informal ones have appeared. This is how we explain the occurrence of the real contracts which are concluded by means of the simple transfer (re) of the object and of the consensual contracts which are concluded by means of the simple consent (*solo consensu*). Their validity is subject to substantive conditions resulting from their economic destination and use. In fact, they are actual pacts, namely agreements which are not veiled under solemn forms, raised to the rank of contracts due to their special economic importance.

Throughout the Imperial Era, the general theory of contracts is progressively developed. The contract (*contractus*), the essential element of which is now the agreement of the parties, is released from the primitive formalism. The contractual system will develop progressively throughout the Roman Imperial Era. The economic and social needs will reveal other conventions generating legal effects that will join the old contractual categories. The pacts, for example, will round the contractual system off, the viability of which consisted in a flexible adjustment to the needs of the social development in continuous transformation.

The subject of obligations has a great importance, both from a practical point of view and from a theoretical point of view. The practical interest results from the multitude and endless variety of legal relations that people create, due to permanent demands of life. In order to satisfy their most basic requirements of life, people conclude various obligation generating contracts every day. Along with the legal relationships created by will, there are others that are born independently of it, such as the obligations involved in the principle of the legal liability. Therefore, the most common act of daily life are resources of legal relations that are the object of obligations.

In a broad sense, obligations mean the legal relations which entail both the active side, which is the right of claim belonging to the creditor, and the correlative of this right, namely the passive side of the relation, which is the encumbrance of the debtor; in the narrow sense, the obligation designates only the passive side, the encumbrance of the debtor.

Therefore, in terms of the active side, the obligation is that legal relation which contains the right of the active subject, called creditor, to ask something to the passive subject, called debtor, whose obligation is to give, to do or not to do something.

If the focus is on the passive side, the active side of the obligation being present by default, the obligation can be defined as the legal relation by virtue of which a person called debtor is hold liable to another person called creditor, either to a positive benefit or to an abstention. The term of obligation sometimes refers to the title itself which establishes the existence of a debt.

If the legal relationship is considered in terms of the creditor, it is called right of claim, and if it is considered in terms of the debtor, it is called obligation.

During the classical antiquity, the obligations take on a particularly large extent due to the development of production and exchange of goods. In this world of business of all kinds, the interest-bearing loan has emerged. Such business operations required new legal instruments.

By being regulated at a higher level, the Roman obligation had a special importance for the economic circuit of Rome. At the same time, the concentration of private property has enabled the process of crystallization of the institution of obligation, by imposing a detailed regulation of contractual rights and obligations.

The obligation, as an institution of law, appears at the same time with private property and social classes, by firstly representing a means of enslaving those who lack the means of production. According to the primitive Roman conception, the obligation (*ius in personam*) is created after the image and likeness of the property right (*ius in re*), i.e. of the real rights. The Romans made the same confusion between family rights and real rights. The etymology of the word "*obligatio*" (ob-ligatio) indicates, in a plastic way, the initial meaning of the term: to bind, to chain.

The development of the production of goods and trade led to the replacement of the formalism of old law,

[5] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, page 241.
[6] Emil Molcuț, *op. cit.*, page 235.

by bringing radical changes in the legal mentality. In this case, the notion of obligation begins to change its primitive structure. The idea of bounding (*ob-ligatio*) ceases to be understood in a strictly material sense. It becomes a purely legal relationship under which the debtor was oblige to perform a service, and in the event of a non-performance, the creditor could pursue the debtor's assets and not his natural person.

It is interesting to study the components of the obligations[7]. If we consider the creditor, he can force the debtor to pay something he owes.

The debtor is always forced to pay something to the creditor.

The scope of the obligation is the payment that the debtor has to make to the creditor. It is important to mention the fact that, by payment, the Romans did not only understand the remittance of amounts of money, but the scope of the obligation could also be established by giving, making, rendering. From the word "*prestare*", the legal expression prestațiune (provision) was formed in order to designate any scope of the obligation. Therefore, moving from Latin to modern legal terminology, the meaning of this word was amplified.

The conditions of the scope of the obligation meant, in Roman law, the fulfillment of requirements without which it could not be fulfilled. Therefore, the scope must be lawful, be possible, be of interest to the creditor and be determined.

Another essential element of the obligation is the coercion, i.e. the legal sanction that is applied to debtor in case of non-execution.

The original features of the obligation have never been lost in full, but they have known some deviations over the century. Due to the fact it is a relationship between debtor and creditor, the Romans found it very difficult to accept debt and claim to be passed to another person. The creation of a real right cannot be contemplated by an obligation. The scope and the persons are definitively established and the Romans belatedly admitted that novation could take place, so that the scope of the new obligation was distinct from that of the old obligation.

The sources of the obligation are the legal acts and facts that give rise to it. In the ancient times of Roman law, they consisted of contracts and crimes, the contracts being rare because the production of family members covered all their material needs. The crimes gave rise to the obligation of the defaulter to pay compensation to the victim.

Any obligation has the effect of the voluntary execution of the service the debtor was bound to provide. This is why, the obligation occurs, unlike property, as a transition right, due to the fact it is extinguished by means of its execution. If the debtor fails to perform the service, the creditor can sue him, as the creditor's claim is protected by the positive law. There are also obligations not sanctioned by any action, as is the case of the so-called natural obligations.

There are cases when the debtor is exempt from performing the service if the execution became impossible. Natural obligations are imperfect, not protected by actions. Being devoid of action, these obligations are not enforceable, meaning that their execution cannot be required before the courts. The term of natural obligation, unknown in ancient Roman law, is found only in the classical antiquity, being gradually developed in the Post-Classical Era. Natural obligations are a creation of the legal advisers of the Imperial Era, determined by the activity of the slaves.

The slave had no legal personality and could not be bound by his contracts.

Positive law allowed slaves, within certain limits, a certain freedom to contract. Although they are not sanctioned by actions, natural obligations still have a legal existence. Their execution represents a payment identical to that of the civil ones, so that the payment made by the debtor cannot be claimed.

Natural obligations can be changed into civil obligations by means of a novation.

They may be opposed in compensation to other civil obligations and even encumbered with a personal or real guarantee. All these are evidence of the legal nature of these obligations, the execution of which represents a payment, not a donation.

The damages are established before the court, by forcing the debtor to compensate the creditor for the damage caused, the damage being the result of the fact that the debtor fails to fulfill his obligation or fulfills it improperly or with delay. In this case, the court will order the debtor to pay damages, namely an amount of money in order to repair the damage caused. The damages will be assessed by the court before which the debtor was sued. They can also be evaluated, in advance, by the parties.

In order to establish such damages, the ancient Roman law used an objective criterion, the damages representing only the material value of the non-executed services. As production and movement of goods were low, such criterion was sufficient.

During the classical antiquity, once with the development of the production, credit and trade, this criterion proved insufficient, being replaced by a subjective one, which puts the spotlight on the creditor. This criterion seeks to satisfy any interest of the creditor[8].

The cases not chargeable to the creditor are: force majeure and unforeseeable circumstances.

Force majeure (*vis maior*) shall mean the events that the debtor cannot oppose due to the fact they are caused by forces beyond his powers, such as: floods, earthquakes, etc.

Unforeseeable circumstances (*fortuitus casus*) shall mean those events that could be avoided by exceptional measures. If the debtor fails to fulfill his

[7] Emil Molcuț, *op. cit.*, page 160.
[8] See also Vladimir Hanga and Mircea Dan Bocșa, *op. cit*., page 286 and the following.

obligations due to such events, he may be held harmless. Notwithstanding, if he fails to fulfill his obligation, due to his fault, although it would perish later by unforeseeable circumstance or force majeure, the debtor would still be obliged to pay damages. The debtor continues to be liable for the loss even if it occurred by unforeseeable circumstance or force majeure, if he failed to provide the service within the deadline, due to his fault.

The cases of culpable failure are: the notice of default and negligence.

Mora is the culpable delay of the debtor who fails to perform his obligation.

In order to be deemed in default, certain conditions are required, the summon being one of them. The creditor must demand payment from the debtor at the appropriate time and place. The existence of a deadline removes the obligation of a summon.

The claim must be enforceable, the enforceability being possible from the moment the claim arises, except the cases where the parties have not set a deadline.

Another condition is that the debtor's refusal to pay the debt is unfair due to the fact any refusal of the debtor to perform his obligation is culpable, unless the debtor proves that he had doubts on the existence of the claim.

The debtor in default shall bear the risks of the work, in other words, if the work is lost by unforeseeable circumstance or by force majeure, the debtor shall pay damages.

The creditor can also be deemed in default (mora creditoris) if he unreasonably refuses or delays to accept the payment which is due to him. The effects of the default of the creditor are the same, the risks pass on to him, the debtor being liable only for his will. The debtor's notice of default can cease if the debtor or a third party provides the creditor with the due benefit accompanied by the amount of the damages. Furthermore, the creditor's notice of default ceases if he accepts the payment and compensates the debtor for the damages suffered.

Another fact chargeable to the debtor is the negligence, which consists of an inadvertence, an inexcusable mistake in the execution of the obligation. Contrary to dilligence, contractual negligence that occurs in the performance of a contract must be distinguished from the tort[9].

It has been admitted in the classical antiquity that negligence can consist not only of a positive, commissive act, but also of an abstention, omission. Negligence is different from *dolus* due to the fact it entails an intentional fault, either commissive or omissive, of the debtor who was knowingly outside the rules of law regarding the execution of the contract.

The theory of negligence was gradually shaped in the Roman law, being definitively formulated in the Post-Classical and Byzantine Era. During the Era of Justinian, the negligence was of two kinds: slight negligence (*levis*) and gross negligence (*lata*).

In the ancient times, the discharge of obligations was governed by the correspondence principle. According to this principle, the obligation is extinguished by using a solemn act identical to the one that gave rise to it, but used in the opposite direction.

The physiognomy of personal rights is different from that of real rights in terms of capitalization. Therefore, real rights are capitalized by the exercise of certain attributes by the right holder, while personal rights are capitalized by the execution of the obligation by the debtor. Thus, real rights are, in principle, perpetual, while personal rights are temporary. Appeared in the field of patrimonial relationships between two determined persons, the rights of claim are extinguished by capitalizing the interests contemplated by the respective relationships.

There are voluntary and involuntary means of extinguishing obligations. Voluntary means entail a manifestation of will of the creditor and the debtor. In addition to the payment, which was currently used, the Romans also knew other voluntary means of extinguishing obligations: transfer in lieu of payment, remission submission, compensation, novation.

Involuntary means do not entail the will of the parties, which is why there are sometimes designated by the terms: forced means or necessary means. Obligations are involuntarily extinguished by: impossibility, non-execution, confusion, death, *capitis de minutio* and extinctive prescription.

3. Conclusions

As we have already shown, many of the current legal concept originate in Roman law, which succeeded in giving them a practical formulation. I find it very interesting that the Romans have achieved such performances, especially in the field of contracts. What I mean by saying this is that contracts have remained, for the most part, unchanged in terms of formation, elements and effects. As we have seen, current changes are formal and there are not changes in principle.

Therefore, this study proves the great importance of Roman law for education and life, due to the fact that, as Romanist say, there has been no other system of private law so thorough and capable of reaching the same high level of legal form of technique, throughout the entire history of society.

[9] For a detailed analysis of the theory of negligence, see Grigore Dimitrescu, *Drept roman. Volumul II – Obligațiuni și Succesiiuni*, Imprimeria Independența Publishing House, Bucharest, page 259.

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THE JUDICIAL INTERDICTION. SPECIAL REVIEW ON THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

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Abstract

Prior to the entry into force of the new Codes, Civil and Civil Procedure, the institution of judicial interdiction was regulated in terms of substantive conditions and effects, by Title III, Chapter 2, Articles 142 - 151 of the Family Code, and the interdiction procedure was regulated in Chapter 3, first section, Articles 30 - 35 of Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural and legal persons. Currently, the seat of the matter is, in terms of substantive conditions and effects in Book I, Title III, Chapter III, Articles 164 - 177 of the Civil Code, and in terms of procedural conditions in Book VI, Title II, Articles 936 - 943 of the Code of Civil Procedure, in essence the current legal provisions resuming the old regulation in the matter. In this study, we set out to analyze the substantive rules and procedure of judicial interdiction, as well as an examination of the jurisprudence of the Constitutional Court in the matter. From the short list of decisions of the Constitutional Court regarding the judicial interdiction, of particular interest is the recent Decision no. 601 of July 16, 2020 regarding the exception of unconstitutionality of the provisions of Article 164 paragraph (1) of the Civil Code, published in the Official Gazette of Romania no. 88 of January 27, 2021.

Keywords: *Civil Code; Code of Civil Procedure; the jurisprudence of the Constitutional Court; the judicial interdiction; human dignity.*

1. Introduction

As shown in a recent situation analysis[1], in the EU population, mental illness affects every fourth citizen and can lead to suicide; mental illness causes significant losses to economic, social, educational, and justice systems; there is still stigma, discrimination and disrespect for the human rights and dignity of people with mental illness and disability. According to the data provided by National Center for Statistics and Informatics in Public Health - National Institute of Public Health, in Romania, in 2019, 229,903 patients were registered by the family doctor with the diagnosis "Mental Illness", increasing compared to the previous year when 218,010 patients were recorded.

Thus, the recent jurisprudence of the Constitutional Court of Romania on the protection of the mentally ill by judicial interdiction is very important. Our study proposes an examination of the jurisprudence of the Court. Although the case law of the Court is not rich in this matter, Decision no. 601/2020, recently published, is of particular interest. We will also analyze the substantive rules and the procedure of placing under judicial interdiction, aspects for which we refer to the vast already existing legal literature[2].

2. Considerations regarding the judicial interdiction

In the literature, the judicial interdiction is defined as the measure of protection of the natural person lacking the necessary discernment to take care of his interests, due to the alienation or mental debility, which is ordered by the court and it consists in the deprivation of the one protected by the capacity to exercise and the institution of guardianship[3].

Prior to the entry into force of the new Codes, Civil and Civil Procedure, the institution of judicial interdiction was regulated in terms of substantive conditions and effects, by Title III, Chapter 2, Articles

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[1] The Ministry of Health, the National Institute of Public Health, the National Center for Health Assessment and Promotion, the Sibiu Regional Center for Public Health, "Sănătate mintală. Analiză de situație", 2021, http://insp.gov.ro/sites/cnepss/date-statistice-sanatatea-mintala/.

[2] To develop, see: Gheorghe Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil* (Bucharest: U.J. Publishing House, 2005), 387-93; Eugen Chelaru, *Drept civil. Persoanele* (Bucharest: C.H.Beck Publishing House, 2020), 178-84; Marian Nicolae (coordinator), Vasile Bîcu, George-Alexandru Ilie, and Radu Rizoiu, *Drept civil. Persoanele* (Bucharest: U.J. Publishing House, 2016), 239-51; Gabriel Boroi, Carla Alexandra Anghelescu, and Ioana Nicolae, *Fișe de drept civil. Partea generală. Persoanele. Familia. Drepturile reale principale*, 5th edition (Bucharest: Hamangiu Publishing House, 2020), 271-79; Flavius Antoniu Baias, Eugen Chelaru, Radu Constantinovici, and Ioan Macovei (coordinators), *Noul Cod civil. Comentariu pe articole Art. 1 - 2664* (Bucharest: C.H.Beck Publishing House, 2012), 155-63; Ioan Leș and Călina Jugastru (coordinators), *Tratat de drept procesual civil,* Vol. II (Bucharest: U.J. Publishing House, 2020), 255 - 63; Gheorghe Piperea, Cătălin Antonache, Petre Piperea, Alexandru Dimitriu, Irina Sorescu, Mirela Piperea, and Alexandru Rățoi, *Codul de procedură civilă. Comentarii și explicații* (Bucharest: C.H.Beck Publishing House, 2020), 1728-34; Andreea Tabacu, *Drept procesual civil. Legislație internă și internațională. Doctrină și jurisprudență* (Bucharest: U.J. Publishing House, 2019), 542-44; Gabriel Boroi and Mirela Stancu, *Drept procesual civil,* 5th edition (Bucharest: Hamangiu Publishing House, 2020), 962-67; Cezara Chirică, "Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție în lumina dispozițiilor noului Cod Civil și a Noului Cod de Procedură Civilă", *Dreptul*, no. 1(2012): 26-59; Maria Fodor, "Punerea sub interdicție în reglementarea noului Cod Civil și a Noului Cod de Procedură Civilă", *Dreptul*, no. 5(2013): 29-47.

[3] Chelaru, *Drept civil. Persoanele*, 179.

142 - 151 of the Family Code[4], and the interdiction procedure was regulated in Chapter 3, first section, Articles 30 - 35 of the Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural and legal persons[5].

Currently, the seat of the matter is, in terms of substantive conditions and effects in Book I, Title III, Chapter III, Articles 164 - 177 of the Civil Code[6], and in terms of procedural conditions in Book VI, Title II, Articles 936 - 943 of the Code of Civil Procedure[7], in essence the current legal provisions resuming the old regulation in the matter, aspect criticized in the doctrine, where it was rightly referred to the regulations in the field of other legal systems that, "unfortunately, our legislator lost the chance to introduce a modern regulation in this field, which would correspond as well as possible to the needs of the various categories of vulnerable persons"[8].

The judicial interdiction must be distinguished from the regulation dedicated to the protection of persons with mental disorders by Law no. 487/2002, republished, which provides for the rights of persons with mental disorders and the procedure of hospitalization in a psychiatric unit (voluntary hospitalization and involuntary hospitalization). In the sense of Law no. 487/2002, the person with mental disorders, covered by this normative act, is the person with mental imbalance or insufficiently developed mentally or dependent on psychoactive substances, whose manifestations fall within the diagnostic criteria in force in psychiatric practice. The person subject to the protection measures provided by Law no. 487/2002, republished, may or may not be judicial interdicted.

Thus, the protection measures provided by Law no. 487/2002, republished, applies to persons with mental disorders, have no influence on the exercise capacity of the protected person[9] and are decided administratively by the medical authority, the court having only the role of resolving any complaints made against the measures thus ordered.

Instead, the judicial interdiction can be instituted only by the court and produces two effects: *1)* the interdicted is totally deprived of capacity to exercise and *2)* the establishment of guardianship of the interdicted[10], which implies a legal regime of representation of the interdicted by the guardian, no just a simple assist.

Not every cause of lack of discernment[11], in regard to the care of one's own interests, can lead to interdiction, but only that which is due to mental alienation or mental debility[12]. It should be emphasized that in Romanian law, the measure of placing under judicial interdiction is not ordered for any mental illness, but only in the case of mental alienation and mental debility defined by Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code[13] as *"a mental illness or mental disability that determines a person's mental incompetence to act critically and predictively on the social-legal consequences that may arise from the exercise of civil rights and obligations"* (our emphasis).

In addition, we point out that under the rule of both current and old regulations, no other cause that could prevent a natural person from taking care of his interests, such as illness, old age or physical infirmity, can lead to judicial interdiction, in the situations enunciated previously to the respective person, a trustee may be appointed, under the conditions stipulated by Articles 178 - 185 of the Civil Code, if he gives his consent in this respect; or, according to Article 181 of the Civil Code, the establishment of the trusteeship does not affect the capacity of the person the trustee represents.

As a novelty, we point out the establishment by the provisions of Article 166 of the Civil Code, following the model of other modern legislation[14], of the so-called "dative guardianship" which allows the appointment of the guardian even by the beneficiary of the protection measure. Thus, Article 166 of the Civil Code provides: *"Any person who has full capacity to exercise may designate by unilateral act or mandate contract, concluded in authentic form, the person to be appointed guardian to take care of the person and his property in if it were interdicted. The provisions of Article 114 (3) to (5) shall apply accordingly"* (emphasis added).

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[4] Republished in the Official Gazette no. 13 of April 18, 1956.

[5] Published in the Bulletin Office no. 32 of January 31, 1954.

[6] Republished in the Official Gazette no. 505 of July 15, 2011.

[7] Republished under Article XIV of Law no. 138/2014 for the amendment and completion of Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and supplementing related normative acts, published in the Official Gazette no. 753 of October 16, 2014, giving the texts a new number.

[8] Chirică, "Ocrotirea anumitor persoane fizice prin măsura punerii sub interdicție judecătorească în lumina dispozițiilor noului Cod Civil și a noului Cod de Procedură Civilă", 59.

[9] Article 68 paragraph (3) of Law no. 487/2002, republished, stipulates: *"Involuntary hospitalization is not a cause of restriction of the patient's legal capacity".*

[10] According to Article 170 of the Civil Code, *"By the decision to place under interdiction, the guardianship court immediately appoints a guardian for the protection of the one placed under judicial interdiction. The provisions of Articles 114 to 120 shall apply accordingly".* The guardianship of the interdicted person is assimilated to the guardianship of the minor who has not reached the age of 14, insofar as the law does not provide otherwise [Article 171 of the Civil Code].

[11] Article 5 letter k) of Law no. 487/2002, republished, defines the consent as a component of the psychic capacity, which refers to a certain deed and from which derives the possibility of the respective person to appreciate the content and the consequences of this deed. Discernment is a state of fact (status facti), as opposed to civil capacity which is a state of law (status iuris).

[12] Nicolae (coordinator), Bîcu, Ilie, and Rizoiu, *Drept civil. Persoanele,* 242.

[13] Published in the Official Gazette no. 409 of June 10, 2011.

[14] In this regard, the legislation of Quebec and France.

The request for interdiction of a person may be formulated by the persons mentioned by Article 111 of the Civil Code, respectively: persons close to the one under judicial interdiction, as well as the administrators and tenants of the house where the minor lives; the local community public service for the registration of persons, on the occasion of the registration of the death of a person, on the occasion of the opening of a succession procedure; the courts, on the occasion of the conviction to the criminal punishment of the prohibition of parental rights; local public administration bodies, protection institutions, as well as any other person.

As regards the competent court, according to Article 936 of the Code of Civil Procedure, the application for the judicial interdiction of a person is resolved by the court of guardianship in whose district he has his domicile.

From a material point of view, jurisdiction lies with the court in accordance with Article 94 (1) (a) of the Code of Civil Procedure.

The request for judicial interdiction shall include, in addition to the elements provided for by common law in Article 194 of the Code of Civil Procedure, the facts resulting from the alienation or mental debility of the person concerned, as well as the proposed evidence [Article 937 of the Code of Civil Procedure]; it is formulated in contradiction with the person in respect of whom the measure is requested.

The phases of the prohibition procedure that we will refer to below are: the non-contradictory phase and the contradictory phase.

Thus, after receiving the request, the president of the court will order the communication of copies of the request and of the documents attached to the one whose judicial interdiction was requested, as well as to the prosecutor, when the request was not submitted by him.

According to Article 938 paragraph (2) of the Code of Civil Procedure, the prosecutor will carry out the following steps: conducting investigations into the person whose interdiction is requested, including hearing the family members of the person concerned (social investigation, conducted by the mayor's office from the domicile of the data subject and the preparation of the corresponding report, at the request of the prosecutor)[15], will take the opinion of a commission of specialist doctors, and if the one whose placement under judicial interdiction is required is hospitalized in a health unit, takes its opinion.

Where appropriate, the President of the Court shall also order the appointment of a trustee, the appointment procedure being regulated by Article 178 - 187 of the Civil Code. If the defendant's state of health prevents his personal presentation, the appointment of the trustee is mandatory for representation in court.

Article 939 of the Code of Civil Procedure provides that, once the opinion of the board of specialists or the health unit has been submitted, the court may find that it is necessary to observe the mental state of the defendant for a longer period. If the observation cannot be made otherwise, the court may order the temporary hospitalization, for a period of maximum 6 weeks, in a specialized unit.

After receiving the result of the prosecutor's investigations, the opinion of the commission of medical specialists and, where appropriate, of the health unit, the court sets a deadline for judging the request, ordering the summoning of the parties.

Concerning the hearing of the person whose judicial interdiction is requested, Article 940 paragraph (2) of the Code of Civil Procedure provides that at trial, the court is obliged to hear him, asking him questions to ascertain the mental state of the defendant. It should be noted that the hearing will take place in court, and if this is not possible, he will be heard at the place where he is.

According to Article 940 paragraph (3) of the Code of Civil Procedure, the participation of the prosecutor in the trial is mandatory.

As regards remedies, we specify that the sentence pronounced in question can be appealed exclusively within 30 days from the communication, as it results from the provisions of Article 94 point 1 letter a) of the Code of Civil Procedure, corroborated with Article 483 paragraph (2) of the same Code.

As a novelty, we show that the provisions of Article 941 of the Code of Civil Procedure have modernized the advertising system to achieve the opposability to third parties of the measure, in order to increase the sphere of the institutions receiving the communication of the operative part of the final decision in a certified copy compared to the previous regulation, Article 144 paragraph (2) of the Family Code according to which: *"After it has become final, the decision will be communicated without delay by the court that issued it the one placed under interdiction was registered, to be transcribed in the register specifically intended"* (our emphasis). The institutions listed in the current regulation are the following: the local community public service for the registration of persons with whom the birth of a person under judicial interdiction is registered, in order to make a mention on the birth certificate; the competent health service, so that it establishes on the person placed under judicial interdiction, according to the law, a permanent supervision; the competent real estate cadastre and advertising office, for notation in the land book, when applicable; trade register, if the person placed under judicial interdiction is a professional. It must be said that after the judgment of interdiction becomes final, its communication will be made by the court that pronounced it, i.e. either the first instance or the appellate court.

For the purposes of Article 941 paragraph (3) of the Code of Civil Procedure, if the request for judicial

[15] Piperea, Antonache, Piperea, Dimitriu, Sorescu, Piperea and Rățoi, Codul de procedură civilă. Comentarii și explicații, 1731.

interdiction has been rejected, the trusteeship established during the trial shall cease by right.

If the cases that caused the judicial interdiction have ceased, the court will decide to lift it, the applicable rules of procedure being the same as those of the interdiction[16]. It should be noted that the request for lifting the interdiction is made by the interdicted person, the guardian and the persons provided for in Article 111 of the Civil Code.

According to Article 943 paragraph (2) of the Code of Civil Procedure, the lifting of the judicial interdiction is mentioned on the decision to put under interdiction. However, the termination of the guardian's right of representation may not be opposed to a third party until the date of completion of the publicity formalities provided for in the Code of Civil Procedure, unless the third party has experienced the lifting of the interdiction in another way. In other words, the right of the guardian to represent the person under interdiction shall cease only from the date on which the appropriate registration on the birth certificate of the person under interdiction is made, as regards the third party who did not know the lifting of the interdiction, of noting the lifting of the interdiction in the land book or of the corresponding mention in the trade register, if the person under judicial interdiction is a professional[17].

3. The jurisprudence of the Constitutional Court regarding the judicial interdiction

Regarding the old regulation in the matter of judicial interdiction, the court of constitutional contentious ruled by Decision no. 226/2003[18]. In the motivation of the decision to reject the exception of unconstitutionality of the provisions of Articles 30 - 35 of Decree no. 32/1954 for the implementation of the Family Code and the Decree on natural persons and the provisions of Articles 43 - 45 of the Code of Civil Procedure, the Court held that the measure of interdiction of a natural person is provided in the situation where, as following an extensive and complex legal investigation, the court seized is convinced that the person lacks the necessary discernment to take care of his own interests. The Court also stated that by the effect of judicial interdiction, it is completely deprived of the capacity to exercise, being assimilated to the minor until the age of 14, having the possibility to capitalize on his capacity to use exclusively by his representation at the conclusion of legal acts, by the guardian. The court of constitutional contention has shown that this measure does not constitute a sanction, but has an obvious purpose of protection of both the natural person who is thus sheltered from the harmful consequences of their own acts, consequences which, due to lack of discernment do not - could foresee, as well as the society, as a whole, the rules of which could be seriously disrupted by maintaining the full exercise of the rights of such a person. Next, it was pointed out that, in view of the particularly drastic consequences of the interdiction - the lack of capacity to exercise and the imposition of guardianship of the interdicted person -, the legislator has established a procedure that offers sufficient guarantees to prevent and annihilate possible abuses in this matter, so that only the court has the power to decide to put the person under interdiction. Thus, as the Court stated, the procedure of judicial interdiction it can be initiated by any interested person and comprises two phases, the non-contradictory phase, in which the necessary investigations are carried out to establish the factual situation and the contradictory phase, which takes the form of an ordinary civil process, based on evidence administered by the court. By the same decision, the Court found that the legal texts deduced from the review of constitutionality only express the requirements of guaranteeing the fundamental rights and freedoms of the person and consequently do not contradict the provisions of Article 16 paragraph (1), Article 21 paragraph (1) and (2), Article 26 paragraph (1) and (2) and Article 30 paragraph (1) of the Constitution invoked in the motivation of the exception of unconstitutionality.

Article 938 paragraph (2) of the Code of Civil Procedure provides: "The prosecutor, directly or through the police, will carry out the necessary investigations, will get the approval of a commission of medical specialists, and if the one whose judicial interdiction is required is hospitalized in a health unit, he will also get its approval". By Decision no. 736/2017[19] to be summarized, the Constitutional Court rejected the exception of unconstitutionality and found that the provisions of Article 938 paragraph (2) of the Code of Civil Procedure are constitutional in relation to the criticisms made.

In order to decide thus, the Court first noted that Article 938 of the Code of Civil Procedure with the marginal name *"Preliminary Measures"* rules on the obligation to communicate the request of the person whose interdiction is requested, as well as to the prosecutor [paragraph (1)]; conducting preliminary investigations by the prosecutor directly or through the police [paragraph (2)]; the appointment of a special trustee [paragraph (3)]; and are part of the special procedure for placing under judicial interdiction regulated by Article 936 - 943 of the Code of Civil Procedure.

Distinct from the reference made to those retained by the Court in the Decision no. 226/2003, it was shown that in the interdiction procedure, the prosecutor has an important role, given that he can initiate any civil action, whenever necessary to defend the rights and legitimate interests of minors, of persons under

[16] Article 943 paragraph (1) of the Code of Civil Procedure.
[17] In this sense, Boroi and Stancu, Drept procesual civil, 967.
[18] Published in the Official Gazette no. 458 of June 27, 2003.
[19] Published in the Official Gazette no. 326 of April 13, 2018.

interdiction and of the missing, as well as in other cases expressly provided by law[20], and the measures established by Article 938 paragraph (2) of the Code of Civil Procedure are a necessary guarantee for the observance of the rights of the person whose interdiction is requested. The Court further stated that the President of the Court is obliged to take measures to ensure that the application for interdiction and the attached documents are communicated to the person concerned and to the prosecutor, and the prosecutor is obliged to carry out the necessary investigations to verify the situations are invoked in the request for interdiction, obligations that fall within the non-contradictory phase of the procedure, in which the investigations necessary to establish the factual situation are carried out.

In the reasoning of the decision, it was also noted that prior to the trial, the prosecutor must conduct the necessary investigations, obtain the opinion of a board of specialists and, where appropriate, the opinion of the health unit, if the person is hospitalized and concluded that this does not contravene to constitutional provisions that were invoked by the author of the exception of unconstitutionality. In the Court's view, the legislative solution criticized is a natural one in the context in which at this stage of the proceedings the substance of the dispute is not settled, but only the necessary measures are taken for the proper administration of the act of justice. The Court explained that the documents drawn up and obtained by the prosecutor are to be communicated by him to the court in order to fix the first trial term, under the conditions of Article 940 of the Code of Civil Procedure. The Constitutional Court has ruled that the establishment of a pretrial stage is not contrary to the principle of free access to justice, as long as the acts and measures ordered by the prosecutor are to be subject to the control of the court.

Next, the Court explained that the criticized legal provisions represent procedural norms, the regulation of which is the exclusive competence of the legislator, who may establish, in view of special situations, special rules of procedure, according to Article 126 paragraph (2) of the Constitution. Thus, the legislator can assign certain competencies to the prosecutor in the civil process, even if the attributions of the Public Ministry are exercised, mainly, in the criminal judicial activity.

Also, regarding the phrase *"necessary research*", from the content of Article 938 paragraph (2) of the Code of Civil Procedure, criticized for the lack of predictability, the Court argued that the text does not make an express determination of them, but obviously refers to the checks carried out in relation to the person whose interdiction is resolved, with regarding the facts presented in the request for interdiction and the proposed evidence, and the prosecutor will assess concretely on the investigative activities that need to be carried out and concluded that the legal provisions criticized are accurate and predictable. Continuing the argument, regarding the criticism according to which the text of the law gives the possibility to the representative of the Public Ministry to delegate the competence to the police, it was noted that this is not a relationship of subordination of police to the prosecutor, because according to Article 2 of Law no. 218/2002 on the organization and functioning of the Romanian police[21], the activity of the Romanian Police constitutes a specialized public service and is performed in the interest of the person, of the community, as well as in support of state institutions, exclusively on the basis of and in law enforcement. In addition, the Constitutional Court has also shown that the purpose of the prosecutor's action is not to obtain for a party the satisfaction of a claim, but, as a representative of the general interests of society, defends the rule of law, the rights and freedoms of citizens, fulfilling a constitutional role enshrined in Article 131 of the Constitution.

By the same decision, the Court ruled that it could not be detained either the alleged contradiction of the provisions criticized with Article 126 paragraph (1) of the Constitution because the placing under interdiction is carried out by the court, which, based on the evidence administered, will decide the admission or rejection of the application.

Recently, by Decision no. 795/2020[22], the Court found the unconstitutionality of the provisions of Article 299 paragraph (3) of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code[23] according to which: "*(3) Until the date of entry into force of the regulation provided in para. (1), the attributions of the guardianship court regarding the exercise of guardianship regarding the assets of the minor or the judicial interdicted person, as the case may be, regarding the supervision of the way the guardian administers his assets belong to the guardianship authority*"(our emphasis). The legal provisions that were the object of the exception of unconstitutionality refer to Article 229 paragraph (1) of the same normative act, according to which: *"(1) The organization, functioning and attributions of the guardianship and family court are established by the law on judicial organization"* (our emphasis).

With regard to the exception with the analysis of which it was invested, the court of constitutional contentious recalled that according to Article 158 - 160 of the Family Code of 1953, repealed by Article 230 letter m) of Law no. 71/2011, the attributions of guardianship authority belong to the executive and disposition bodies of the local, communal, city, municipal or sector councils of the municipality of Bucharest, which is competent, among others, in the

[20] Article 92 paragraph (1) of the Code of Civil Procedure.
[21] Republished in the Official Gazette no. 307 of April 25, 2014.
[22] Published in the Official Gazette no. 1299 of December 28, 2020.
[23] Published in the Official Gazette no. 409 of June 10, 2011.

exercise of the guardianship of the person placed under interdiction.

As the Constitutional Court recalled, Article 107 of the Civil Code of 2009, with the marginal name *"Court of guardianship"*, established the jurisdiction of a specialized court, the court of guardianship and family, with regard to the resolution of claims and proceedings in the matter of protection of the natural person.

The Court further held that the transitional rule criticized extends the powers of the guardianship authority to supervise the manner in which the guardian administers the assets of the interdicted person regulated by the Family Code, from the date of entry into force of the Civil Code, respectively 1 October 2011, until in force of the norms regarding the organization, functioning and attributions of the guardianship and family court, by the corresponding modification of Law no. 304/2004 regarding the judicial organization[24], normative act that at the date of pronouncing the Decision no. 795/2020 had not been completed in this regard.

The Constitutional Court specified that the transitional norm criticized temporarily assigns the attributions established by the Civil Code in charge of the guardianship court to an administrative body subordinated to the local public authority, respectively the guardianship authority, thus ensuring, for a determined period, the correlation between the old and the new regulation, respectively the Civil Code of 2009 and, respectively, the Family Code. Therefore, - the Court explained - during the criticized transitional norm, there is an ultra-activation of the legal provisions contained in the Family Code regarding the attributions of the guardianship authority regarding the control of the exercise of guardianship. Thus, in the absence of express regulation by law of the organization and functioning of a special court, replacing the guardianship authority, with regard to the latter's powers of control, guidance and decision relating to guardianship, the settlement of requests for interdiction, requests for the lifting of the interdiction measure, the requests for the replacement of the guardian, as well as the establishment of other protection measures were the competence of the sections or, as the case may be, at the control of the guardianship, respectively the inventory of the goods of the person placed under interdiction[25], the receipt of the annual report of the guardian, checks related to the administration of income and property, the report of psycho social investigation provided by Article 396 and the following of the Civil Code, necessary in the case of establishing the relations between the divorced parents and their minor children, except for the investigation provided by Article 508 paragraph (2) of the Civil Code, necessary in the case of the procedure of revocation of parental rights, which is resolved by the guardianship court, on the date of the decision by specialized panels for minors and family at the request of public administration authorities with responsibilities in child protection.

Continuing its argument, the Court noted that until the establishment of the guardianship court, the authorities and institutions with responsibilities in the field of protection of the rights of the child and the individual continue to exercise the powers provided by the regulations in force at the time of entry into force of the Civil Code, except for those given exclusively in the jurisdiction of the guardianship court, on that date panels or specialized sections for minors and family which does not agree with the purpose of the new regulation on the protection of natural persons established by the New Civil Code, which established a court specialized in fulfilling important duties in the field of personal protection, as well as decisions or solving problems related to the life of the natural person, such as those related to the capacity of the natural person[26], marriage[27], rights and property obligations of spouses[28], divorce, filiation, parental authority, maintenance obligation, co-ownership sharing, liberality capacity or the nullity of the contract concluded by a minor.

The Constitutional Court insisted that, given the increased role of the guardian in the measures of protection of the natural person, assigned to him by the provisions of Title III with the marginal name "*Protection of the natural person"* of the Civil Code of 2009, the legislator considered that it is necessary to replace the control attributions of the guardianship authority as an administrative institution, subordinated to the local public authority, with those of a specialized court, respectively the guardianship court. The Court also drew attention to the fact that given the importance of quickly identifying optimal solutions to the specific problems of a person for whom the judicial interdiction is resolved, the legislator expressly provided in Article 107 paragraph (2) of the Civil Code, the speedy settlement of claims for the jurisdiction of the guardianship court, in accordance with the constitutional principle of the right to a fair trial, conducted in an optimal and predictable time.

In the Court's view, the above issues were not compatible with the fact that the transitional situation persisted from the date of entry into force of the Civil Code, the lack of intervention of the legislator in the sense of regulation, by the law on judicial organization likely to contravene Article 1 paragraph (5) of the Constitution regarding the principle of legality, in its component regarding the quality of the law, as well as Article 124 of the Constitution on the administration of

[24] Republished in the Official Gazette no. 827 of September 13, 2005.
[25] Inventory subject to court approval.
[26] Article 40, 41, 44, 46 and Article 92 of the Civil Code.
[27] Article 272 and 274 of the Civil Code.
[28] Article 315, 316, 318, 322, 337, 368, 388 of the Civil Code.

justice, as it does not ensure a good administration of justice, by the lack of correlation with the substantive legal norms established in the Civil Code, thus perpetuating a transitional situation.

The Court noted that the lack of intervention of the legislator in establishing the rules on the organization of the court of guardianship, from the date of entry into force of the Civil Code was likely to distort the purpose of the law, namely to grant a court the powers exercised until the date of entry into force of an administrative authority, respectively the guardianship authority, considering the increased role of the tutor in the administration of the interdicted person's property, a role that requires effective control by a court that benefits from guarantees of impartiality and independence.

The Court also stated that given that the legislator expressly regulated the speedy settlement of requests for protection of the individual, in case of guardianship, with the consequence of failure to exercise civil rights, as well as the minority, lack of regulation of organization and functioning of the court of tutorship lacks efficiency the purpose of the legislator to involve the court in making decisions or solving problems related to the natural person, in all cases where the intervention of the court of guardianship is necessary.

In addition, the Court emphasized that maintaining sine die in the active fund of a transitional rule, contradicts the purpose of such a rule, to ensure, for a certain period, the correlation of two successive regulations, which is likely to violate the quality requirements of the law, guarantee of the principle of legality, by lack of predictability of regulation.

The Court also noted that, under the transitional rule criticized, an administrative body, subordinated to the local public authority or the guardianship authority, rules on the exercise of guardianship over the assets of the judicial interdicted person or, as the case may be, over the supervision the way in which the guardian administers his assets, without the interested party being able to contest the decision of the administrative body before the court, which contradicts Article 21 paragraph (1) of the Constitution on free access to justice.

By Decision no. 795/2020, the Court held that, pending the organization by law on the judicial organization of the court of guardianship, its special attributions regarding the exercise of guardianship over the property of the minor or the interdicted person or, as the case may be, regarding the supervision of which the guardian administers his property, are fulfilled by the courts, sections or, as the case may be, specialized panels for minors and family.

We signal the recent publication of Decision no. 601/2020[29], an extremely important decision in this matter since the Constitutional Court admitted the exception of unconstitutionality and found that the provisions of Article 164 paragraph (1) of the Civil Code are unconstitutional, which we will refer to below.

The object of the exception of unconstitutionality was represented by the provisions of Article 164 paragraph (1) of the Civil Code with the following content: *"(1) The person who does not have the necessary discernment to take care of his interests due to alienation or mental weakness, will be placed under interdiction"* (our emphasis).

We note that prior to the settlement of the case, at the deadlines of November 21, 2019 and January 21, 2020, the request was submitted to the Court of Justice of the European Union with a preliminary question under Article 267 of the Treaty on the Functioning of the European Union, respectively Article 412 paragraph (1) point 7 of the Code of Civil Procedure in conjunction with Article 3 paragraph (2) and Article 14 of Law no. 47/1992 on the organization and functioning of the Constitutional Court and the suspension of the trial of the national case, having as object the following three questions:

"1. It is the automatic revocation of the right to vote in elections to the European Parliament of a person suffering from a mental disorder, as a result of his being interdicted on the grounds that *"he does not have the necessary discernment to take care of his interests"* compatible with Article 39 paragraph 2 of the Charter of Fundamental Rights of the European Union, taking into account Article 12 of the Convention on the Rights of Persons with Disabilities?

It is the automatic forfeiture of the right to employ a person suffering from a mental illness, as a result of being interdicted on the grounds that "he does not have the necessary discernment to take care of his interests" a form of direct discrimination prohibited by Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment with regard to employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities?

In case of a negative answer to question no. 2, is the automatic revocation of the right to employment of a person suffering from a mental illness, as an effect of being interdicted on the grounds that "he does not have the necessary discernment to take care of his interests" a form of indirect discrimination prohibited by Article 2 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment with regard to employment and occupation, having regard to Article 12 of the Convention on the Rights of Persons with Disabilities? "

Referring to the case law of the Court of Justice of the European Union which it used in its argument, the Constitutional Court held that the application to the Court of Justice of the European Union is unnecessary, as the questions referred are irrelevant and nor the relevance in question, so that it rejected the claim as unfounded.

[29] Published in the Official Gazette no. 88 of January 27, 2021.

The Court noted that the analyzed regulation establishes *a substitute regime*, so that the rights and obligations of the person placed under judicial interdiction will be exercised by a legal representative, regardless of the degree of impairment of the discernment of the person concerned, to the detriment of *a support regime* characterized by a support mechanism to be granted by the State according to the degree of impairment of the discernment. Next, the Constitutional Court analyzed whether the unconditional option for such a substitute regime complies with Article 50 of the Constitution and Article 12 of the Convention on the Rights of Persons with Disabilities.

Regarding Article 50 of the Constitution, the Constitutional Court stated that it enshrines the right of persons with disabilities to enjoy special protection, meaning that the state must ensure the implementation of a national policy of equal opportunities, prevention and treatment of disability, in order to ensure the effective participation of people with disabilities in community life. It was stated that this constitutional norm imposes on the legislator the positive obligation to regulate adequate measures so that persons with disabilities can exercise their fundamental rights, freedoms and duties, obligation of support and backing to come to their aid[30].

With regard to the Convention on the Rights of Persons with Disabilities[31], the Court noted that it aims to promote, protect and ensure the full and equal exercise of all fundamental human rights and freedoms by all persons with disabilities[32] and seeks to respect inalienable dignity and autonomy, including the freedom to make one's own choices and the person's independence[33].

Next, the Court referred to Article 12 of the Convention with the marginal name *"Equal recognition before the law"* as interpreted by the Committee on the Rights of Persons with Disabilities in General Comment no. 1/2014[34]. Thus, the Court recalled that Article 12 paragraph (2) of the Convention states that all persons with disabilities have the right to full legal capacity and that legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights and acquires a special significance for persons with disabilities when they must make fundamental decisions about their health, education and work. The Court also noted that Article 12 point (2) of the Convention recognizes that persons with disabilities enjoy legal capacity on an equal footing with other persons in all areas of life, and that legal capacity and mental capacity are distinct concepts. The Court also mentioned that pursuant to Article 12 point 3 of the Convention, the state has the obligation to take all appropriate measures to ensure the access of persons with disabilities to the support they would need in the exercise of their legal capacity. In addition, the Court noted that according to Article 12 point 4 of the Convention it is possible to apply protection measures to persons with disabilities, adapted to their particular situation, measures that will be proportionate to the degree to which they affect the rights and interests of the person and will be adapted to his situation and will respect the rights, the will and preferences of the person. The Court pointed out that in terms of the duration for which a protection measure is instituted and its periodic review, the Convention provides in Article 12 point 4 that a protection measure is applied for the shortest possible duration and is subject to review by a competent authority. Therefore, - the Court concluded - the Convention provides for certain safeguards which must accompany the measures of protection instituted against persons with disabilities.

Regarding the provision of guarantees that must accompany the protection measures, the Court also referred to the Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe on principles concerning the legal protection of incapable adults[35]. We note that although the recommendations are not binding, they seek to approximate the laws of the Member States and are a means of directing[36]. As such, the Court referred to Principles 3 and 6 of Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe which states that national legislation should, as far as possible, recognize that there may be different degrees of incapacity and that the incapacity may vary over time and, if necessary, a measure of protection, it must be proportionate to the degree of capacity of the data subject and adapted to his or her individual circumstances and needs. At the same time, the Court pointed out that Principle 14 point 1 of the Recommendation no. R (99) 4 of the Committee of Ministers of the Council of Europe provides for a

[30] See, in this respect, see also Decision no. 138 of March 13, 2019, published in the Official Gazette no. 375 of May 14, 2019, paragraph 60; Decision no. 681 of November 13, 2014, published in the Official Gazette no. 889 of December 8, 2014, paragraph 21.

[31] Adopted in New York by the General Assembly of the United Nations on 13 December 2006, opened for signature on 30 March 2007 and signed by Romania on 26 September 2007. Romania has ratified the Convention by Law no. 221/2010 published in the Official Gazette no. 792 of November 26, 2010.

[32] Article 1 of the Convention. By persons with disabilities, the text of the Convention means those persons who have lasting physical, mental, intellectual or sensory deficiencies, deficiencies which, in interaction with various barriers, may impede the full and effective participation of persons in society on an equal footing with others.

[33] Article 3 letter a) of the Convention.

[34] Available at: http://www.crj.ro/wp-content/uploads/2018/01/CRPD-Comentariu-General-art-12-RO.pdf. The purpose of the General Comment no. 1/2014 is to explore the general obligations deriving from the various components of Article 12 of the Convention on the Rights of Persons with Disabilities.

[35] Adopted by the Committe of Ministers on 23 February 1999 at the 660th meeting of the Ministers' Deputies.

[36] In this regard, Anamaria Groza, *Uniunea Europeană. Drept instituțional* (Bucharest: C.H.Beck Publishing House, 2008), 359.

limited duration of the protection measure and the establishment of a periodic review of it.

In view of the foregoing, in the recitals of the decision in paragraph 34, the Court held that, in order to respect the rights of persons with disabilities, any protection measure must be proportionate to the degree of capacity, be adapted to the person's life, be only if other measures cannot provide sufficient protection, take into account the will of the person, apply for the shortest period of time and be reviewed periodically.

Considering this normative framework and taking into account the fact that by regulating a special regime for the protection of persons with disabilities, the premise of respecting all their rights is created, the court of constitutional contention mentioned that in the conception of Article 12 of the Convention on the Rights of Persons with Disabilities, as this article has been interpreted by General Comment no. 1/2014, the legal capacity of the person is not confused with his mental capacity, being distinct concepts, and the perceived or real limitations in mental capacity should not be used as a justification for rejecting legal capacity.

The Court also noted that, "The Civil Code operates with absolute values in the sense that any potential impairment of mental capacity, regardless of its degree, may lead to a lack of capacity to exercise. (...) Thus, any partial / total, permanent / temporary limitation of mental capacity may inexorably lead to loss of capacity to exercise and limitation of civilian capacity, without the possibility of such a situation being avoided by necessary support measures" (our emphasis). As such, the Court found that "there is a paradigmatic mismatch between the Convention on the Rights of Persons with Disabilities and the Civil Code on protection measures to be taken in respect of persons with disabilities, the former falling within the scope of support measures and operating with intermediate values, while the latter placing itself in a regime of substitution and absolute values, refusing intermediate solutions adapted to the particular situation of each person"[37] (our emphasis).

Given that a person's lack of capacity to exercise and his exercise through a guardian is a particularly serious consequence of placing a person under judicial interdiction, the Court further examined whether the protection measure regulated by the legal provisions criticized are accompanied by sufficient guarantees, as provided for in the Convention on the Rights of Persons with Disabilities, which ensure the exercise of their legal capacity and, as a consequence, respect for the dignity of the person.

Thus, the Court observed that from the way of regulating the measure of placing under judicial interdiction by Article 164 paragraph (1) of the Civil Code does not show that it concerns the total lack of discernment of the person in relation to the multitude of interests he can manifest in different areas of life. Or, as the Constitutional Court rightly noted, although the person in question may manifest a conscious will in a certain field, by placing him under judicial interdiction he loses his capacity to exercise. It was criticized by the Constitutional Court that although the Convention on the Rights of Persons with Disabilities stipulates that a protection measure is established taking into account the existence of different degrees of capacity, Romanian legislation provides for restricted capacity to exercise only in respect of a minor aged 14 to 18[38], no and the restricted capacity of the adult who, as a result of being placed under judicial interdiction, will be completely deprived of it, the legal acts will be concluded, on his behalf, by a legal representative[39].

The Constitutional Court held that the effects of the restriction of capacity to exercise of a person more than necessary may place him, in terms of freedom of action in areas where he manifests a conscious will, in a situation of inequality with respect to other persons who are not under a protective measure, being free to exercise their rights and to exercise their freedoms, with consequences for the principle of equality. Given that there are different degrees of disability, and a person may have to a greater or lesser extent the discernment affected, but not completely abolished, in the Court's view, until a measure is ordered to restrict the person's capacity to exercise must be taken into account the imposition of alternative and less restrictive measures than the placing under judicial interdiction. Consequently, the Court said, in the absence of such alternative measures, it is for the legislature to identify and regulate mechanisms capable of providing the necessary support in making decisions based on the will and preference of those persons. In other words, the Court noted that as assumed by the ratification of the Convention on the Rights of Persons with Disabilities, the Romanian state must provide support in exercising legal capacity, through mechanisms based on the premise of respecting the rights, will and preferences of persons with disabilities and, only to the extent that the support thus provided proves to be ineffective should it regulate protection measures adapted to the particular situation of the persons. With these arguments, the Court concluded that *"a protection measure such as judicial interdiction should be regulated only as a last resort, as it is of extreme gravity involving the loss of civil rights as a whole and must be carefully considered each time, including whether other measures have proved ineffective in supporting the person's legal capacity. Therefore, the state must not give up its positive obligation resulting from the provisions of Article 50 of the Constitution and must provide all the necessary support to avoid such an extreme measure"*[40] (emphasis added).

[37] Decision of the Constitutional Court no. 601/2020, paragraphs 35 - 36.
[38] Articles 38 and 41 of the Civil Code.
[39] Article 43 paragraph (2) of the Civil Code.
[40] Decision of the Constitutional Court no. 601/2020, paragraph 39.

Continuing its reasoning, the Court noted that neither in terms of the duration for which the protection measure is imposed nor in terms of its regular review, the legal provision does not correspond to the international standards according to which a protection measure applies for the shortest period of time and shall be subject to regular review by a competent authority. The Court recalled that according to Article 177 paragraph (1) of the Civil Code, the interdiction and, implicitly, the guardianship, lasts until the cessation of the causes that caused them. According to the Court, this legal provision is a guarantee of substantial law, but stressed that in order for it not to be illusory, the legislator must guarantee its disposition over certain periods of time and to enable the assessment of the cessation of cases that led to the establishment measure. With regard to other legal systems, the Court has ruled that these time-limits must be characterized by the fact that they are short, predetermined, easily identifiable, flexible and without an excessive duration, allowing for a periodic review of measures in a mode efficient and consistent.

At the same time, the Court held that according to Article 940 paragraph (1) letter b) of the Code of Civil Procedure, the obligation of the court to communicate the decision of interdiction to the competent health service was regulated, so that it establishes a permanent supervision over the one placed under judicial interdiction, according to the law. Therefore, as the Court rightly pointed out, a person may be placed under judicial interdiction for an indefinite period of time, and permanent supervision of the health service does not necessarily imply a regular reassessment of the person's capacity, which is not unequivocally apparent from the national regulations. Therefore, it has been shown that the mental retardation can vary over time, the judicial interdiction for an indefinite period and without a periodic reassessment of the person's capacity affects the rights and interests of people who, in certain periods, may be aware and coordinate their actions. On these issues, the Court concluded that the measure to protect the person with a mental disability must be individualized in relation to the degree of disability.

Referring to the relevant jurisprudence of the ECHR, the Constitutional Court noted that the protection measure consisting in placing under judicial interdiction, which has the consequences of depriving the person of the capacity to exercise and establish the guardianship, is not accompanied by the specified guarantees. In the recitals of the decision, in paragraph 44, the Court stated that in the absence of these guarantees *"the deprivation of the person's capacity to exercise leads to the impairment of one of the supreme values of the Romanian people, namely the human dignity provided by Article 1 paragraph (3) of the Constitution, which, according to the jurisprudence of the Constitutional Court, represents the source of fundamental rights and freedoms, as well as their guarantees"*[41] (our emphasis). At the same time, it was noted that *"the free development of the human personality is affected, which is closely related to human dignity, both in terms of its active side - expressed in the form of freedom of action - and its passive side expressed in the form of respect for the personal sphere of the individual and the underlying requirements"*[42] (our emphasis).

The Constitutional Court held in paragraph 46 of the Decision that the measure of judicial interdiction "is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. It does not take into account the fact that there may be different degrees of incapacity or the diversity of a person's interests, is not available for a specified period of time and is not subject to regular review. Any protection measure must be proportionate to the degree of capacity, be adapted to the person's life, be applied for the shortest period of time, be reviewed periodically and take into account the will and preferences of persons with disabilities. Also, when regulating a protection measure, the legislator must take into account the fact that there may be different degrees of disability, and mental deficiency may vary over time. Lack of legal capacity or discernment can take various forms, for example, total / partial or reversible / irreversible, a situation that requires the establishment of protection measures appropriate to reality and which, however, are not found in the regulation of the measure of judicial interdiction. Therefore, different degrees of disability need to be attached appropriate degrees of protection, the legislator in regulating legal measures must identify proportionate measures. An incapacity must not lead to the loss of all civil rights, but must be analyzed in each case" (our emphasis).

In conclusion, the Court ruled in paragraph 47 of the Decision that "in the absence of the establishment of safeguards to accompany the measure of protection of judicial interdiction, touches are brought to the constitutional provisions of Article 1 paragraph (3), of Article 16 paragraph (1) and of Article 50, as interpreted according to Article 20 paragraph (1), and in the light of Article 12 of the Convention on the Rights of Persons with Disabilities" (emphasis added).

The Court also emphasized that it is up to the National Authority for the Rights of Persons with Disabilities, Children and Adoptions to make regulatory proposals in this area, with Parliament or, as the case may be, the Government having the obligation to adopt regulations in accordance with the

[41] See, in this sense, Decision no. 1109 of September 8, 2009, published in the Official Gazette no. 678 of October 9, 2009. For developments on this topic, see Izabela Bratiloveanu, "Considerations about human dignity in the jurisprudence of the Constitutional Court," in *Proceedings of the International Conference European Union's History, Culture and Citizenship*, 12th edition (Bucharest: C.H. Beck Publishing House, 2019), 482-99.

[42] See, in this sense, Decision no. 465 of July 18, 2019 published in the Official Gazette no. 645 of October 5, 2019, paragraphs 31, 44, 45.

Constitution and the Convention on the Rights of Persons with Disabilities.

4. Conclusions

In connection with the effects of the decisions of the Constitutional Court, we specify that according to Article 147 paragraph (4) of the Constitution, from the date of their publication in the Official Gazette, the decisions of the Court are generally binding and have power only for the future, and regarding the provisions of the laws and ordinances in force found to be unconstitutional, paragraph (1) of the same article stipulates that *"its legal effects shall cease 45 days after the publication of the decision of the Constitutional Court if, during this period, the Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During this period, the provisions found to be unconstitutional are suspended by law"*. As noted in the doctrine, the decision to establish unconstitutionality applies directly in pending cases, pending before the courts[43]. Finally, we emphasize that gradually, in the European countries, the systems of adult protection have been modernized, personalized measures have been introduced, and the possibility has been established to allow everyone to organize in advance the consequences of a mental impairment, therefore comparative law can provide valuable benchmarks for future regulation in this area.

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- Decision no. 138 of March 13, 2019, published in the Official Gazette no. 375 of May 14, 2019;
- Decision no. 465 of July 18, 2019, published in the Official Gazette no. 645 of October 5, 2019;
- Decision no. 601 of July 16, 2020, published in the Official Gazette no. 88 of January 27, 2021;
- Decision no. 795 of November 4, 2020, published in the Official Gazette no. 1299 of December 28, 2020.

[43] In this regard, see Benke Károly and Mihaela Senia Costinescu. *Controlul de constituționalitate în România. Excepția de neconstituționalitate* (Bucharest: Hamangiu Publishing House, 2020), 244. For the effects of the decisions of the Constitutional Court, see also Tudorel Toader and Marieta Safta, *Curs de contencios constituțional* (Bucharest: Hamangiu Publishing House, 2017), 309-44, Bianca Selejan-Guțan, *Excepția de neconstituționalitate* (Bucharest: C.H. Beck Publishing House, 2010), 237 - 64.

IMPORTANT MODIFICATIONS ON FISCAL LEGISLATION - A MAJOR IMPACT UPON PRACTICAL DECISIONS OF LEGAL PRACTITIONERS AND OTHER PARTICIPANTS ON THE MARKET

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Abstract

The end of 2020 brought some major modifications on the fiscal legislation. As we can see, the impact will be significant taking in consideration that these modifications will bring some changes which will affect not only the fiscal practitioners or the lawyers or the administrative personnel but all people involved in fiscal transactions, in a word, the whole market. This study is the first step in an analytical analyse of these modifications trying to underline the impact on the market. Also, we have to have in mind that the fiscal legislation was amended year by year which meant a fiscal instability . We will try to see if these new changes will bring more predictability for all actors involved in this process.

Keywords: *Fiscal Code, fiscal authorities, fiscal documents, VAT, independent activities*.

1. Introduction

Legislative changes have always had a rather aggressive impact on civil society, especially when they directly affect the business environment that has had and still has a something to say, perhaps harder than citizens, viewed individually. That is why the changes of the fiscal legislation always enjoy maximum attention. I really wonder if we should put the verb to rejoice in quotation marks, because what changes is not always beneficial. Not to mention the harsh impact of this business environment, quite harassed, per say, in 2020 by the medical and social crisis generated by the COVID 19 virus.

Besides the direct impact on the business decision, the changes in taxation have raised an equally controversial issue: the amendment of both the Fiscal Code and the Fiscal Procedure by an Emergency Ordinance and not by parliament procedure.

The impact of adopting this solution has not always been good because it has generated substantial changes on short term. Or, the business environment and even the citizens were not and are not always ready for such a thing. Any economic impact should be weighed, adopted by consulting with the involved factors after conducting short, medium and long term analyses and previsions.

Taxation has a contractual nature in a way that together with the monetary policy contributes considerably to the achievement of the economic policy - the proximate gender of the two institutions.[1]

Also, a measure adopted should be allowed to generate the expected effects and not be amended again and again, thus leading to unpredictability, frustration and finally to a negative reaction of the legal regulation to its applicability.

The doctrine is unanimous in stating that "This source of law (s.n. Fiscal/Tax Code) is fully present in the field of social relations governed by public fiscal and financial law, but its particularities reside not in the general legal regime of the law, Government Ordinance and Emergency Ordinance, but relative to the special legal regime applicable to certain categories of laws, Ordinances or Emergency Ordinances: ... As a rule, the amendment must be promoted in public discussions with 6 months prior to the date of its enforceability."[2]

2. Presentation of the actual situation submitted to the analysis. The incidental legal framework

The market participant affected by the tax decisions incidental in this article states that in 2019 a number of new apartments with VAT included were purchased by a natural entity from a real-estate developer, in order to resell or lease them. Starting with 2021, the acquirer desired to sell these apartments.

The natural entity is not registered for VAT purposes, but practices independent activities through an entity registered for VAT purposes.

Is the raised legal issue limited to the situation of determining the VAT treatment applied to the sale of apartments considering the quality of taxable person registered for VAT purposes for liberal activity?

How will the sale of apartments be treated from the income tax perspective, as being from personal patrimony or as an independent activity?

Can the purchase/sale of apartments be carried out in reverse charge?

Can the subsequent sale of these apartments be made for a fee or is it exempted?

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[1] Mădălin Irinel Niculeasa, *Summa fiscalis. Tratat de drept fiscal si financiar public*. Edition, reviewed and completed, Universul Juridic, Bucharest, 2014, p. 33.

[2] Mădălin Irinel Niculeasa, op. cit, p. 245.

Does a natural entity have to register for VAT purposes or does one use the same VAT code that one has for an independent activity?

Will the tax paid for each of the five apartments be 3% on the income achieved from sale, from which we deducted the non-taxable amount of 450,000 lei?

2.1. The legal framework

- G.E.O. no. 44/2008 regarding the development of economic activities by authorized natural entities, individual enterprises and family enterprises[3];
- Law no. 227/2015 on the Tax Code, with further completions and amendments[4];
- The methodological application regulation of Law no. 227/2015 on the Tax Code, approved by Government Decision no. 1/2016 with further completions and amendments, hereinafter referred to as the Methodological Regulations[5].
- Law no. 207/2015 on the Tax Procedure Code, with further completions and amendments[6].

2.2. The legal nature of VAT

The basis for tax establishment resides the need of the state to gather resources to cover the expenses it has to make in order to meet its economic and social function.

At the basis of establishing taxes in Romania, there are a series of principles:

- Neutrality of tax measures;
- Certainty of taxation;
- Fiscal equity at individual level.[7]

The European Union lawmaker, when defining value added tax (”VAT”) as a general consumption tax applicable to all transactions consisting of supplies of goods or services for consideration, does not consider transactions free of charge at their nominal value.[8]

According to art. 1 of Directive no. 2006/112, the principle of the common system of VAT presumes the application of a general consumption tax on goods and services exactly in proportion to the price of goods and services, no matter the number of operations carried out in the manufacturing and distribution process prior to the stage in which the tax is perceived.

For each transaction, VAT, calculated on the price of the goods or services at a rate applicable to the goods or services in question, becomes chargeable after deducing of the amount of VAT directly borne by the various components other than the price.[9]

2.3. Fiscal treatment

Purchasing apartments and then selling them, represents, usually, an economic activity, for which authorization is required based on the provisions of the G.E.O. no. 44/2008 regarding the development of economic activities by the authorized natural entities, the individual enterprises and the family enterprises, with further completions and amendments.

Likewise, the purchase of apartments and selling them afterwards can also be seen as a generating fact. The generating fact represents the fact by which the necessary legal conditions for the exigibility of the tax are met. This is both the national definition and the Community definition.[10]

Taxable operations in Romania represent the delivery of goods carried out for consideration on the Romanian territory by a taxable person acting as such, i.e., those economic activities that constitute or are assimilated with a supply of goods, performed by a taxable person, with payment.[11]

The exercise of an independent activity supposes its development regularly, continuously, on own account and pursuing incomes to be achieved.

In accordance with Art. 7, point 3 of the Tax Code, an independent activity represents any activity carried out by a natural entity for the purpose of achieving income that meets at least 4 of the following criteria:

- the natural entity has the freedom to choose the place and the way of carrying out the activity, as well as the work schedule;
- the natural entity has the freedom to carry out the activity for several customers;
- the inherent risks to the activity are assumed by the natural entity carrying out the activity;
- the activity is carried out by using the patrimony of the natural entity carrying out that activity;
- the activity is exercised by the natural entity using the intellectual capacity and/or one’s physical performance, depending on the specifics of the activity;
- the natural entity is part of a professional body/order with a representative function, with the profession developed being regulated and supervised, according to the special regulatory documents that rule the organization and exercise of the respective profession;
- the natural entity has the freedom to carry out the activity directly, with employed staff or through collaboration with thirds in accordance with the law.

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[3] Published in the Official Gazette, Part I under no. 328 as of April 25th, 2008.
[4] Published in the Official Gazette, Part I under no. 688 as of September 10th, 2015, as amended by Law no. 230/2020.
[5] Published in the Official Gazette, Part I sub no. 22 as of January 13th, 2016.
[6] Published in the Official Gazette, Part I sub no. 547 as of July 23rd, 2015.
[7] L. Țâțu, C. Serbănescu, D. Ștefan, D. Cataramă, A. Nica, E. Miricescu, *Fiscalitate, De la lege la practică,* C.H. Beck press, Edition IV, Bucharest, 2007, p. 1.
[8] Mădălin Irinel Niculeasa, op. cit., p. 762.
[9] Mădălin Irinel Niculeasa, op. cit., p. 763.
[10] Mădălin Irinel Niculeasa, op. cit., p. 892.
[11] Mădălin Irinel Niculeasa, op. cit., p. 811.

Natural entities can carry out economic activities, opting for one of the following possibilities:

- as a self-employed person;
- as a sole proprietor of an individual enterprise;
- as a member of a family business.

The natural entities are authorized at the Trade Register Office and are registered at the competent tax body by submitting the form (070) Statement of fiscal registration / Statement of trades / Statement of deregistration for natural entities who carry out economic activity independently or exercise free professions.

The activities carried out by a natural entity must be analysed from the VAT perspective as a whole, as it results from the provisions of art. 266 p. (1) point 4 of the Tax Code. Therefore, for all economic activities carried out by a natural entity as a taxable person, a single registration code is assigned by the competent tax body for VAT purposes.

We state that neither art. 316 of the Tax Code, regarding the registration of taxable persons for VAT purposes, nor the methodological regulations for the application of Title VII of the Tax Code, do not provide obligations regarding a new registration for VAT purposes of taxable persons who have already registered for VAT purposes as natural entities and which are subsequently registered at the Trade Register Office based on Government Ordinance no. 44/2008.

Likewise, according to art. 82 para. (1) of the Tax Procedure Code, "any person or entity that is the subject of a fiscal legal report is fiscally registered receiving a fiscal identification code", the purpose of the fiscal registration being the assignment for each taxpayer of a single fiscal identification code.

Under the circumstance where the natural entity has registered for value added tax purposes and subsequently is authorized according to G.E.O. no. 44/2008, the competent fiscal body will notify the Trade Register Office with the registration code already assigned to the respective natural entity, because as we showed above, a subject of fiscal law, regardless of the number of activities, must be identified with a single tax identification code.

From the VAT perspective, the sale of apartments is a taxable operation in Romania either by applying the standard rate of 19% or by applying the reduced rate of 5%, if the conditions imposed by law for home sales in the Romanian social policy are met.

Even if the natural entity is registered for VAT purposes, the operation is not within the scope of VAT, if the respective apartment is from the personal patrimony of the natural entity, without being an apartment from the business patrimony, for example an apartment built by the natural entity as a real estate developer.

If the apartment to be sold is part of the personal patrimony (for example, it is the home residence of the natural entity), the operation does not have an economic character because it is considered that it is part of the personal patrimony and not of the business patrimony. The real estate would be considered from the patrimony of the business if it had not been used for personal purpose, either as a home or as a holiday home.

In this case, the provisions of art. 269 of the Tax Code application regulations, point 4, p (2): "In applying the provisions of paragraph (1), natural entities are not considered to carry out an economic activity in the scope of tax application when they achieve income from sale of personal property or other property, which has been used by them for personal purposes. The category of property used for personal purposes includes construction and, where appropriate, the land related to them, personal property of natural entities who have been used as homes, including holiday homes, any other property used for personal purposes by the natural entity, as well as property of any kind inherited or acquired as a result of remedial measures provided by the laws on the reconstitution of property rights".

If the real estate has not been used for personal purposes by the natural entity or has been purchased for resale, the operation falls within the scope of VAT, in which case it can be sold by applying the exemption regime regulated by art. 292 p. (2) letter f), but only if the respective apartment is not a new construction.

The new construction is defined by regulations, at point 55 p. (5) of the Application Regulations of art. 292 p. (2) letter f) of the Tax Code: "If the delivery of a construction takes place before the date of the first occupation, as the first occupation is defined in paragraph (3), the delivery of a new construction shall be considered to take place".

The definition of the new construction can also be found in p. (3), (4) of the Application Regulations of art. 292 p. (2) letter f) of the Tax Code:

"(3) The date of the first occupation, in case of a construction or of a part of the construction that has not undergone transformations of the nature provided in art. 292 p. (2) letter f) point 4 of the Tax Code is considered to be the date of signing by the beneficiary of the final acceptance report of the construction or of a part of the construction. The final acceptance report means the acceptance report at the end of the works, concluded according to the current legislation made under own management, the date of the first occupation is the date of the document on the basis of which the construction or the part of the construction registered in the accounting records as a fixed tangible asset.

(4) The date of the first use of a construction refers to constructions that have undergone transformations of the nature of those provided in art. 292 p. (2) letter f) point 4 of the Tax Code.

The date of first use means the date on which the beneficiary signs the final acceptance report of the transformation works of the construction in question or of a part of the construction. The final acceptance report means the acceptance report at the end of the works, concluded according to the legislation in force. In the case of transformation works of a construction or part of the construction in own management, the date of the

first use of the asset after the transformation is the date of the document based upon which the value of the construction or part of the construction is increased by the value of the respective transformation.

According to art. 292 p. (2) letter f) of the Tax Code the following are specified "2) The following transactions shall also be exempt from duty:

f) delivery of buildings / parts of buildings and of the lands on which they are built, as well as of any other lands. By way of exception, the exemption does not apply to the delivery of new construction, parts of that or new build-up lands.

For the purposes of this article, the following are defined:

- buildable land represents any arranged or unarranged land, on which constructions can be carried out, according to the legislation in force;
- construction means any structure fixed in or on the ground;
- the delivery of a new construction or part of it means the delivery made no later than December 31st of the year following the first occupation or use of the construction or part of it, as the case may be, following the transformation;
- a new construction also includes any transformed construction or transformed part of a construction, if the cost of transformation, excluding tax, amounts to at least 50% of the value of the construction or part of the construction, excluding the value of land, after transformation, respectively the value recorded in accounting in the case of taxable persons who are required to keep accounting records and who do not apply the cost-based assessment method in accordance with International Financial Reporting Standards, or the amount expertise/assessment report, in the case of other taxable persons. If only a part of the construction is alienated, and its value and the related improvements cannot be determined based on the accounting data, they will be determined based on an expertise/assessment report ".

In conclusion, if the sale of the apartment is made by the natural entity, in his capacity as an authorized natural entity/self-employed, in addition to VAT, one owes income tax for independent activities, contribution for social insurance and contribution for social health insurance, as follows:

- according to art. 148 p. (1-4) of the Tax Code, natural entities who achieve income from independent activities from one or more sources and/or income categories, owe the social insurance contribution, if they estimate for the current year net income whose cumulative value is at least equal to 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code.

The inclusion in the annual threshold of at least 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code, is carried out by cumulating the net incomes from independent activities that are estimated to be achieved in the current year.

The annual basis for calculating the social security contribution, in the case of persons earning income from independent activities and intellectual property rights, is the income chosen by the taxpayer, which cannot be lower than the level of 12 minimum gross salaries per country, in force at the deadline for submitting the sole statement provided in art. 120 of the Tax Code.

According to art. 150 p. (1) of the Tax Code, regarding the specific exceptions regarding the incomes from independent activities, specifies the following:

"(1) Natural entities insured in their own social insurance systems, who do not have the obligation to insure in the public pension system according to the law, as well as the persons who have the quality of pensioners do not owe the social insurance contribution for Ct' incomes foreseen at art. 137 p. (1) letters b) and b1)."

- in what regards the social health insurance contribution, the Tax Code provides in art. 170 that natural entities owe the contribution of social health insurance if they achieve cumulative annual incomes at least equal to 12 gross minimum basic salaries per country from one or more sources of income in the following categories:

"a) net/gross income or income norm from independent activities, established according to art. 68, 681 and 69, as appropriate;

b) the net income from intellectual property rights, established after granting the share of flat-rate expenses provided in art. 72 and 721, as well as the net income from intellectual property rights determined according to the provisions of art. 73;

c) net income distributed from associations with legal entities, taxpayers according to title II, title III or Law no. 170/2016, determined according to the provisions of art.125 p. (8) - (9);

d) net income or income norm, by case, for the incomes from the transfer of the use of the assets, established according to art. 84 - 87;

e) the net income and/or revenue from investments, established according to art. 94 - 97. In the case of interest income, the amounts received are considered, and in the case of dividend income, the dividends received are considered distributed starting with 2018;

f) the net income or the income norm, as the case may be, for the incomes from agricultural activities, forestry and fish farming, established according to art. 104 - 106;

g) gross income and/or taxable income from other sources, established according to art. 114 -116."

The share of the social health insurance contribution is 10% and is due by the natural entities for whom there is the obligation to pay the social health insurance contribution, according to the Tax Code.

The natural entity registered for VAT purposes who achieves incomes from the sale of real estate, even

if one is not registered according to G.E.O. no. 44/2008, but carries out an activity regularly, continuously, on its own account and following the achievement of incomes, one has the obligation to observe own rules of incomes from independent activities.

In the situation where the natural entity carries out an activity that meets the criteria that mainly define the existence of an independent activity, then this natural entity obtains income from independent activities, whose fiscal treatment is provided in Title IV "Income tax", Chapter II "Income from independent activities" of the Tax Code.

According to the provisions of art. 14 p. (1) - (3) of the Tax Procedure Code [12]:

"(1) Incomes, other benefits and patrimonial elements are subject to tax legislation regardless of whether they are obtained from acts or deeds that meet or do not meet the requirements of other legal provisions.

(2) The relevant factual situations from the tax perspective are assessed by the tax body in accordance with their economic reality, determined on the basis of the evidence administered under the conditions of the hereby code. When there are differences between the fund or the economic nature of an operation or transaction and its legal form, the tax body assesses these operations or transactions, respecting their economic fund.

(3) The tax body establishes the fiscal treatment of an operation considering only the provisions of the tax legislation, the fiscal treatment not being influenced by the fact that the respective operation meets or does not meet the requirements of other legal provisions."

From the above legal provisions, it results that the incomes, other benefits and patrimonial elements achieved by the natural entities who purchase real estate that they subsequently alienate are subject to the tax legislation regardless of whether they are achieved from acts or deeds that meet or do not meet the requirements of other legal provisions.

Thus, natural entities who bought apartments for the purpose of resale, without being registered according to G.E.O. no. 44/2008, and which, following the reanalysis of the activity carried out, the criteria that mainly define the existence of an economic activity have been met, as it is defined in art. 2 letter a) of the G.E.O. no. 44/2008, and from the tax perspective this economic activity generates incomes from independent activities, they have the obligation to regularize their tax situation by submitting the statements regarding the income achieved according to the legal provisions, for the previous years in which they carried out this activity, must give efficiency to art. 14 of the Tax Procedure Code and to charge the stated incomes.

Likewise, we state that, at art. 2 letter j) of the G.E.O. no. 44/2008 the meaning of the term patrimony of affectation is presented and which represents the patrimonial mass within the patrimony of the entrepreneur, representing the totality of the affected rights and obligations, by written statement or, as the case may be, by the constitution agreement or by an additional document to it, exercise an economic activity.

According to the provisions of art. 111 of the Tax Code, the notaries public calculate and collect the tax related to the incomes from the transfer of the real estate's only in the situation in which the transfer of some real estates from the personal patrimony takes place.

At the same time, in accordance with the provisions of point 33 p. (2) of the Methodological Regulations, given in application of art. 111 of the Tax Code, an exception is made to the transfer of the property right or its dismemberments for the real estate properties from the business patrimony, defined according to point 7 p. (8) of the methodological regulations given in the application of art. 68 of the Tax Code, these being included in the income categories for which the annual net income is determined based on the accounting data.

3. A different example on the same topic

On December 24th, 2020, Law no. 296/2020[13] for the amendment of the Law no. 227/2015 regarding the Tax Code.

One of the amendments brought by Law no. 296/2020 was that from point 160 of the Law, which provided that:

In Article 291 (3) (c), point 3 is amended to read as follows:

"3. the delivery of dwellings with a usable area of maximum 120 sqm, excluding household annexes, whose value, including the land on which they are built, does not exceed the amount of 140,000 euros, the equivalent in lei of which is established at the exchange rate notified by National Bank of Romania, valid on January 1st of each year, excluding value added tax, purchased by natural entities. The useful area of the home is the one defined by the Housing Law no. 114/1996, republished, with further completions and amendments. The household annexes are those defined by Law no. 50/1991 on the authorization of the carrying out construction works, republished, with further completions and amendments. The reduced rate applies only in the case of homes which upon sale may be therefore inhabited."

Therefore, by enforcement of the Law no. 296/2020, the legal provisions regarding the application of the value added tax rate (VAT) of 5% on the sale of dwellings were amended by increasing the threshold to the amount of 140,000 euros.

This change has been seen by both natural entities and real estate developers as a breath of fresh air, with many people hoping to buy a new home.

[12] Published in the Official Gazette no. 547 as of 23.07.2015, lately modified by Law no. 295/2020.
[13] Published in the Official Gazette, Part I under no. 1269 as of December 21st, 2020.

However, shortly after the enforcement of the Law no. 296/2020, on December 31st, 2020, the Emergency Ordinance no. 226/2020 on some tax-budgetary measures and for amending and supplementing some normative documents and extending certain deadlines, has also entered into force.[14]

According to Art. XVIII.pct. 2 of the Emergency Ordinance no. 226/2020:

"Paragraph (1) of Article VII of Law no. 296/2020 for the amendment and completion of Law no. 227/2015 on the Tax Code, is amended and completed as follows:

2. After letter e) a new letter is inserted, letter f), with the following content:

f) the provisions of art. I point 13 and 160 shall enter into force on January 1st, 2022."

Therefore, as a result of the entry into force of Ordinance no. 226/2020 increasing the ceiling up to which 5% VAT is applied is postponed until January 1st, 2022. From that date, the threshold will reach, from 450,000 lei, as it is in present, to approximately 680,000 lei (the equivalent in lei of the amount of 140,000 euros).

Therefore, the joy generated by such a measure was of very short and those who had made predictions about the applicability of legal provisions had to postpone them at least until 2022.

4. Conclusions

The situation set out above perfectly illustrates the legislative hurdle in which a taxpayer is faced with solving tax problems. Not infrequently, the solutions of the tax bodies come in contradiction with the solutions of the courts, which makes the tax provisions even more difficult to apply.

Moreover, tax equity should not be pursued only as an impact of an income tax. 100% tax equity (utopian to be achieved) should track all taxes borne by one person.[15]

Further, in times of crisis such as the one we are going through, securing funds is the key to survival, regardless of its source.[16]

Yet, the fiscal predictability, at least in times of crisis, would help both the business community and natural entities and should be considered by the political class when deciding on tax measures concerning the society.

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[14] Published in the Official Gazette, Part I under no. 1332 as of December 31st, 2020.

[15] L. Țâțu, C. Serbănescu, D. Ștefan, D. Cataramă, A. Nica, E. Miricescu, op. cit., p. 1.

[16] Alina Duca, Emilian Duca, *Soluții fiscale pentru perioade de criză,* Universul Juridic press, Bucharest, 2009, p. 60.

THE RECENT LEGAL EVOLUTION OF THE ROMANIAN PREFECT IN EUROPEAN CONTEXT: FROM SENIOR CIVIL SERVANT TO PUBLIC OFFICIAL

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Abstract

The prefect has the essential role of creating a link between the central and the local public administration, being most frequently described with the phrase "the representative of the Government in the territory". In the last two decades, the role, responsibilities and, especially, the juridical statute of the prefect have stirred debates. Recently, the Government has adopted an emergency ordinance that changes the statute of the prefect from senior civil servant, to public official with political affiliation. Arguments have been brought by specialists both in favour and against this change. Even though the institution of the prefect has been the subject of numerous analyses in the literature, this recent transformation demands a new one, focusing on both its impact, and its European context. However, thoroughly analysing the whole institution of prefecture, especially taking into account its whole historical evolution, is a rather vast undertaking. Therefore, in this paper, we limit ourselves to two objectives. Firstly, we aim to analyse the impact of this recent change on the main attributions of the prefect, such as on the administrative supervision of acts signed by local public authorities. Secondly, we set out to analyse comparatively the present legislative provisions of the prefect in Romania with the ones in other EU member states. In order to reach our objectives, we employ the logical and comparative methods, studying both the relevant legislation, as well as the national and international doctrine on the subject.

Keywords: *administrative law, prefect, civil servant, public official, European Union*.

1. Introduction

This paper concerns the regulatory framework of a public position essential in the Romanian public administration, the prefect, with emphasis on its evolution. Our perspective is focused on its comparative aspects – more exactly, comparing the present legislation, which has undergone recent changes, with the previous one, as well as comparing the Romanian legislation with European ones.

Analysing the prefect, both as a public position and as an institution, is important for several reasons. First and foremost, the prefect is invested with important powers and responsibilities, having the role of creating a connection between the central and the local administration. The prefect's powers also include creating and leading strategies and interventions in case of natural disasters, by having the role of president of county commission for disaster defence. Moreover, the prefect has the right to challenge the legality of acts emitted by public authorities, and having them suspended until the court makes a decision on the matter. Therefore, any changes concerning the prefect can upset a delicate balance in the public administration. Secondly, the prefect and the institution of the prefect have a long tradition in Romania, predating the Great Union of the country. Thirdly, the position of the prefect is not only established through the Administrative Code, but through the Constitution – which means that certain changes cannot be adopted only by organising a popular referendum, which underlines the importance of this position. Fourthly, the analysis of the Romanian prefect is important since it concerns a public position that is rather rare, when looking at other public administrations in the region as well as in the world.

In order to analyse the evolution of the regulatory framework concerning the prefect, we will analyse comparatively the previous legislation and the current one, underlining the relevant changes and their implications. We will also include the views of specialists on the matter, as far as these are relevant in relation to the changes in the legislation. Moreover, we will consult the legislation and doctrine of several countries that have the public office of the prefect: France, Spain, Italy, or of those that organise differently the responsibilities attributed to the Romanian prefect, such as the United Kingdom. This will underline how the recent changes relate to other public administration systems in Europe, whether they make the Romanian prefect more or less European.

Given the novelty of these legislative changes, the existing specialised literature on the role, importance and responsibilities of the prefect can be outdated, and the papers that have already discussed the implications of these transformations are quite few.

2. Recent changes concerning the Romanian prefect

Despite relative frequent changes to the duties and power of the prefect, the Romanian prefect remains an important position in the administrative system. As stated by the Constitution, the prefect acts as the Government representative at local level, also having to role of directing the decentralised services of the ministries at local level. Another role established by the

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Constitution for the prefect is to challenge the local administrative acts considered illegal before the administrative court[1]. Further responsibilities are established in the Administrative Code, which adds duties regarding emergency situations[2]. The Administrative Code also adds details regarding the role of the prefect as the representative of the Government at local level, such as public order duties, supporting the electoral process, collaborating with certain institutions for certain goals, and ensuring the quality of some public services, such as the issue of passports and driving licenses[3].

Recently, important changes have been brought to the statute and the role of the prefect through Government Emergency Ordinance no. 4/2021. In this section, we present these changes in a comparative manner, highlighting both the previous and current judicial provisions.

First and most important of all, it has changed art. 250 from the Administrative Code, which previously categorized the prefect, as well as the subprefect, as senior civil servants; after this Ordinance, the prefect and the subprefect are public officials (dignitaries)[4]. In the same article, this new law clarifies the prefect's and subprefect's rights concerning payment, which are now subject to Law no. 153/2017.

Secondly, the new law indicates six conditions that a person has to respect in order to become prefect: Romanian nationality and residence on Romanian territory; possessing electoral rights; lack of criminal convictions or the presence of rehabilitation; having an undergraduate degree, at least; having graduated a specialised training program organised by the National Institute of Administration. This was a necessary measure, taking into consideration that the appointment of a public official has fewer conditions compared to the appointment of a senior civil servant. Therefore, if additional conditions were not clearly specified, there would have been a decrease in the standards, as well as the prestige of the position and institution of the prefect.

Thirdly, within the prefect's institution, the new law introduces a new function, that of general secretary of the prefect's institution, who is a senior civil servant directly subordinated to the prefect. In order to be appointed as general secretary to the prefect, one needs a university degree in one of these fields: law, public administration, or political sciences[5].

The role of the general secretary is to ensure a higher stability to the institution of the prefect, once the prefect becomes a public official, as well as a continuous management, taking into consideration that the prefects and subprefects will be changed each time a new government is formed and approved. Another important role of the general secretary to the prefect is to act as a link between different departments of the prefect's institution[6].

The actual responsibilities of the secretary general are to be established through a Government Ordinance, at the proposal of the minister that has as a responsibility the coordination of the prefect's institution[7] (at the moment, this is accomplished through the Ministry of Internal Affairs, through a specialised General Direction[8]). Therefore, Government Ordinance no. 906/2020 was modified in 2021 in order to indicate the specific attributes of the secretary general to the prefect, of which we underline the role in "supporting the activity of the prefect in exercising the attributions regarding the verification of legality"[9], as provided in the Administrative Code.

3.The impact of the recent changes concerning the Romanian prefect

Besides the novelty of this law and its implications, one other reason why we chose it for our analysis is the strong, opposite opinions that it generated. Regarding the shift of the prefect from senior civil servant to public official, which have quite different judicial regimes, especially in their relation to the political element, the majority of views we encountered were either in favour, or strongly opposed; the provisions of GEO no. 4/2021 were either considered long awaited and beneficial, or detrimental, anti-European and regressive.

The main criticism received by this Ordinance was the so-called 'politicisation' of the prefect: under the old provisions, it was forbidden for a prefect to be member of a political party, which is now allowed. According to the Constitution, art. 123, the prefect is named by the Government, one for each county and one for Bucharest; then, each prefect acts as a representative of the Government.

In the substantiation note to GEO no. 4/2021, the legislator argues that the fact that prefects and subprefects can have political affiliation "is in line with the role of the prefect as a representative of the Government at the local level, the Government being a

[1] Art. 123, Romanian Constitution.

[2] Art. 252, Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, no. 555 of July 5th 2019.

[3] Art. 258, Government Emergency Ordinance no. 57/2019.

[4] Art. 1, Government Emergency Ordinance no. 4/2021 for modifying and completing Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, Part I, no. 117 of February 3rd 2021.

[5] Government Emergency Ordinance no. 4/2021.

[6] *Ibidem.*

[7] *Ibidem.*

[8] "Directia Generala pentru Relatiile cu Institutiile Prefectului", Ministerul Afacerilor Interne, accessed March 14, 2021, https://www.mai.gov.ro/despre-noi/organizare/aparat-central/directia-generala-pentru-relatiile-cu-institutiile-prefectului/.

[9] Art. 3, Government Ordinance no. 906/2020 for the implementation of some provisions of Government Emergency Ordinance no. 57/2019 regarding the Administrative Code, published in the Official Journal of Romania, no. 994 of October 28th, 2020.

public authority that has a political structure"[10]. One of the observations of the supporters of this change is that, until now, each Government has named its own prefects[11]. As it is stated in the doctrine, "in reality, the prefect has become a political and politicised public servant"[12]. Therefore, there was rather a contradiction between practice and the constitutional role of the prefect, on one hand, and his statute of senior civil servant, on the other hand, a statute which should ensure a high degree of continuity, predictability and independence from political shifts.

Before the Administrative Code, which repealed Law no. 340/2004, there were explicit provisions regarding the principles of the prefects' activity; more exactly, the activity of the prefect was subject to the principles of impartiality and objectivity[13]. The Administrative Code included most of the provisions of Law no. 340/2004, however, the ones regarding those principles, including the requirements of impartiality and objectivity, were left out. At the time, in 2019, the prefect was a senior civil servant, and, therefore, was subject to the general principles applying to civil servants, which, according to art. 373 of the Administrative Code, include both impartiality and objectivity[14]. Once the prefect became a public official, these principles automatically changed, and the prefect and subprefect only remain subject to the general principles of public administration, stated in art. 6-13 of the Administrative Code. Therefore, the prefect no longer has to act in accordance to the principle of objectivity, but the principle of impartiality remains.

The importance of the impartiality of the prefect, in the context of his political affiliation, concerns one of his most important responsibilities: his role in checking the legality of administrative acts issued by the public local authorities, established by art. 252 of the Administrative Code, which states that the prefect has the right to challenge any local administrative act considered illegal. Moreover, art. 255 of the Administrative Code brings further explanations to this power, stating that the prefect can check the legality of any acts issued by the mayor, the local council and the county council, and challenge the ones considered illegal. All these provisions are in accordance with the constitutional ones – actually, in this case, the Constitution has additional details on the matter: that the challenged act is suspended de jure, and that the competent court is the administrative court.

Moreover, on the matter of the impartiality of the prefect, the founding of the function of general secretary of the prefect's institution, a senior civil servant, represents an additional guarantee.

4. The Romanian prefect in European context: a comparative view

In Council of Europe's European Charter of Local Self-Government, it is stated that the right to participate in public affairs is best exercised at the local level, therefore the importance of local self-government, and of limiting the powers exercised at a central level[15]. Since the Romanian institution of the prefect represents the power of the Government in the territory, the attributions of the prefect have to be limited in order to protect the principles of local self-government and those of decentralisation. In art. 8 of the European Charter of Local Self-Government, the administrative supervision of local authorities is limited to those stated either in the Constitution, or in a statute; more exactly, its exercise should only be "according to such procedures and in such cases as are provided for by the constitution or by statute"[16]. As we have already pointed out, the institution of the prefect is enshrined in the Romanian Constitution, and its duties established in the Administrative Code are in line with those indicated in the Constitution.

When one consults comparative law literature, it appears that the institution of the prefect is rather rare in this form, even though in some cases there are some rough equivalents.

As it is widely pointed out in the literature, the Romanian institution of the prefect has been inspired after the French one, both initially, and as it evolved in time. In France, the prefect is a senior civil servant, which, given its influence on the Romanian prefect, can partly explain the controversy regarding the change into a public official.

As the literature points out, the French prefecture is a pre-democratic institution, which has been subject to a wide adaptation process in order to fit into the new context[17]. In its infancy, the French prefecture had a military component. Through several reforms, the French prefect nowadays "have justified their existence through notions related to the horizontal coordination of the State, partnership with local and regional

[10] Ibidem.

[11] "Guvernul a aprobat ordonanța de urgență care le permite prefecților și subprefecților să fie membri de partid. Constituția prevede că atribuțiile prefectului se stabilesc doar prin lege organică / Cseke Attila: Terminăm cu ipocrizia", G4Media, accessed May 14, 2021, https://www.g4media.ro/guvernul-a-aprobat-ordonanta-de-urgenta-care-le-permite-prefectilor-si-subprefectilor-sa-fie-membri-de-partid.html.

[12] Irina Alexe, "Prefectul și subprefectul în viziunea propunerii legislative privind revizuirea Constituției României", Drept public, no. 10 (2014): 586-588.

[13] Art. 5, Law no. 340/2004 regarding the prefect and the institution of the prefect, republished in the Official Journal of Romania, no. 225 of March 24th 2004.

[14] Art. 373, Government Emergency Ordinance no. 57/2019.

[15] Council of Europe, European Charter of Self-Government, Strasbourg, 15th October 1985.

[16] Ibidem.

[17] Alistair Cole, "Prefects in Search of a Role in a Europenised France", *Jnl. Publ. Pol., Cambridge University Press*, 31, no. 3 (2011): 385-407.

authorities and orchestration of France's interaction with the European Union in the field of regional policy"[18]. We underline the fact that all these three elements are also present in the role of the Romanian prefect. However, we also underline an important difference between the French and the Romanian prefect: the first can be seen as a professional corps, even though this characteristic is not as strong as it was some decades ago, researchers observing a decrease and fracture in the collective identity, influence and professionalism of this corps[19].

Another European institution similar to the Romanian prefect is the Italian one. As it is the case in France, in Italy the prefect the currently is a public official. This position has historically been one of high importance for Italy; for example, a historian calls the liberal period of Italy the "prefectocracy" (it., *preffetocrazia*)[20]. Similar to the French prefect, the Italian one was subject to a deep process of adaptation and evolution. For example, before 1982, the prefect did not need special qualifications for appointment, exercised supervision over local authorities, and was involved in solving both administrative and political issues[21]. The most important force for modernizing the institution of the prefect in Italy was the decentralization. The acts that most changed the institution of the prefect in Italy were, on one hand, Act no. 300/1999, which transformed the institution of prefecture in „territorial government offices", and the prefect into the holder of these offices and, on the other hand, Regulation no. 287/2001.

In Spain, there is an equivalent of the prefect called a civil governor (sp., gobernador civil), which is a public servant, but that, in comparison with the French and Italian ones, has a more important role in public order. The Spanish civil governor generally holds less powers than the Italian one[22].

In the United Kingdom, there is no institution of the prefect in the Romanian and French model, and no perfect equivalent. A somewhat similar position is held by the lord-lieutenant, which, however, is the monarch's representative in the lieutenancy areas of the country. Lord-lieutenants are unpaid, and their main duty is to uphold the dignity of the monarchy, as well as promoting local administrative cooperation. Even so, the literature underlines how foreign is the concept of 'prefect' to the British administration: "for English observers, the most curious creature in the whole French administrative menagerie must surely be the prefect […] the prefect combines the functions and powers of many officers in British local government"[23], the author enumerating no less than eight different ones.

The foreign comparisons could continue; however, not all countries had the same evolution regarding the prefect. In the 19th century, many European countries, such as Greece, Belgium, Portugal or the Netherlands, had French-inspired prefects, but not all passed the test of time. For example, in 2013 Portugal decided to suppress its prefects, called civil governors.

5. Conclusions

Regarding the impact of GEO no. 4/2021 on the attributions of verifying the legality of local administrative acts and of contesting acts considered illegal before administrative contentious courts, the Ordinance added in this process the secretary general, in order to avoid concerns regarding the politicisation of this process, which must be exclusively legal, characterized by objectivity and impartiality. Therefore, we notice that this responsibility is shared between a public official, the prefect, and a senior civil servant, the general secretary of the prefect, who brings additional guarantees regarding the objectivity and impartiality of challenging the legality of public administrative acts.

Following the comparative analysis with the role of the prefect and the institution of the prefect in other states, we draw some conclusions. This institution is not a common one in administrative systems, and, in some states that is does not exist, its responsibilities are divided into several different positions. Where it is encountered, France and Italy being particularly relevant, the prefect is a (senior) civil servant, and many of his duties coincide with those of the prefect as regulated in Romanian law. However, we emphasize that in both in France, and in Italy, the role of the prefect has been in a constant change and evolution to in order to adapt and remain relevant in relation to the current administrative, social, political and cultural realities.

In our opinion, the change of the prefect's status from senior public officer to public official falls into this category of transformations, even though these turned in a different direction than its European counterparts.

However, taking into consideration the importance of the principle of objectivity in the activity of the prefect, further guarantees to ensure this, beyond the new function of general secretary of the prefect, would be beneficial.

We emphasize the importance of limiting the prefect's powers and consider that these changes do not have a negative impact. For example, a problematic change in relation to the European Charter of Local

[18] *Ibidem*, p. 385.
[19] *Ibidem*, pp. 403-404.
[20] Gaetano Salvemini *apud* Gaetano Armao, "The Role of the Prefect in the Italian Legal System", *ILAS Student Review*, no. 1 (2018): 1-26.
[21] Gaetano Armao, *op. cit.*
[22] Council of Europe, *Report on European practice and legal framework on prefect institution, local government in emergency situations*, Council of Europe, Strasbourg, 2015.
[23] Howard Machin, "The French Prefects and Local Administration", *Parliamentary Affairs*, no. 27 (1974): 237-250.

Self-Government and the Romanian Constitution would have been the increase of its powers and of the domains of competence.

However, a potential problem we notice is the adoption of amendments to the prefect's status by Government Emergency Ordinance. Even if there are exceptions to the constitutional provisions regarding the obligation to regulate the prefect's institution by organic law, it is not impossible for the Romanian Constitutional Court to consider the adoption of amendments by this legislative form as unconstitutional. Only the presence of this possibility, even if it does not materialise, has the unfortunate effect of adding a negative element of uncertainty, in relation to a position and an institution that is currently of great importance for the Government, as well as for the local administration.

Taking into consideration these findings, we expect further legislative changes, firstly, in order to consolidate the objectivity of the prefect, and, secondly, in order to protect these changes from being challenged on unconstitutionality grounds.

Further research could focus on other aspects related to the prefect as a public official, or as an institution. Since this study was concerned with the evolution of legislation, others could analyse the changes by employing public administration theories. Moreover, we consider that the prefect's European role, concerning his powers related to the European Union, could be further analysed and critically discussed, as well as those concerning disaster defence.

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THE RIGHT OF MINORITIES TO ADDRESS IN THEIR NATIVE SPEECH TO THE ADMINISTRATIVE AUTHORITIES

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Abstract

Changes on the political map of the world at the end of the Cold War, the conflicts that arose following these adjustments, along with awareness of the widespread consequences of the migration phenomenon have reminded the international public opinion the disparity between the trend of homogeneous political communities and the pronounced degree of diversity that characterizes a significant part of the states of the contemporary world. The challenges faced by the political communities in this context have brought back to the agenda older dilemmas related to the tools available to states in terms of their interest in administrative-territorial centralization and economic integration, cultural-linguistic standardization, creation and supporting a common space for identification and political participation.

Keywords: *minorities, public administration, native speech, administrative authorities, fundamental rights*.

1. Introduction

The changes on the political map of the world at the end of the Cold War, the conflicts that led to their outbreak, along with the widespread awareness of the consequences of migration have brought to the attention of international public the issue of disparities between the tendencies of congruity of political communities and the pronounced degree of intercultural diversity that characterizes a considerable part of the states of the contemporary world. The desire for homogeneity, whose foundations have been deeply rooted in the history of political reflection, has led to the dismemberment of multinational states, justified in the opinion of attempts at ethnic cleansing in several independent states, and grounded autonomous movements in the case of concentrated minorities from a territorial point of view. The challenges faced by the political communities in this situation have brought back to the agenda a number of issues already deliberated in the past regarding the tools available to old and new states regarding their interest in administrative-territorial and economic systematization, cultural-linguistic evenness, creation and support of a common space for identification and political participation. Advancements in the global politics scene have brought back into question the issues surrounding the basis of political communities revealed by a series of studies dedicated to the most diverse situations that have highlighted the fact that a political community is usually the result of a process identifying community members with a set of political institutions that they accept as legitimate in the optimal management of community life, furthermore in ensuring its long-term survival. The conclusive results of the studies reveal that the stability and unity of political communities can be ensured with greater chances if community members speak the same language, share the same culture and religion, under the conditions given by the principle of homogeneity, and where this circumstance is absent, inevitably will appear bordering categories whose interests are not appropriately defended in the internal organizational structures of the community. The situation of minorities has been a matter of great interest in political debates both nationally and internationally, representing one of the most complicated and newsworthy topics of public debate on which both members have expressed their views and dissatisfaction over minorities disadvantaged by the laws of the states in which they coexist as well as citizens of the majority ethnic groups. Nonetheless, they brought to the surface some challenging situations of a legislative nature that these minorities face, situations that aimed to diversify and expand the current legislative framework to ensure respect for the rights and freedoms of all citizens of a rule of law.

2. Content

2.1. The Legal Management of Minorities in Relation to the European Public Administration from a Comparative Perspective

Following the end of the Cold War, a number of international and regional instruments emerged that are of considerable relevance from the perspective of minority rights as an indispensable part of human rights. Such an instrument is represented by the United Nations Charter of Universal Human Rights, which legislates the application of human rights without discrimination on the basis of race, sex, language or religion since its first article. This is compelling in this case because of the international emphasis on preventing discrimination in the period between the end

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of World War II and the fall of communism[1]. Internationally, the most important acts on the rights of minorities are the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Persons belonging to Ethnic, Linguistic and Religious Minorities. While the Convention places the rights of minorities in full human rights, the Declaration speaks of the right of minorities to participate in the decision-making process, of the right to education in their native speech and of participation in economic life. At European level, the main promoters of national minority policies are the CSCE / OSCE and the Council of Europe[2]. Like other international organizations, the events in Central and Eastern Europe after the fall of communism were the main catalyst. The Organization for Security and Cooperation in Europe was established in the first instance as a tool for conflict identification and prevention, crisis management and post-conflict reconciliation, persons belonging to national minorities, which led to the establishment of the High Commissioner for National Minorities. The key documents on the protection of national minorities are: the Helsinki Final Act (1975) and the Document of the Copenhagen Meeting of the CSCE Conference on the Human Dimension. By ratifying the first document, human rights become a legitimate subject of dialogue and a topic of interest, a concern for all CSCE member states, respectively following the adoption of the second act a series of rules on the rights of persons belonging to national minorities are determined , addressing issues such as non-discrimination, the use of minority languages, minority education. Although not a treaty, the document is of legal and political importance, due to the mutual agreement of the OSCE states. The fundamental European document on the linguistic rights of minorities in affiliation to public administration authorities is the European Charter for Regional or Minority Languages[3], which was adopted by the Council of Europe on 5 November 1992 in Strasbourg. Fundamentally, in the analysis of the relevant legislation is the 10th article of this Charter which enshrines the right to use minority or regional languages in relations with public services and administrative authorities. We draw attention to the fact that this European normative act encloses arrangements with a more permissive character than the national legislation, in view of the fact that in the counties inhabited by a number of speakers of minority languages, the density necessary for the application of legal provisions is not precisely provided. Thus, each state is free to assess the percentage according to which the stipulations of the relevant legislation can be implemented. Another document of extensive importance is the Framework Convention for the Protection of National Minorities, which was adopted in 1994 and entered into coercion in 1998. This convention does not include collective rights, but is based on the idea that minorities can be protected by guaranteeing the rights of individuals belonging to these minorities. The Convention actually embodies a normative act that provides for the enactment of general principles regarding the rights of individuals belonging to national minorities, including: non-discrimination, equality, promotion of conditions necessary for the preservation and development of culture, religion, language and traditions , expression, freedom of thought, conscience and religion, use of the mother tongue in public and private, oral and written, as well as in relations with public administration authorities[4]. The protection of the rights of minorities is a recent concern of the Union, determined first of all by the extension to the areas previously governed by a communist regime, and secondly by the problem of immigrants on the territory of the Union. The post-communist space recognizes the progress made in developing the legislative framework on the regime of national minorities under international standards, especially the pressure exerted in the context of the enlargement of the European Union. Electoral systems are the mechanism by which the political representation of minorities can be achieved at the level of central and local state institutions, thus appreciating a special importance. Many states such as Albania, Hungary, Croatia, Macedonia have mixed electoral systems, combining the majority principle with the proportional one, not having special policies for minorities in the first two situations. Other countries such as Bulgaria, Slovakia, Slovenia, the Czech Republic, Montenegro, Poland, Serbia and Romania have opted for proportional representation, with an electoral verge of 5% in the last three countries and 4% in Bulgaria[5]. A successful electoral policy is the provision of reserved seats in parliament for minorities. This is also the case of some states such as Romania, Croatia, Montenegro, Slovenia that have adopted this measure as a form of compensation for non-representation through elections. However, the system may vary from state to state, so if Romania offers a place for each national minority that fails to exceed the electoral threshold, in the case of Slovenia the situation is different, the system benefiting only Hungarians and Italians, while in Croatia has three mandates reserved for Serbs, one each for Italians and Hungarians, one common for Czechs and Slovaks, one

[1] I. Salat, Levente, Policies for the integration of national minorities in Romania. Legal and institutional aspects in a comparative perspective, p.31.
[2] Idem, p. 33.
[3] European Charter for Regional or Minority Languages, art. 10, 1998.
[4] I. Salat, Levente, Policies for the integration of national minorities in Romania. Legal and institutional aspects in a comparative perspective, p. 34.
[5] Ljubomir Mikić: National Minorities in Croatia: Status of National Minorities, Legal In struments and Institutions, lucrare prezentată la Conferința Legal Instruments on the Status of National Minorities in South East Europe, Cluj-Napoca, 17-19 Octombrie 2007.

for the other former Yugoslav minorities, except Serbs, and one for the rest of the minorities, namely Austrians, Bulgarians, Germans, Poles, Romanians, Ruthenians, Russians, Turks, Ukrainians, and Jews[6]. However, we can note many critiques about the application of special places for minorities, starting from the large number of minorities jointly represented by a single representative in the implausible case of common interests for so many minorities such as Croatia, to issues related to the lack of pluralism in the system, in the case of representation by a single mandate. Also, states such as Serbia and Poland have opted not to apply the electoral threshold to minorities, thus stimulating central representation. Regarding the rights of establishment of political parties, Albania and Bulgaria constitute special cases by legislation prohibiting the establishment of political parties on ethnic, racial or religious grounds, while noting that in neither case did the legislation succeed in preventing effective representation of national minorities in Parliament, talking here about the situation of Greeks in Albania and Turks in Bulgaria. An abnormal case is Bosnia and Herzegovina, which has a complex central power structure designed to meet both the multiethnic composition and the need for post-conflict reconciliation. Analyzing the governance formula transposed in the constitution and the state laws, we find a varied and complex form of power division that has as finality the equitable representation of all the rights of minority communities. Thus, the executive has a multiethnic structure, requiring the participation of each ethnic group, with the right of representation and the right of veto. The presidency consists of three representatives, each belonging to an ethnic group, both elected and territorial, although the latter aims to represent ethnic groups, not territorial entities. De facto, the executive power is held by the Office of the High Representative, which is a form of international protectorate that practically has as a designating element the amendment of the dysfunction of the constitution of Bosnia and Herzegovina. The inclusion of minorities in government is another way of ensuring the representation of minority interests in the political decision-making process. Given these issues, the inclusion of minority parties in government is a fairly widespread practice. Thus, in Albania, Bulgaria, Croatia, Montenegro, Romania, Serbia and Slovakia, minority parties have been included in the ruling coalition for at least one term. This form of political participation has been supported and encouraged by European Union fora, which justifies the widespread use of the system. The beneficial effects of this policy are presumed rather than documented, in very few cases there is an assessment of the participation of minority parties in government[7]. Analyzing the degree of decentralization, we find that Serbia has granted autonomy to the province of Vojvodina, the latter enjoying a limited form of territorial autonomy since 1991. The province enjoys budgetary, legislative, executive and above all, its own decision-making bodies of decisions represented by an Assembly, the Executive Board and administrative bodies. According to 112nd article of the Constitution, the legislator stipulates, instead, the fact that the central bodies can intervene whenever they want in the administrative-political life of the province[8]. Another aspect worth debating is the situation of the many states in the region that have developed minority self-governments, thus allowing minorities not only to participate in decision-making, but also to control their own lives. The system of self-government of minorities in Hungary provides for the possibility of setting them up at two levels of local government: either within local government bodies or in independent organizations under local authorities. These structures are responsible for the cultural life of the community and can influence the relevant legislation only through direct participation in decision-making mechanisms. Special accouterments stipulate the formation of self-government automatically, instead of local authorities, if more than half of the members of local councils belong to a national minority, a rare situation, given that most minorities are geographically dispersed. Following the previous analysis, we find that the role of self-government is to represent minorities and to promote the interests of their own community in relation to public authorities. In this case, self-governments can make a series of decisions at the local level, such as setting up educational or media institutions, displaying community-specific signs and names. Moreover, they can interfere in the development of educational components for minorities, in the formulation of legislation on the protection of historical monuments, thus having a veto on local education issues, media, collective use of language.

2.2. The National Legislative Framework of Minorities Regarding the Right to Address in the Native Speech in Relation to the Public Administration

According to the regulations provided by the Constitution, Romania is qualified as a national state, a phrase that includes the coexistence of a national majority with several minorities, among which we mention Jews, Germans and Hungarians. Analyzing, from the early stage of drafting the theses of the Draft Constitution was debated the existence of the right of

[7] Monica Robotin, Levent Salat, (eds.): A New Balance: Democracy and Minorities in Post-Communist Europe, Budapest: LGI, 2003; Zoltán Kántor, Nándor Bárdi: "The Democratic Alliance of Hungarians in Romania (DAHR) in the Government of Romania from 1996 to 2000", în Regio, 2003.

[8] Aleksandra Sanjevic: National Minorities in Serbia and National Councils as Institutions of Minority Autonomy, lucrare prezentată la Conferința Legal Instruments on the Status of National Minorities in South East Europe, Cluj-Napoca, 17-19 Octombrie 2007.

minorities to address in their mother tongue through an amendment belonging to Mr. Hosszu Zoltan containing the following: "unrestricted use of the language of national minorities it is guaranteed [9]"but it was not voted by the Commission. Subsequently, the issue of consecrating this right was raised, but it was expressly and limitedly provided only in relations with the public administration. Thus, Karoly Kiraly was the one who formulated the following amendment "in the territorial administrative units inhabited by citizens belonging to national minorities with a share of at least 10% of the total population in that region, they are provided with the use of mother tongue in their written and verbal relations. with the local and county public administration ". However, the Commission accepted the idea set out in this amendment from a dual perspective, namely that firstly the acts of local and county public administration authorities will be issued in the official language, and secondly the possibility for national minorities to use the language was recognized in relation to these authorities, in accordance with the law. We can note with bewilderment that the right of minorities to use their native speech in relation to public administration authorities functioned until 2003 without an express provision in the Constitution, when it was stipulated and enshrined in constitutional principle by introducing a new paragraph, which became paragraph (2) of art.120, following the analysis from which we can deduce a series of constitutive elements of the legal regime regarding the right in this case[10]. Thus, the main normative act, which regulates the rules for the use of the language of national minorities on the territory of administrative-territorial units, is Law no. 282/2007 for the ratification of the European Charter for Regional or Minority Languages. It is also joined by the Framework Convention for the Protection of National Minorities, concluded in Strasbourg on February 1, 1995, ratified by Romania by Law no. 33/1995[11]. By dwelling in detail on the above-mentioned settlements, we can extract a first aspect worthy of analysis, regarding the category of beneficiaries of the previously disputed right. Thus, focusing on the constitutional text we find that this right is not recognized to all citizens belonging to a minority but especially to citizens who form a significant share on the territory of the administrative-territorial unit in which they live. The meaning of serious gravity finds its foundation in the provisions of the Administrative Code which in the content of art. 94 mentions the express percentage share of 20%. The legislative innovation that will disrupt the constitutional legislative barriers is found in paragraph (2) of the same article which provides: in which nationals belonging to national minorities do not reach the share provided for in paragraph 1 ". We can appreciate the fact that this legislative provision is likely to jeopardize compliance with the constitutional norm, taking into account the fact that they are allowed to use their native language in relation to public administration authorities even minorities with a share of 1%[12]. Following the Constitutional Decision no. 328 of May 10 2017[13], it was stated in paragraph 37 that, respecting and ensuring the rules of applicability of the European Charter for Regional or Minority Languages, the legislator enjoys the freedom to establish the criteria according to which the state is obliged to grants this type of protection to Romanian citizens belonging to national minorities. However, in the process of establishing these criteria, it is obliged to take into account the specific conditions and traditions of each region, as they have the role of promoting equality between speakers of minority languages and the rest of the population. Another interesting legislative aspect is provided by the Administrative Code in art. 604 which stipulates that in the event that the share of the minority population falls below 20%, the recognition of the right in this case may be maintained until the final results of the next census. It is important to note that the exercise of this right is enforceable only in relation to local public administration authorities, not central ones. The de facto realization of this right is achieved by giving the possibility to persons belonging to a national minority to address themselves in writing and orally and to be able to receive answers to their requests both in Romanian and in their mother language. Moreover, the Administrative Code provides a series of ways in which this right is materialized in relation to the local public administration, of which I will mention: first of all in the content of art.94 in conjunction with 195th article paragraph (1) is recognized the right of minorities with a share of 20% to address in their mother tongue both in relations with the local public administration and in the public institutions subordinated to them as well as in relations with decentralized public services; secondly, 138th article regulates the public character of the local council meetings as well as the manner of their conduct, the rule being that the proceedings of the meetings are conducted in the mother tongue, and the exception refers to local councils where local councilors belonging to a national minorities exceed the percentage of 20%, a situation in which the mother tongue can be used during council meetings, but the documents will be written in Romanian, the official language in the state according to the regulations provided by the constitution. It is important to note that these requirements apply with respect to the relationship between the rule and the exception, noting that it is completely out of the question to turn the

[9] Genesis of the Romanian Constitution 1991, Proceedings of the Constituent Assembly, Ed. Regia Autonomă Monitorul Oficisl 1998, p. 81.
[10] Published in the Official Gazette. No. 752 of November 6, 2006.
[11].Published in the Official Gazette. No. 82 of May 4, 1995.
[12] Verginia Vedinaș, Administrative Law, 12th Edition, Universul Juridic Publishing House, Bucharest 2020, p. 226.
[13] Published in the Official Gazette. No. 424 of June 8, 2017.

exception into a rule. In the spirit of these constitutional and legal provisions, we can see that freedom of expression in the mother tongue is guaranteed for national minorities[14].

3. Conclusions

Through this article, I aimed to present the regime of the rights of national minorities as well as the concrete mention of the forms of its implementation in the countries of the European Union. In the first chapter we analyzed the constitutive elements of the minority rights regime, the main international and European documents, as well as the evolution and diversified conceptualizations of the term national minority found in them. In the second part of the paper I gave a practical perspective on the rules that respect the direct applicability of constitutional and legal provisions in Romania on the right of national minorities to address in their native speech in relations with local public administration, pursuing both the developed institutional framework and the specific policies. The implementation of the minority rights regime in the Romanian state takes different forms, depending on the types of minorities, their percentage, territorial concentration, as well as the history of interethnic relations and diversity accommodation policies. Thus, following the forms of participation and political representation of minorities, the territorial composition of the state, language, education and citizenship policies outlines a diverse landscape of institutional options for transposing the rights of minorities into practice, but also a series of deficiencies that make accommodating diversity to remain a topic of interest in Romania.

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[14] Ș. Deaconu, Protection of national minorities in Romania, in Annals of the University of Bucharest, 2002-II, April-June, p. 48.

PRECAUTIONARY AND PROVISIONAL MEASURES IN CIVIL PROCEEDINGS

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Abstract

In this article, we deal with issues related to precautionary and provisional measures in civil proceedings, such as: notion, classification, conditions to be met cumulatively in order to instate such measures, the court competent to resolve a set-up request, the settlement procedure, the enforcement of measures, the annulment of measures under the law, as a penalty for failing to fulfill an obligation, lifting the measures, capitalising on the seized goods, special provisions on the distraint imposable on civilian ships, designation and role of a distraint trustee/provisional trustee, the scope of provisional measures in matters of intellectual property rights regulated as a novelty in the Code of Civil Procedure.

Keywords: *precautionary and provisional measures in civil proceedings, distraint, garnishment, judicial lien, distraint instated on civilian ships, provisional measures in matters of intellectual property rights.*

1. Introduction

,,A civil proceeding can be defined as the activity carried out by a Court of Law, the parties involved, other persons or bodies taking part in the trial, for the purpose of obtaining or recognising the subjective rights or other legal situations brought before the Court, as well as for the purpose of a mandated enforcement of Court Rulings or other titles, in accordance with the procedures set forth by the law." [1]

The principles of a civil proceeding make up the basic rules for the entire civil proceeding, both during its trial stage and during its mandated enforcement stage.

The fundamental principles of a trial are: the principle of free access to justice, the right to a fair trial, which must be resolved within an optimal and predictable deadline, the legality principle, the equality principle, the disposability principle, the principle of good faith, the right of defence principle, the contradiction principle, the orality principle, the immediacy principle, the publicity principle, the continuity principle, the principle of conducting the civil proceeding in Romanian and the judge's active role in uncovering the truth.

Our aim, in this article, is to discuss certain aspects related to the precautionary and provisional measures that can be ordered during a civil proceeding, in observance of the legal provisions in place and the principles governing such civil proceedings, aspects related to notion, classification, the instatement conditions, the instatement procedure, capitalising on the seized assets, lifting and annulling the precautionary measures imposed, special provisions on the distraint imposable on civilian ships and provisional measures in matters of intellectual property, analysing, for this purpose, the legal provisions, the doctrine and the relevant jurisprudence in this field.

2. Content

According to the General Law Theory, ,,the law system is the result of unifying all law branches and institutions." [2]

When it comes to the notion of *law branch*, the specialised doctrine has defined this concept as ,,the bulk of all judicial norms regulating the social relationships in a certain social life domain, based on a specific regulation method and on certain common principles." [3]

In the Romanian legal system, the positive law is divided into public and private law. The Public Law includes law branches such as Constitutional Law, Criminal Law, Administrative Law, Financial Law, Procedural Law, Labour and Social Security Law, while the Private Law sphere includes Civil and Commercial Law.

With regards to the topic chosen to be developed in this paper, we've mentioned above, that the Procedural Law falls within the scope of Public Law, without specifying if we refer to Criminal Procedural Law, Civil Procedural Law or both.

Placing the Civil Procedural Law in the public or in the private law sphere has generated various controversies and opinions, as ,,the civil procedure contains legal norms that bring it closer to the public law side (those concerning the organisation and functioning of courts), but also legal norms that bring it closer to private law (those related to legal actions, the right to plead). " [4]

Besides, we want to point out that, the rules established by civil procedural law are applicable not

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[1] Gabriel Boroi, Mirela Stancu, *Civil Trial Law*, 2nd Edition, revised and supplemented, Hamangiu Publishing House, Bucharest 2015, p. 3.

[2] Nicolae Popa, *General Law Theory*, 6th Edition, C.H. Beck Publishing House, Bucharest, 2020, p. 87.

[3] Nicolae Popa (coordinator.), Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Seminary Notebook. 3rd General Law Theory*, Edition, C.H. Beck Publishing House, Bucharest, 2017, p. 44.

[4] *Ibidem*, p. 45.

only to litigations related to subjective civil rights, pure private law litigations, but they represent the common law in procedural matters as well and, as such, they are also applicable to administrative law cases, to financial and criminal law matters, the latter being law branches that fall exclusively within the scope of public law.

With this regard, art. 2 of the Code of Civil Procedure stipulates: (1) The provisions of this Code make up the common law procedure in civil matters. (2) Besides, the provisions of this Code shall also apply to other matters, insofar as the laws regulating such matters, do not stipulated anything to the contrary.

Moreover, the Contentious Administrative Law no. 554/2004, stipulates, in its transitional and final provisions, in art. 28, paragraph (1), the following: the provisions of this law shall be supplemented by the provisions of the Civil Code and by those of the Code of Civil Procedure, to the extent that such provisions are not incompatible with the specific power relations existing between the public authorities, on the one hand and the persons whose rights or legitimate interests had been prejudiced, on the other hand.

Similarly, Law no. 207/2015, on the Code of Fiscal Procedure stipulates, in its art. 3, paragraph (2), the following: in maters not regulated by the provisions of this Code, the provisions of the Civil Code and those of the Code of Civil Procedure, republished shall apply, insofar as they may be applicable to the relations existing between public authorities and taxpayers/ payers.

Moreover, the provisions of the Code of Civil Procedure represent the common law in terms of procedure, in case of insolvency as well; thus, Law no. 85/2014 on insolvency prevention procedures and insolvency procedures stipulates, in its art. 342 paragraph (1) the following: the provisions of this law shall be supplemented, insofar as they do not stipulate anything to the contrary, by those of the Code of Civil Procedure and by those of the Civil Code.

By *Civil Procedural Law* we understand the set that includes ,,the judicial norms regulating the organisation and development of the activity of solving cases related to subjective civil rights and legal situations protected by law, as well as the enforcement of enforceable titles." [5]

A civil action is the bulk of all procedural means stipulated by law, for the protection of the subjective right claimed by one of the parties or for the protection of another legal situation, as well as to insure the parties' defence in a trial.

By *subjective right* we understand ,,a subject's capacity to claim or defend a certain right, that is legally protected, against third parties." [6]

The Code of Civil Procedure regulates, in its 4th Book, named *Special Procedures*, the 4th Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civil ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

Thus, the Code of Civil Procedure regulates three precautionary measures, namely distraint, garnishment and judicial lien. At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

,,Precautionary measures are procedural means meant to render unavailable, a debtor's seizable assets (in the case of distraint and garnishment) or the assets making up the subject matter of a procedure (in the case of judicial lien) to prevent their debasement or their disappearance (in case of real assets) or the reduction of the debtor's patrimonial assets (in case of personal assets)." [7]

2.1. Distraint

A distraint measure consists of rendering unavailable the debtor's movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

The conditions that must be met in order to instate a distraint measure are stipulated in art. 953 of the Code of Civil Procedure, where we can identify three situations in which a distraint measure can be ordered; therefore, we can also identify specific conditions to be met for each of these situations.

Thus, the first such situation is presented in art. 953, paragraph (1), namely: A creditor that does not have an enforceable title, but whose receivable is confirmed in writing and exigible, may ask for the instatement of a distraint over the debtor's movable and immovable assets, if they can prove that they have filed a Suing Petition in Court. They can be ordered to pay a bail set forth by the Curt.

Consequently, when it comes to the first situation, the following conditions must be cumulatively met for the instatement of a distraint:

1. The receivable must be confirmed by a written document, which would not represent an enforceable title under the law;

2. The receivable must be exigible;

3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case,

[5] Andreea Tabacu, *Civil Procedural Law – national and international legislation*, doctrine and jurisprudence, Universul juridic Publishing House, Bucharest, 2015, p. 8.

[6] Nicolae Popa, *op.cit.*, 2012, p. 30.

[7] Gabriela Răducan, Mădălina Dinu, *Civil Procedure Sheets for the admission to Magistracy or Lawyering Activities*, 4th Edition, revised and supplemented, Hamangiu Publishing House, Bucharest, 2016, p. 327.

having, as subject matter, the payment of the money for which the distraint measure is requested;

4. The Creditor may be ordered to pay a bail, with the posting of that bail being optional and the amount of such bail being set forth by the Court;

5. The distraint can only be instated over the debtor's movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party.

The second situation in which a distraint measure can be ordered, is presented in art. 953, paragraph (2) of the Code of Civil Procedure, namely: A creditor whose receivable is not confirmed by a written document, shall also have the same right, if they can prove that they have filed a Suing Petition in Court and they submit, along with the distraint request, a bail amounting to half of the claimed sum.

If we read the above-mentioned text, we realise that, for to the second situation in which a distraint can be instated, the following conditions must be cumulatively met:

1. The creditor's receivable must not be confirmed by a written document;

2. The creditor's receivable must be exigible;

3. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case, having, as subject matter, the payment of the money for which the distraint measure is requested;

4. The creditor must also prove that they have posted a bail equal to half of the receivable claimed in the litigation; in this case, both the posting and the amount of the bail shall be mandatorily determined by lawmakers;

5. The distraint can only be instated over the debtor's movable and/or immovable seizable assets, which are still in his/her possession or in the possession of a third party. The seizable nature of an asset shall be determined in accordance with the exiting provisions in place in the filed of mandatory attachment – art. 727 of the Code of Civil procedure.

The third situation is stipulated in art. 953, paragraph (3) of the Code of Civil Procedure, which states: The Court may order a distraint measure even if the receivable is not exigible yet, if the debtor has reduced, via their actions, the guarantees provided to the creditor or if they have failed to provide the guarantees promised or, when there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth. In such cases, the creditor must prove the fulfilment of the other conditions stipulated in paragraph (1) – the first situation – and they must post a bail in the amount set forth by the Court.

Thus, the necessary conditions that must be cumulatively met to instate a distraint measure in the third situation, are the following:

1. The creditor's receivable must be confirmed by a written document, which would not represent an enforceable title under the law;

2. The creditor's receivable must be exigible;

3. The creditor must prove that the debtor has reduced, via their actions, the guarantees provided to the creditor or that they have failed to provide the guarantees promised or that there is a risk that the debtor would avoid the seizing measures or they would conceal or scatter their wealth;

4. The creditor must prove that they have filed a Suing Petition in Court, on the merits of the case;

5. The creditor must post a bail, in the amount set forth by the Court; in this case, the posting of the bail is mandatory, but its amount shall be left at the Court's discretion.

We consider it useful to underline the provision of art. 1.417 paragraph (1) of the Civil Code, according to which: the Debtor shall forfeit the benefit of making the payments upon the deadlines agreed upon if they are in default or in insolvency declared under the law and if they reduce, via their actions, either on purpose or due to gross negligence, the guarantees set up in favour of the Creditor, or when they fail to institute the guarantees promised.

When it comes to the procedure of instating a distraint measure, the application for such measure must meet the general conditions stipulated in art. 148 of the Code of Civil Procedure, as well as the conditions presented in art. 194 of the Code of Civil Procedure.

„A request to instate a precautionary or a provisional measure may be formulated both directly and incidentally, within an on-going trial [art. 30, paragraph (6) of the New Code of Civil Procedure] or as an accessory application [art. 30, paragraph (4) of the New Code of Civil procedure], if it is requested via the very Suing Petition filed on the merits of the case." [8]

The Court competent to resolve such a request, for the instatement of a distraint measure, shall be the Court competent to try the case on its merits. If the request to instate a distraint measure is submitted via the Suing Petition filed on the case merits, it shall be entrusted to the Court charged with the settlement of the case merits, but the distraint request shall be resolved before the first hearing of the merits litigation, according to art. 203, paragraph (2) of the Code of Civil Procedure.

The Court shall urgently decide on such matter, in Council Chambers, without subpoenaing the parties, by way of an enforceable ruling, setting forth the maximum amount for which the distraint measure is approved, as well as the amount of the bail and the deadline for its posting, if applicable.

Failure to post the bail within the set deadline, shall lead to the annulment of the distraint under the law. Such annulment shall be confirmed by a final court ruling, issued without subpoenaing the parties. The

[8] Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, *The New Code of Civil procedure. Comments by article*, Vol. II. Art. 527-1133, Hamangiu Publishing House, Bucharest, 2013, p. 490.

judicial bail concept is regulated by the provisions of art. 1.057-1.064 of the Code of Civil Procedure.

The Ruling issued on the restraint request shall be communicated by the Court to the creditor, right away and it shall be communicated by the bailiff to the debtor, when the measure is enforced. The issuance of such ruling may be postponed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum 48 hours of its issuance.

„The bailiff shall only communicate the enforceable ruling to the debtor if the above-mentioned ruling orders the instatement of a distraint measure; if the Court rejects the creditor's request for the instatement of such measure, the ruling shall not be communicated." [9]

Such ruling may only be challenged by appeal, within five days of its communication, before the Court hierarchically superior to the one that issued it. Such an appeal shall be tried urgently, most likely by quickly subpoenaing the parties.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

A distraint measure shall be enforced by the bailiff, in accordance with the rules applicable to mandatory enforcements, which shall be applied appropriately, without any other authorisation or consent being needed with this regard.

In case of immovable assets, the bailiff shall travel, as quickly as possible, to the place where such assets are located. The bailiff shall place the seizable assets under restraint, only to the extent that this is necessary to recover the receivable. In all cases, the distraint measure shall be enforced without any prior writ or notification to the debtor.

A distraint measure applied to an asset subject to any publicity formalities, shall immediately be registered in the Land Book, in the Trade Registry, in the *National Movable Publicity Registry* (Electronic Archive of Security Interests) or in any other public records, as the case may be. Such registration shall render the distraint legally binding to anyone who gains any rights over the property in question, after the registration.

The interested party shall have the right to contest the enforcement method of any distraint measure.

The Court may order a distraint measure lifted, upon the debtor's request, if such debtor provides, in all cases, a sufficient (personal or real) security. Such request shall be resolved in the Council Chambers, with a quick subpoenaing of the parties, by way of a ruling that can only be challenged by way of appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Such appeal shall by tried urgently.

Besides, if the main application, based on which the precautionary measure was ordered, is later annulled, rejected or declared outdated, by a final court decision, or its author no longer requests its judgement, the debtor may ask for such precautionary measure to be lifted by the same court that instated it. The court shall rule on such a request via a final ruling, issued without subpoenaing the parties.

The seized assets shall only be capitalised on, once the creditor obtains an enforceable title, represented by a final Court Decision ordering the debtor to pay the money claimed by the creditor.

2.2. Special provisions on the distraint imposable on civil ships

The creditor may ask for a distraint to be instated on civilian ships, under the conditions described above and in observance of the international conventions applicable to the distraint of ships, that Romania is part of.

With this regard, we mention the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships signed in Brussels on May 10, 1952, that Romania adhered to, under Decree no. 40/1991 on Romania's accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952, respectively, under Law no. 91/1995 on Romania's accession to the International Convention for the Unification of Certain Rules on Arrest of Sea-going ships, signed in Brussels on May 10, 1952.

According to art. 1, point 1 of the International Convention for the Unification of Certain Rules on the Arrest of Sea-going Ships, a „maritime claim" means a claim or a receivable arising out of one or more of the following: (a) damage caused by any ship either in collision or otherwise; (b) loss of life or personal injury caused by any ship or occurring in connexion with the operation of any ship; (c) salvage; (d) agreements related to the use or hire of any ship whether by charterparty or otherwise; (e) agreements related to the carriage of goods in any ship whether by charterparty, under a bill of lading or otherwise; (f) loss of or damage to goods including baggage carried in any ship; (g) general average; (h) bottomry; (i) towage; (J) pilotage; (k) goods or materials wherever supplied to a ship for her operation or maintenance; (1) construction, repair or equipment of any ship or dock charges and dues; (m) wages of Masters, Officers, or crew; (n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner; (o) disputes as to the title to or ownership of any ship; (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship; (q) the maritime mortgage or security.

On the same time, according to art. 1, point 2 of the same Convention, „arrest" means the detention of a ship by judicial process to secure a maritime claim, but

[9] Gabriela Răducan, Mădălina Dinu, *op.cit.*, p. 329.

does not include the seizure of a ship in execution or satisfaction of a judgment.

The procedure to instate a distraint measure on civilian ships requires, in urgent cases, the possibility to formulate the instatement request, even before a Suing Petition is submitted to a Court, on the case merits. In this case, the creditor for whom the distraint measure is granted, shall have the obligation to submit the above-mentioned suing petition before the competent court or to take the necessary steps to convene an arbitration court within maximum twenty days of the precautionary measure's approval. A distraint request shall be triad urgently, in the council chambers, with the Court subpoenaing the parties. The Ruling of the Court is enforceable and it can only be appealed within five days of its issuance.

Failure to submit the Suing Petition, on the case merits, within the above-mentioned 20-day deadline, shall lead to the annulment of the distraint. Such an annulment shall be confirmed by a final Court Ruling, issued with the Court subpoenaing the parties.

The Court competent to resolve a request for the instatement of a distraint measure over a civilian ship shall be the tribunal of the region where the ship is located (the Constanta Tribunal or the Galati Tribunal), regardless of the court where the Suing Petition has been or is about to be submitted on the case merits.

No distraint measures can be instated over a civilian ship that is on the verge of leaving. A ship is considered to be on the verge of leaving, once the commander of that ship has, onboard, all the certificates, the ship's documents, as well as the departure permit, handed to him/her by the Harbour Master, according to art. 963 of the New Code of Civil Procedure.

A voyage authorisation may be issued by the same Court that ordered the distraint measure, upon the request of the creditor holding a claim over that ship, upon the request of a co-owner of the ship or even upon the debtor's request, while also setting forth all the pre-emptive measures that might be necessary, depending on the circumstances. Such a request shall be tried urgently, in the Council Chambers, with the court subpoenaing the parties. The Ruling shall be enforceable and it shall only be appealed within five days of its issuance.

The ship shall only be allowed to leave, once the approval ruling is transcribed in the records kept by the relevant maritime authority and an adequate observation is inserted in the ship's nationality document.

The expenses incurred with such a voyage shall be borne by the party that requested its approval.

The ship lease for a court-mandated voyage, may be added to the sale price, after all the voyage expenses are deducted.

A transfer of the distraint may be approved for justified reasons, upon the debtor's or the creditor's request, as the case may be; the court that ordered the distraint shall have the right to swap one seized ship for another.

The creditor, who is the legitimate owner of the Bill of Lading, may seize the merchandise on the ship, listed in such Bill of Lading. If the ship's distraint is not requested, the creditor shall have to ask for the vessel to be unloaded as well.

A precautionary distraint measure shall be enforced by the Harbour Master of the port where that ship is located, who shall arrest the vessel in question. In this case, the Harbour Master shall not issue the documents needed for the ship's navigation and it shall not allow the vessel to leave the port or the berth. The interested party shall have the right to challenge the way the distraint is enforced, by contesting such enforcement before the tribunal serving the place where the ship is located, according to art. 967 of the Code of Civil Procedure.

In order to guarantee the port traffic and the civil security while the ship is arrested, the tribunal serving the place where the vessel is located (the Constanta or the Galati Tribunal), may issue a Presidential Order, to instate emergency measures; in this case, the provisions of art. 997 and the following, of the Code of Civil Procedure shall apply accordingly.

A temporary halt of the ship, in the absence of a Court Decision, may also be ordered by the Harbour Master, under the conditions of the special law.

Thus, according to art. 132 of Government Decree no. 42/1997, on sea transport and on the transportation carried out on interior navigable ways, as modified under Emergency Government Decree no. 74/2006, Harbour Masters may prevent any ship from leaving a port or another place of stoppage located on the national navigable waters, upon a request coming from the Romanian Naval Authority, the Port Administrations and/or the Navigable Ways Administrations, from other public state authorities or from certain economic agents, if the ship's owner or operator or the owner of the merchandise transported by the ship, has debts towards the above-mentioned authorities or economic agents. Such a departure interdiction cannot last for more than twenty-four hours counted from submission of the ship's departure approval request. Once this period expires, the ship shall only be detained if the claimant provides the Harbour Master with an enforceable ruling with this regard, issued by a Court of Law. Such detention can cease if the ship's owner or the owner of the merchandise transported on the ship, as the case may be, proves that they have set-up sufficient guarantees to cover the receivable claimed and such guarantees have been accepted by the person who requested the ship's detention.

2.3. Garnishment

According to art. 970 of the Code of Civil Procedure, a precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third

parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of precautionary distraint, in art. 953 of the Code of Civil procedure – the three situations presented above.

As we've said before, the provisions regulating the instatement of precautionary distraint, as well as those related to the settlement of such request, the enforcement of the measure, the annulment and lifting of a distraint, shall apply, accordingly, to garnishment as well.

„A specification must be made, in relation to the content of a Garnishment request. Thus, art. 971, paragraph (2) stipulates the following: in case of a bank garnishment request, the creditor must not necessarily identify, in its content, the third parties targeted by such request. *Per a contrario*, we can conclude that, when a garnishment request is submitted against third parties other than a bank, it is mandatory to indicate the garnished third party, in the garnishment request." [10]

2.4. Judicial lien

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable judgment.

As a rule, a lien is instated over assets making up the subject matter of a merits litigation, and the measure may be instated over the totality of such assets or over a part of them, over tangible and/or intangible assets, such as shares in limited liability or in share companies. As an exception, a lien may also be instated over goods that do not make up the subject matter of a merits litigation, in the situations and under the conditions stipulated by law.

Thus, as a rule, whenever there is a litigation over the ownership or over another main real right, over the possession of a movable or an immovable asset, or over the use or administration of a jointly-owned good, the Court may approve the instatement of a judicial lien, upon the interest party's request, if such a measure is necessary to preserve the respective right.

By "*the interested party*" we understand either one of the litigating parties or a third party, such as a creditor of the litigating parties, who asks for a judicial lien to be instated, via the oblique action regulated in the Code of Civil Procedure, in art. 1.560-1.561.

As an exception, a judicial lien may be approved, even without a trial:

Over an asset that the debtor offers for their release;

Over an asset in relation to which, the interest party has serious reasons to fear that it would be stolen, destroyed or altered by its current holder;

Over certain movable assets making up the creditor's guarantee, when the creditor reveals the debtor's default or when they have serious reasons to suspect that the debtor would avoid a mandatory enforcement or that the said assets would be stolen or deteriorated.

In the exceptional cases mentioned above, the party that obtained the instatement of a judicial lien shall have the obligation to file a Suing Petition with the competent court, to take the necessary steps to convene an arbitration court or to ask for the enforcement of the enforceable title, within maximum twenty days of the precautionary measure's approval; otherwise, the judicial lien shall be annulled under the law. Such an annulment shall be confirmed by a final Court Ruling, issued without subpoenaing the parties.

The court competent to rule on a request related to the instatement of a judicial lien, shall be the court charged with trying the case on its merits (when there is a trial pending – the rule) and the court serving the region where the assets is located (when there is no trial pending – the exception).

When it comes to the procedure employed to instate a judicial lien, the request for such a lien shall be tried urgently, with the court subpoenaing the parties.

If the request is upheld, the court shall be able to force the plaintiff to pay a bail – setting forth the amount and the posting deadline of such bail – other the penalty of having the precautionary measure annulled under the law.

The Judicial lien shall be registered in the Land Book, in the Trade Registry, in the National Movable Publicity Registry (*formerly known as the Electronic Archive of Security Interests*) or in any other public records, as the case may be. The Court ruling resolving the request to instate a judicial lien can only be challenged by appeal, within five days of its issuance, before the court hierarchically superior to the one that issued it. Its issuance may be delayed by maximum twenty-four hours, and the substantiation of the decision made, must be provided within maximum forty-eight hours of its issuance.

In all cases when the competent first instance court is the Court of Appeal, the remedy method shall be a recourse.

If the lien request is upheld, the asset shall be entrusted, for protection, to a lien trustee – namely, to a person jointly appointed by the parties and, if the parties cannot come to an agreement with this regard, to a person appointed by the court, who might be the very holder of the asset in question. For this purpose, the bailiff notified by the interested party, shall travel to where the location of the asset set to be placed under lien, to handed over to the lien-trustee, based on a handover report. A copy of this report shall be provided to the court that approved this lien measure.

The lien-trustee shall be entitled to carry out all preservation and administration activities, to cash in any incomes or amounts owed and to pay any current

[10] Gabriel Boroi, Mirela Stancu, *op.cit,* p. 379 - 380.

debts, as well as any debts certified by an enforceable title. Besides, with the prior authorisation of the Court that appointed him/her, the lien trustee shall be entitled to alienate the asset, if it cannot be preserved or if the alienation is obviously necessary for other reasons; besides, he/she shall be allowed to participate in trials related to the asset placed under lien, on behalf of the litigating parties, if he/she has been previously authorised to do so.

If a person other than the holder of the asset is appointed lien -trustee, the court shall determine an amount as remuneration for the activity performed, while also setting forth the payment methods; thus, the provisions of Title V of the Civil Code – having the marginal designation of „*Administrating other people's assets*" shall be come applicable.

„Once the trial is completed, the lien-trustee shall must hand over the asset, along with its fruits, including any income collected, to the party to whom the property was assigned by Court Decision, and if the lien - trustee was himself/ herself a party to the proceedings, and he won the case, then he/she shall keep the assets and its fruits."[11]

In urgent cases, the court will be able to appoint, by final ruling issued without subpoenaing the parties, a provisional trustee, until the judicial lien request is resolved.

2.5. Provisional measures in matters of intellectual property rights

The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one's intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code.

If the owner of an intellectual property right or any other person who uses such intellectual property right with the owner's consent can credibly prove that their intellectual property rights are the target of a current or an imminent illicit action, that threatens to cause them a prejudice that would be hard to repair, they can ask the Court to order certain provisional measures.

When it comes to the admissibility of a request to instate provisional measures in matters of intellectual property rights, a reading of the legal provisions in place reveal the following: a) the plaintiff must be the owner of the intellectual property right in question; these measures may also be requested by any other person exercising the intellectual property right, with the owner's consent; b) the intellectual property right must be the target of a current or an imminent illicit breaching action; c) there is a risk that a prejudice might be caused, that would be difficult to repair, d) the measures ordered must be provisional in nature; the case merits must not be pore-judged." [12] The Court may specially forbid the breach or it may order the provisional cessation of such breach or, it may order the implementation of the necessary measures to preserve the evidence

Thus, Law no. 8/1996 on copyright and its related rights, stipulates, in its art. 188: (1) The holders of the rights recognised and protected under this law may ask the courts or other competent bodies, as the case may be, to recognise their rights and to confirm their violation and they may claim compensations for the reparation of the prejudices caused. The same requests may also be made for and on behalf of the holders of these rights, by management bodies, by anti-piracy associations or by other persons authorised to use the rights protected under this law, in accordance with the mandate granted to them for this purpose. When an action has been initiated by the rights holder, the persons authorised to use the rights protected under this law may intervene in the trial, requesting the reparation of the prejudice caused to them; (2). In determining the compensations due, the court shall take into account: a) either criteria such as the negative economic consequences suffered, particularly lost gains, benefits unjustly obtained by the perpetrator and, where appropriate, elements other than economic factors, such as the moral damages caused to the right's holder; b) or the granting of compensations equal to three times the amounts that would have been legally due for the type of use that made-up the object of the illicit action, if the criteria provided under letter a) are not applicable; (3) If the copyright holder or one of the persons mentioned in paragraph (1) can credibly prove that their copyright is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take certain provisional measures. The court may order in particular: a) the prohibition of the violation or its temporary cessation; b) the necessary measures to ensure the preservation of evidence; c) the necessary measures to ensure the repair of the prejudice; To this end, the court may order precautionary measures against the movable and immovable assets of the person alleged to have breached the rights recognised under this law, including a freeze of their bank accounts and other assets. For this purpose, the competent authorities may order the communication of bank, financial or commercial documents or they may provide for appropriate access to pertinent information; d) Collecting or handing-over, to the competent authorities, all the goods in respect of which there are suspicions regarding the breach of a right protected under this law, in order to prevent them from being placed on the market; (4) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure, related to the

[11] Gabriel Boroi, Mirela Stancu, *op.cit.,* p. 382.

[12] Gabriel Boroi, Octavia Spineanu-Matei, Andreia Constanda, Carmen Negrilă, Veronica Dănăilă, Delia Narcisa Teohari, Gabriela Răducan, Dumitru Marcel Gavriș, Flavius George Păncescu, Marius Eftimie, op.cit., pp. 533 – 534.

provisional measures in matters of intellectual property rights.

Besides, Law no. 64/1991 regarding the patents for invention, stipulates, in its art. 66, as follows: (1) If the holder of a patent for invention held between March 6, 1945 and December 22, 1989 or the persons holding an industrial property right protected by a patent granted by the Romanian state and the legal successors of such persons, whose patrimonial rights conferred by the patent have been infringed by the abusive exploitation of the invention in question, without the consent of the proprietor or by any other act of infringement of such rights, or any other person exercising the industrial property right with the consent of the proprietor, can credibly prove that their industrial property right, protected by such patent is the target of a current or an imminent unlawful action, and that such action is likely to cause them a prejudice that would be difficult to repair, they may ask the court to take provisional measures; (2) The court may order in particular: a) the prohibition of the infringement or its temporary cessation; b) the necessary measures to ensure the preservation of evidence. The provisions of Government Emergency Decree no. 100/2005 on ensuring the observance of industrial property rights, approved with amendments by Law no. 280/2005, with its subsequent amendments and supplements are also applicable here; (3) The applicable procedural provisions are contained in the dispositions of the Code of Civil Procedure related to provisional measures in matters of intellectual property rights; (4) Such provisional measures may also be ordered against an intermediary whose services are used by a third party to infringe a right protected by this law.

In case of prejudices caused by the written or the audio-visual media, the court may not order a temporary cessation of the prejudicial action unless the prejudices caused to the plaintiff are serious, if the action is not obviously justified, according to art. 75 of the Civil Code, and if the measure ordered by the court does not appear to be disproportionate in relation to the prejudices caused. The provisions of art. 253 paragraph (2) of the Civil Code shall remain applicable.

The court shall resolve the request according to the provisions related to presidential orders, which shall apply accordingly, namely art. 997 and the following of the Code of Civil Procedure.

If the request is made before the Suing Petition is filed on the case merits, the decision ordering the provisional measure shall also set the time limit for the said Petition to be filed, under the penalty of having the measure ordered terminated under the law.

The measures taken prior to initiating a court action for the protection of an infringed right shall cease under the law, if the applicant fails to notify the court within the above-mentioned time limit, but not later than 30 days after their instatement.

If these measures can cause a prejudice to the opposite party, the Court may order the plaintiff to post a bail, in the amount set by the court; otherwise, the measure ordered shall cease under the law.

Upon the interested party's request, the plaintiff shall have the obligation to repair the prejudice caused by the precautionary measures taken, if the court action initiated on the merits of the case, is dismissed as unfounded. However, if the plaintiff is not at fault or the blame can be put on him only to a minor extent, taking into account the concrete circumstances of the case, he/she may refuse to pay the compensations ordered or he/she may ask for their reduction.

If the opposite party does not ask for liquidated damages, the court shall order the release of the bail, at the plaintiff's request, by decision issued after subpoenaing the parties. Such a request shall be tried in accordance with the provisions related to Presidential Orders, which shall apply accordingly.

If the defendant opposes the release of the bail, the court shall set a deadline for initiating the court action on the merits of the case, which may not be longer than thirty days counted from the date the Court Decision was issued, under penalty of having the measure that rendered the bail amount unavailable, lifted.

3. Conclusions

The Code of Civil Procedure regulates, in its 4th Book, named *Special Procedures*, the 4th Title – *Precautionary and Provisional Measures*, some aspects related to distraint – general provisions and special provisions for the distraint of civilian ships, garnishment, judicial lien and provisional measures in matters of intellectual property rights.

At the same time, the provisional measures in the matter of intellectual property rights are also regulated, provisional measures that are not precautionary measures, but specific measures for the protection of the above-mentioned rights, regardless of their patrimonial or non-patrimonial content.

A distraint measure consists of rendering unavailable the debtor's movable and/or immovable seizable assets, that are still in his/her possession or in the possession of a third party, for the purpose of capitalising on them when the creditor of a certain amount of money obtains an enforceable title, according to art. 952 - 959 of the Code of Civil Procedure.

A precautionary garnishment can be instated over amounts of money, securities or other movable intangible seizable assets owed to the debtor by third parties or set to be owed in the future based on certain existing legal relationships, under the conditions set forth, for the instatement of precautionary distraint, in art. 953 of the Code of Civil Procedure.

A judicial lien consists of rendering unavailable the assets that are the subject-matter of a litigation or other assets under the law, by entrusting them for protection to a lien trustee, until the trial is resolved by an enforceable Court Decision.

The provisions of art. 978 – 979 of the Code of Civil Procedure regulate the provisions measures needed to protect one's intellectual property rights, regardless of their patrimonial or non-patrimonial content and regardless of their origin. The provisional measures needed to protect other non-patrimonial rights are regulated by art. 255 of the Civil Code designs that complement each other. For example, you can add a matching cover page, header, and sidebar.

Click Insert and then choose the elements you want from the different galleries. Themes and styles also help keep your document coordinated. When you click Design and choose a new Theme, the pictures, charts, and SmartArt graphics change to match your new theme. When you apply styles, your headings change to match the new theme. Save time in Word with new buttons that show up where you need them.

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- Emergency Decree no 74/2006 modifying and supplementing Government Decree no. 42/1997 on naval transport;
- Government Decree no. 42/1997 on maritime transport and transportations on inner navigable ways;
- Law no. 134/2010 on the Code of Civil Procedure;
- Law no. 287/ 2009 on the Civil Code;
- Law no. 8/1996 on copyright and other related rights;
- Law no. 64/1991 on patents for invention;
- Law no. 91/1995 on Romania's accession to the International Convention for the Unification of Certain Rules on the Arrest of Sea-going ships, signed in Brussels on May 10, 1952;
- Law no. 554/2004 on the Contentious Administrative;
- Law no. 207/2015 on the Code of Fiscal Procedure;
- Law no. 53/2003 on the Labour Code;
- Law no. 85/2014 on insolvency prevention procedures and insolvency procedures.

INCREASED PLASTIC WASTE POLLUTION OF FRESHWATER RESOURCES – DO WE HAVE THE APPROPRIATE LEGAL FRAMEWORK TO ADDRESS IT?

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Cristiana MIC-SOARE[**]

Abstract

It is widely known and demonstrated that plastic waste pollution is a significant factor contributing to the deterioration of the worldwide freshwater resources. In close relation to this is also the marine and oceanic pollution, which is influenced, among other, by the pollution of the freshwater resources which discharge into the seas and oceans. On top of that comes the latest research, which shows that plastic waste pollution is predicted to exceed the efforts to mitigate such pollution with reference to the year 2030.

In such context, we find that it is important to determine, from a legal standpoint, if and how the currently applicable Romanian legal framework is capable to address and contribute to the mitigating mechanisms against freshwater pollution by plastic waste.

First, this paper undertakes to briefly discuss the latest findings related to the plastic waste pollution of freshwater resources. Second, we will analyse the most important and relevant legal provisions in the field of water protection against pollution with plastic waste, on one hand, and in the field of (plastic) waste management, on the other hand. Third, we will try to determine if and how they can be seen as establishing a coherent and integrative legal framework, capable of addressing the above-mentioned issues. Last but not least, we will present the conclusions of our study and potential areas of improvement of the applicable legal provisions in Romania in relation to pollution of freshwater resources by (plastic) waste.

Keywords: *plastic waste, waste management, freshwater resources, pollution, Romanian legal framework.*

1. Introduction

Plastics – they are everywhere. They surround us with an ever-increasing speed, because they come from everything: from plastic food-packaging (e.g. bottles used for water, juices, milk), cosmetic and other products, to the classic plastic bags of all kinds, or even to fashion products which include (perhaps surprisingly) a high amount of plastic in them.

Not only are plastics everywhere, but their quantities are continuously rising, being found in various forms in the soil, oceans, freshwater resources and in the air (e.g. the notorious PM 2.5), "even in the most remote and pristine areas of the world".[1] Thus, even though – ideally and purely theoretically – assuming there would exist an effective plastic management system at all levels, they should not enter the environmental systems, in practice they do, and in large amounts.

Due to their potentially harmful impact and high volume, various bodies at international and intergovernmental level (for example, the United Nations, the World Bank, etc.), regional level (e.g. the European Union) and national level are debating the issue of plastics in the surrounding environment, addressing it by means of various policies and regulations.

Nonetheless, even though plastics are a major concern and have been extensively documented and regulated in relation to marine environments, plastic pollution affecting freshwater resources has been subject to limited research and even more limited regulation, such research being also more recent, as we will discuss in more detail below in section 2.1. One important example is that of the European Water Framework Directive,[2] which, although older than the European Marine Strategy Framework Directive (which includes provisions related to plastic waste pollution),[3] does not encompass specific provisions related to the issue of plastic pollution, as we will further show in section 2.2. below. By contrast, the Romanian Water Law[4] does include certain provisions regarding waste in general, thus encompassing also the plastic waste, as will be detailed in section 2.2. below.

In this context, this study undertakes to answer the following main research questions, which will be subsequently analysed in the following sections:

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[1] Karen Raubenheimer and Niko Urho, *Possible elements of a new global agreement to prevent plastic pollution* (Copenhagen: Nordic Council of Ministers, 2020), 20, https://norden.diva-portal.org/smash/get/diva2:1477124/FULLTEXT02.pdf.

[2] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ("Water Framework Directive").

[3] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy ("Marine Strategy Framework Directive").

[4] Romanian Water Law no. 107/1996, as subsequently amended and supplemented, published in the Romanian Official Gazzette no. 244 dated 8 October 1996 ("Romanian Water Law").

1. What is the current status of freshwater resources from the perspective of their pollution with plastics?

2. Are the current Romanian legal frameworks regarding freshwater resources protection against pollution by plastic waste, on one hand, and plastic waste management, on the other hand, appropriately drafted so as to address issues of pollution with plastics in such increasing amounts?

3. How are these Romanian legal frameworks working together in order to coherently mitigate the issues of plastic pollution of freshwater resources and what improvements could be brought thereto?

2. Discussions on the Romanian legal framework addressing plastic pollution of freshwater resources

2.1. Current status of freshwater resources from the perspective of their pollution with plastics

Plastic is a type of waste that is among the most frequently identified as polluting the international freshwater resources. It affects virtually every freshwater and marine ecosystem globally, being thus a "planetary threat",[5] and a very pervasive one as well.[6] Freshwater resources – particularly rivers – have been identified as being the main transporters of plastic waste to marine resources, thus significantly contributing to the pollution of our oceans and seas.[7]

Even though there is extensive research on the plastic pollution of marine environments, similar research conducted with respect to freshwater resources is much more limited and quite recent.[8]

Thus, it has been shown that, by restricting the plastic pollution from river freshwater ecosystems into marine ecosystems, the globally accumulated plastic waste into the environment would be diminished.[9] Nevertheless, it would not seem to be sufficient even to completely stop the global production of plastic – which seems rather like a long-term, rather than short- or mid-term goal – since plastic has a very long degradation duration[10] (e.g. in the marine environment, 3.1 years for a biodegradable plastic bag, 3.4 years for a plastic bag, 58 years for plastic bottles, 1200 years for plastic pipes).[11]

In this context, a life-cycle approach to plastics would be highly recommended, coordinated at global level, where attention would be drawn, *inter alia*, to the limitation of production of virgin plastics, use of more environmentally-friendly materials for plastics, alignment of global standards for the use of recoverable and recyclable designs for commodity plastics, but also to the waste cycle of plastic – such as plastic waste reduction, waste management or even environmental recovery.[12]

Recent studies have shown that, even if the waste management capacities would be increased, this measure alone would not suffice taking into account the projected plastic waste generation growth, being essential to reach a circular economy of plastics, "where end-of-life plastic products are valued rather than becoming waste."[13]

We also note that, in addition to the – perhaps more obvious and more researched upon – macroplastics, one of the most frequently identified forms of plastic found in freshwater systems all over the world are microplastics,[14] which is rarely regulated at international and national level under different policy

[5] Stephanie B. Borrelle *et al.*, "Predicted growth in plastic waste exceeds efforts to mitigate plastic pollution", *Science* 369, no. 6510 (September 2020): 1515, https://doi.org/10.1126/science.aba3656.

[6] S. B. Sheavly and K. M. Register, "Marine Debris & Plastics: Environmental Concerns, Sources, Impacts and Solutions", *J Polym Environ* 15 (2007): 301, https://doi.org/10.1007/s10924-007-0074-3.

[7] See, for example, Jenna R. Jambeck *et al.*, "Plastic waste inputs from land into the ocean," *Science* 347, no. 6223 (February 2015): 768-771, https://doi.org/10.1126/science.1260352; Maarten van der Wal *et al.*, "SFRA0025: Identification and Assessment of Riverine Input of (Marine) Litter. Final Report for the European Commission DG Environment under Framework Contract No ENV.D.2/FRA/2012/0025" (2015): 59-60, https://ec.europa.eu/environment/marine/good-environmental-status/descriptor-10/pdf/iasFinal%20Report.pdf; Laurent C.M. Lebreton *et al.*, "River plastic emissions to the world's oceans," *Nat Commun* 8, no. 15611 (2017): 5-6, https://doi.org/10.1038/ncomms15611; Christian Schmidt, Tobias Krauth, and Stephan Wagner, "Export of Plastic Debris by Rivers into the Sea," *Environ Sci Technol* 51 (2017): 12246, 12251, https://doi.org/10.1021/acs.est.7b02368; Martín C.M. Blettler *et al.*, "Freshwater plastic pollution: Recognizing research biases and identifying knowledge gaps," *Water Research* 143 (2018): 416-417, 422, https://doi.org/10.1016/j.watres.2018.06.015.

[8] Blettler *et al.*, "Freshwater plastic pollution: Recognizing research biases," 417; Dafne Eerkes-Medrano, Richard C. Thompson, and David C. Aldridge, "Microplastics in freshwater systems: A review of the emerging threats, identification of knowledge gaps and prioritisation of research needs," *Water Research* 75 (2015): 63-82, http://dx.doi.org/10.1016/j.watres.2015.02.012; Martin Wagner *et al.*, "Microplastics in freshwater ecosystems: what we know and what we need to know," *Environmental Sciences Europe* 26 (2014): 12, http://www.enveurope.com/content/26/1/12.

[9] Olivia K. Helinski, Cara J. Poor, and Jordyn M. Wolfand, "Ridding our rivers of plastic: A framework for plastic pollution capture device selection," *Marine Pollution Bulletin* 165, no. 112095 (2021): 1, https://doi.org/10.1016/j.marpolbul.2021.112095.

[10] Helinski, Poor, and Wolfand, "Ridding our rivers of plastic," 1.

[11] Ali Chamas *et al.*, "Degradation Rates of Plastics in the Environment," *ACS Sustainable Chem Eng* 8 (2020): 3502, https://dx.doi.org/10.1021/acssuschemeng.9b06635.

[12] Winnie W. Y. Lau *et al.*, "Evaluating scenarios toward zero plastic pollution," *Science* 369 (2020): 1455–1461, https://doi.org/10.1126/science.aba9475; Borrelle *et al.*, "Predicted growth in plastic waste," 1517.

[13] Stephanie B. Borrelle *et al.*, "Predicted growth in plastic waste exceeds efforts to mitigate plastic pollution", *Science* 369, no. 6510 (September 2020): 1517, https://doi.org/10.1126/science.aba3656.

[14] Chaoran Li, Rosa Busquets, and Luiza C. Campos, "Assessment of microplastics in freshwater systems: A review", *Science of the Total Environment* 707, no. 135578 (2020): 7, https://doi.org/10.1016/j.scitotenv.2019.135578.

fields (such as waste management, chemical regulation, water management).[15]

A very recent study – published on 22 March 2021 – performed on Romanian freshwaters indicates that microplastic is present in all analysed samples from the freshwaters, recommending the elaboration of specific measures for preventing and comabint microplastic pollution of freshwaters in Romania.[16] Per article 11 para. 2. lit. (a) of the European Waste Directive,[17] "by 2020, the preparing for re-use and the recycling of waste materials such as at least paper, metal, **plastic** and glass from households and possibly from other origins as far as these waste streams are similar to waste from households, shall be increased to a minimum of overall **50 %** by weight". A similar provision was also transposed in the Romanian Waste Law[18] in article 17 para. (1) lit. b).

In spite of these regulations, against a European Union average of 47.7% in 2019, according to Eurostat data, the reality shows a decreasing rate of the waste materials from households that are recycled in Romania, with 14.8% in 2012, 13.9% in 2017 and only 11.5% in 2019 being prepared for re-use and recycling in Romania, situating our country on the second to last place in the European Union – only Malta having a lower percentage of 8.9% in 2019.[19]

We note also the recycling rates for plastic packaging waste (referring to the total quantity of recycled packaging waste, divided by the total quantity of generated packaging), which state that, against a European Union average of 41.2% in 2017 and of 41.5% in 2018, Romania had a higher recycling rate – of 47.6% in 2017, respectively of 43% in 2018.[20]

On the other hand, however, the view has been expressed that there are significant margins of error with respect to the Eurostat data, since this is received from the Romanian National Environmental Protection Authority, which receives it in its turn from local authorities and waste operators.[21]

It is important to notice that the pollution of freshwater resources with plastic waste has been for a long time at alarming levels in Romania, despite the fact that, in 2016, 66.14% of the freshwaters that were inventoried had a good ecological status (for details regarding this notion, please see section 2.2. below), 33.33% had a moderate status, and only under 1% had a poor or bad ecological status.[22] The 2018 National strategy for sustainable development mentions that one of the main measures taken for improving the quality of the freshwater resources was "the elimination of uncontrolled depositing of wastes", identifying at the same time depositing as the main method for eliminating municipal wastes (among which also plastic wastes) and confirming the existing deficiencies related to selective collection, recycling and re-use of wastes or their incineration in the waste-to-energy system.[23]

Moreover, as indicated in the report issued by the Romanian Court of Accounts on 16 March 2021 with respect to the management of municipal waste between 2016 and 2018, the authorities have identified numerous cases of uncontrolled dumping of waste and of lack of sanitation of the areas affected by this illegal activity.[24] Emphasis was placed on the fact that, despite numerour breaches of the applicable regulations on the uncontrolled depositing of waste that were observed by the National Environmental Guard, this authority did not frame the respective actions according to their gravity and the applicable legislation, thereby not actually discouraging such illegal practices.[25]

Against this background, we will proceed to analyse the most important provisions shaping the Romanian legal framework regarding freshwater resources protection against pollution by plastics and the waste management.

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[15] Nicole Brennholt, Maren Heß, and Georg Reifferscheid, "Freshwater Microplastics: Challenges for Regulation and Management", in *Freshwater Microplastics. Emerging Environmental Contaminants?*, ed. Martin Wagner and Scott Lambert, The Handbook of Environmental Chemistry, vol. 58, eds. Damia Barccelo and Andrey G. Kostianoy (Springer Open: 2018): 267, https://link.springer.com/content/pdf/10.1007%2F978-3-319-61615-5.pdf.

[16] Asociația Act for Tomorrow, "Cartografierea Microplasticului în Apele României. Mapping Microplastic in Romanian Waters. Raport" (March 2021): 39, https://drive.google.com/file/d/15HYeJeqxE6B3Cflwv9dxlDWzAxSAA6aK/view?fbclid=IwAR0HDSzc6pJ1I0l3OwH_Sw_FT9KReC40Se1qznFbVgaTSXdK6z3OROAL1_c.

[17] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives ("European Waste Directive").

[18] Romanian Law no. 211/2011 on wastes' regime, as subsequently amended and supplemented, republished in the Romanian Official Gazzette no. 220 dated 28 March 2014 ("Romanian Waste Law").

[19] "Recycling rate of municipal waste (online data code: SDG_11_60)," Source of data: Eurostat, available at https://ec.europa.eu/eurostat/databrowser/view/sdg_11_60/default/table?lang=en.

[20] "Recycling rates for plastic packaging waste (online data code: TEN00063)," Source of data: Eurostat, available at https://ec.europa.eu/eurostat/databrowser/view/cei_wm020/default/table?lang=en.

[21] Sorin Ioniță, Otilia Nuțu, and Ilie Brie, "Celelalte crize ale României. Ce învățăm din proasta gestionare a gunoaielor și calității aerului după aderarea la UE" (English "The other crises of Romania. What do we learn from the bad management of litter and air quality after the admission to the EU"), May 2020: 19, https://expertforum.ro/wp-content/uploads/2020/05/Raport-EFOR-Deseuri-2020.pdf.

[22] 2018 National strategy for sustainable development for Romania 2030, adopted by Government Decision no. 877/2018 regarding the adoption of the National strategy for sustainable development for Romania 2030, published in the Romanian Official Gazzette no. 985 dated 21 November 2018 ("2018 National strategy for sustainable development"), chapter 6.

[23] 2018 National strategy for sustainable development, chapter 6.

[24] Romanian Court of Accounts, "Sinteza raportului de audit al performanței. Analiză și diagnoză în gestionarea deșeurilor menajere" (English: "Synthesis of the performance audit report. Analysis and diagnose of the management of municipal waste"), 16 March 2021, http://www.curteadeconturi.ro/Publicatii/Sinteza_deseuri_16032021.pdf, 38.

[25] Romanian Court of Accounts, "Sinteza raportului de audit", 39.

2.2. Main provisions of the Romanian legal framework regarding the protection against pollution by plastics of freshwater resources

Plastic waste – or waste in general – is not regulated in the Water Framework Directive, which was transposed in Romania within the Romanian Water Law.

The Water Framework Directive makes reference to the states' obligation to "implement the necessary measures to prevent deterioration of the status of all bodies of surface water",[26] as well as to "protect, enhance and restore all bodies of surface water, … with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive".[27] "Good surface water status" refers to the status achieved by a surface water body when both its ecological status and its chemical status are at least "good",[28] whereas a "good ecological status" relates to the quality of the structure and functioning of aquatic ecosystems associated with a body of surface water, so classified in accordance with Annex V of the Water Framework Directive,[29] and a "good surface water chemical status" refers to the chemical status required to meet the environmental objectives for surface waters established in Article 4 para. (1) lit. (a) of Water Framework Directive, that is the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16 para. (7), and under other relevant Community legislation setting environmental quality standards at Community level.[30]

Nevertheless, even despite the lack of specific provisions in the Water Framework Directive related to measures of protection of watercourses against plastic pollution, the necessity to prevent the deterioration of the status of all bodies of surface water indirectly implies their protection against pollution with plastics. Thus, the occurance of plastics (and even, more specifically, microplastics), can have a significant impact on the quality of the freshwaters, being able to influence the ecological status thereof, while a number of substances listed in the Water Framework Directive as priority substances, the concentration of which should not exceed certain levels in order to maintain a good chemical water status, are frequently (although not exclusively) used as additives in plastics.[31]

By contrast to the Water Framework Directive, the Romanian Water Law also includes – in addition to similar provisions regarding the good surface water status, good ecological status and other provisions as discussed in relation to the Water Framework Directive – a number of provisions regarding waste in general, thus encompassing also the plastic waste in its field of regulation.

One of the specific interdictions laid down in Article 16 para. (1) lit. c) of Romanian Water Law is the express prohibition to dump, introduce, or to deposit in anyway in the riverbeds or lake basins any kinds of waste. Depositing waste of any kind is forbidden also in the protection areas instituted by the Romanian Water Law, whereas the use, transportation and handling of waste in areas near waters and in other areas from which they could reach the surface waters is allowed only if it does not pollute waters. At the same time, the depositing of waste in areas near waters can only be performed according to the water rights permit (Romanian *aviz de gospodarire a apelor*) issued by the competent Romanian water authority.

We notice that Romanian Water Law does not couple these specific interdictions with directly correlated sanctions. This approach will be further discussed in section 2.4. below.

Nevertheless, Romanian Water Law includes a list of actions and inactions which are qualified as contraventions, if they are not performed as to be crimes. Among these, we note the following as the most relevant with respect to waste affecting freshwater resources:

- lack of operative measures taken by the local public administrative authorities regarding the establishment of special places for depositing any kinds of waste. We note that this is the only contravention expressly related to waste. This can be sanctioned by fine ranging between lei 75,000 (approximately EUR 15,370[32]) and lei 80,000 (approximately EUR 16,400) for legal persons, and between lei 25,000 (approximately EUR 5,125) and lei 30,000 (approximately EUR 6,150) for natural persons;
- depositing "any kinds of materials" in the riverbeds or at the shores of, among other, the freshwaters (rivers or lakes), or in their protection areas – we consider that this provision can also be interpreted as indirectly referring to (plastic) waste. This can be sanctioned by fine ranging between lei 75,000 (approximately EUR 15,370) and lei 80,000 (approximately EUR 16,400) for legal persons, and between lei 25,000 (approximately EUR 5,125) and lei 30,000 (approximately EUR 6,150) for natural persons;
- dumping residues "or any other materials" in water resources, in breach of the water rights permit (Romanian *aviz de gospodarire a apelor*) or of the water rights authorisation (Romanian *autorizatie de gospodarire a apelor*) – this provision can be

[26] Article 4 para. 1. lit. (a) pt. (i) of Water Framework Directive.
[27] Article 4 para. 1. lit. (a) pt. (ii) of Water Framework Directive.
[28] Article 2 pt. 18. of Water Framework Directive.
[29] Article 2 pt. 21. and 22. of Water Framework Directive.
[30] Article 2 pt. 24. of Water Framework Directive.
[31] Charlotte Wesch *et al.*, "Microplastics in Freshwater Environments. A Need for Scientific Research and Legal Regulation in the Context of the European Water Framework Directive," *Zeitschrift für Europäisches Umwelt- und Planungsrecht* 4 (2014): 277, https://www.researchgate.net/publication/269572531.
[32] All exchange rates in this paper have been calculated at a level of EUR 1 = lei 4.88.

interpreted, in our view, as encompassing the interdiction to dump (plastic) waste into freshwater resources, in breach of an existing water rights permit or authorisation, or even in lack of one. This can be sanctioned by fine ranging between lei 35,000 (approximately EUR 7,175) and lei 40,000 (approximately EUR 8,200) for legal persons, and between lei 10,000 (approximately EUR 2,050) and lei 15,000 (approximately EUR 3,075) for natural persons;

- not informing the water authorities regarding a case of accidental pollution, by the users that have produced it, respectively not taking operative measures, by the users that have produced the accidental pollution, for eliminating the causes and effects thereof – such pollution could also be made by (plastic) waste. This can be sanctioned by fine ranging between lei 35,000 (approximately EUR 7,175) and lei 40,000 (approximately EUR 8,200) for legal persons, and between lei 10,000 (approximately EUR 2,050) and lei 15,000 (approximately EUR 3,075) for natural persons;

Moreover, the following acts are qualified by the Romanian Water Law as crimes and are punished by imprisonment between 1 and 5 years:

- the evacuation, throwing or injecting in the surface waters of any kinds of waste containing substances, bacteria or microbes in a quantity or concentration that could change the water's characteristics, endangering life, health or corporal integrity of people, animals' lives, the environment, the agricultural or industrial production or the fishing stock;
- any kind of pollution of water sources (thus including plastic waste pollution) if it is systematic and it causes damages to the downstream water users.

If the above-mentioned acts are performed without criminal intent, the imprisonment is reduced by half.

2.3. Currently applicable Romanian legal framework regarding plastic waste management, relevant with respect to the protection of freshwater resources against pollution by plastics

The legislation regarding waste management is very diverse and numerous. Therefore, for the purposes of this study, only a limited number of provisions will be analysed and presented, respectively the ones directly related to the protection of freshwater resources against pollution by plastic waste.

To begin with, we note that "waste" is defined by Romanian Waste Law as "any substance or object that its holder throws or intends to or has the obligation to throw",[33] whereas the plastic waste is included in the notion of "municipal waste", which is defined as "mixed waste or separately collected waste from households, including … plastic materials …".[34] Waste is also defined in a number of other national and international legal instruments, such as the Government Emergency Ordinance no. 195/2005 on environment protection, which refers to the notion of "waste" as referring to any substance, chemical or object included of the categories established by the relevant waste legislation which is thrown by its holder or which the holder intends or is obliged to throw.[35]

The ecological management of waste is considered to be primarily ensured by an adequate legal framework regarding the collection, transport, recovery and elimination of waste, on one hand, and by the supervision of such operations and further maintenance of the corresponding facilities (especially the ones for elimination of waste).[36]

One of the main provisions included in the Romanian Waste Law refers to the general obligation that the management of waste (thus, also of plastic waste) must be performed without endangering the human health and without prejudicing the environment, especially, also among other, without generating risks to the water.[37] There are a number of obligations which must be performed by complying with this above-mentioned general obligation, among which we note the following:

- the obligation of waste producers and waste holders to recover it. The breach of this obligation is qualified as administrative offence and can be sanctioned by fine ranging between lei 20,000 (approximately EUR 4,100) and lei 40,000 (approximately EUR 8,200) for legal persons, respectively between lei 3,000 (approximately EUR 615) and lei 6,000 (approximately EUR 1,230) for natural persons;
- the obligation of waste producers and waste holders to perform the treatment operations accordingly or to transfer such operations to a competent authorised economic operator, respectively the obligation of collectors or transporters of waste to deliver and transport waste only to authorized units for sorting, treating, recycling and depositing waste. The breach of any of these obligations is qualified as administrative offence and can be sanctioned by fine ranging between lei 20,000 (approximately EUR 4,100) and lei 40,000 (approximately EUR 8,200) for legal persons, respectively between lei 3,000 (approximately EUR 615) and lei 6,000 (approximately EUR 1,230) for natural persons;
- the obligation of waste producers and waste holders to eliminate the waste that was not recovered in secure conditions. Interestingly, the breach of this obligation does not have a direct correlative sanction.

[33] Point 9 of Annex 1 of Romanian Waste Law.
[34] Point 9^2 of Annex 1 of Romanian Waste Law.
[35] Article 2 point 19 of Government Emergency Ordinance no. 195/2005 on environment protection, as subsequently amended and supplemented, published in the Romanian Official Gazzette no. 1196 of 30 December 2005.
[36] Daniela Marinescu and Maria-Cristina Petre, *Tratat de Dreptul mediului*, 5th ed. (Bucharest: Editura Universitara, 2014), 537.
[37] Article 20 lit. a) of Romanian Waste Law.

Additionally, Romanian Waste Law specifically forbids:

- the abandonment of waste. The breach of this provision can be sanctioned by fine ranging between lei 20,000 (approximately EUR 4,100) and lei 40,000 (approximately EUR 8,200) for legal persons, respectively between lei 3,000 (approximately EUR 615) and lei 6,000 (approximately EUR 1,230) for natural persons. A complementary sanction can be imposed in this case as well, that of picking up the waste deposited in areas other than the authorised ones, cleaning the respective land, as well as eliminating it according to the legislation in force;
- the elimination of waste outside of areas authorised with this purpose. The breach of this provision can be sanctioned by fine ranging between lei 20,000 (approximately EUR 4,100) and lei 40,000 (approximately EUR 8,200) for legal persons, respectively between lei 3,000 (approximately EUR 615) and lei 6,000 (approximately EUR 1,230) for natural persons.

Probably most of the activities that lead to the pollution of freshwater resources with plastic waste could be considered as representing abandonment of waste and could thus be sanctioned as such. Moreover, such activities could also be sanctioned as contraventions with a fine ranging between lei 30,000 (approximately EUR 6,150) and lei 60,000 (approximately EUR 12,300) for legal persons, respectively between lei 5.000 (approximately EUR 1,025) and lei 10,000 (approximately EUR 2,050) for natural persons, based on Government Emergency Ordinance no. 195/2005 on environment protection, which forbids, among other, throwing and depositing any types of waste in the surface waters. However, as we will show below in section 2.4., the actual application of the above-mentioned legal provisions is insufficient in Romania.

2.4. Potential areas of improvement of the currently applicable Romanian legal framework regarding waste management and freshwater resources protection against pollution by plastics

As previously stated in section 2.2, Romanian Water Law does not link specific sanctions to the breach of the interdictions regarding waste. It does indeed include a number of sanctions (qualified as contraventions or crimes, as the case may be) for various actions or inacctions, which can be interpreted to include also as indirectly referring to the above-mentioned interdictions. However, we consider that, for a higher impact and better clarity of the consequences of such forbidden acts related to waste (including plastic waste), the sanctions should be directly linked to the interdictions stated in the Romanian Water Law. If necessary, more general, broad-ranging sanctions could also be maintained, complementary to the specific ones.

Moreover, we are of the view that more specific interdictions referring to various types of waste should be included in the Romanian Water Law, with different sanctions depending, mainly, on the severity of the impact of the pollution of the respective waste on the freshwater environments, but also on other factors such as the recurring character of the action.

Additionally, the amounts of the fines should also be significantly increased, and the actual collection of the respective fines should be ensured by the Romanian competent authorities, in order for these obligations and their correlated sanctions not to remain simply „obligations on-paper".

Other legislative amendments could regard the following:

- exclusion of the currently applicable legal provisions stating that if the penalties applied in respect with environmental breaches are paid within 48 hours, they are diminished to half;
- removal of any statute of limitation regarding the right to action against the breach of at least the environmental provisions regarding the contamination of freshwater resources and negligent or irresponsible waste management, considering the specific consequences of the ecologic damages caused by plastic waste pollution;
- development of better enforcement mechanics for the „poluter pays" principle, in order to ensure not only the sanctioning of the polluter via the fine, but also the cleaning of the contaminated water resource on the cost of the actual polluter;
- introducing in the Romanian Water Law the specific obligation to monitor the presence and concentration in freshwaters of plastics in general, and of microplastics in particular;[38]
- development of a national strategy for preventing and combating Romanian freshwater pollution with waste.[39]

Last but not least, we submit, in line with other authors, that even the Water Framework Directive could benefit from amendments in the sense of including waste or even, more specifically, (micro)plastics provisions therein,[40] even though this could indeed be a cumbersome process, particularly due to the increased monitoring obligations which would be imposed on Member States of the European Union.[41] Moreover, the regional coordination of Member States with river basin authorities would also have an important role in limiting or even decreasing the plastics reaching the freshwater environments.[42]

[38] For a similar recommendation, Asociația Act for Tomorrow, "Cartografierea Microplasticului în Apele României": 39.
[39] For a similar recommendation, Asociația Act for Tomorrow, "Cartografierea Microplasticului în Apele României": 40.
[40] Charlotte Wesch *et al.*, "Microplastics in Freshwater Environments," 277.
[41] Maarten van der Wal *et al.*, "SFRA0025," 73.
[42] *Id*.

3. Conclusions

As shown above, plastic pollution of freshwater resources is a growing and very challenging problem, and therefore "without a well-designed and tailor-made management strategy for end-of-life plastics, humans are conducting a singular uncontrolled experiment on a global scale, in which billions of metric tons of material will accumulate across all major terrestrial and aquatic ecosystems on the planet."[43] This aspect has to be placed in the context that water (in general), and freshwater (in particular), has a very important ecological and economical value as a natural resource, and therefore its quantitative and qualitative protection and conservation represent imperative objectives.[44]

However, only 79% of the Romanian citizens expressed their concern about the effects of plastics on the environment, in the 2017 Special Eurobarometer on attitudes of EU citizens towards the environment – this being the lowest proportion in the EU, where the average was of 87%.[45]

Therefore, along with the legislative amendments proposed above, we are of the view that the raising of awareness of the Romanian population on the effects that their daily actions have on the environment could have a significant impact on the improvement of the huge problem represented by the plastic pollution of freshwater resources and thus, raise the level of separate collection of plastic waste. Additionally, the strict and careful application of the provisions stating that the polluter should always support the cost of the cleaning process supplementary to the sanctions imposed by the applicable legislation, in all cases where breaches are identified are also essential. This requires a well improved monitoring by the authorities, but also the closer implication of various non-state actors such as NGOs or even natural persons for alerting the competent authorities when they notice such breaches.

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[44] Lucreția Dogaru, *Dreptul mediului*, 2nd ed. (Bucharest: Pro Universitaria, 2020), 238.

[45] European Commission, "Commission Staff Working Document. The EU Environmental Implementation Review 2019. Country Report – ROMANIA," Brussels, 4.4.2019, SWD(2019) 130 final: 4, https://ec.europa.eu/environment/eir/pdf/report_ro_en.pdf.

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HOW THE PANDEMIC AFFECTED ROHINGYA'S

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Abstract

In the face of the COVID-19 crisis, we are all vulnerable. The virus has shown that it does not discriminate - but many refugees, those forcibly displaced, the stateless and migrants are at heightened risk.

Millions of refugees worldwide are exposed to violence, family separation, culture loss and exile. The coronavirus disease 2019 (COVID-19) exposes these populations to a new threat, one that could prove to be more devastating than the events forcing them to flee their homelands.

The Rohingya population is under the successive oppression of Myanmar's governments, representing one of the largest stateless populations.

A large part of the Rohingya population lives in overcrowded refugee camps in Bangladesh while another part of them who remained on Myanmar territory in Rakhine State are subject to government persecution, being confined in villages without freedom of movement and without freedom of movement. access to food, education, adequate livelihoods and medical care.

Three-quarters of the world's refugees and many migrants are hosted in developing regions where health systems are already overwhelmed and under-capacitated. Many live in overcrowded camps, settlements, makeshift shelters or reception centers, where they lack adequate access to health services, clean water and sanitation.

Millions of refugees worldwide are exposed to violence, family separation, culture loss and exile. The coronavirus disease 2019 (COVID-19) exposes these populations to a new threat, one that could prove to be more devastating than the events forcing them to flee their homelands.

Humanitarian groups like the International Rescue Committee are concerned that people in refugee camps face a heightened risk of Covid-19.

The UN has warned that, given the conditions in the camps in Bangladesh and the high levels of vulnerability among the population, "the severity of the possible impact of the virus on refugees is of major concern".

Keywords: *Rohigya, pandemic, Covid 19, Bangladesh, Cox Bazar.*

1. Introduction

When the Covid 19 pandemic escladated in march 2020, the entire world was put in front of a new chalenge. The challenge of dealing with something worse than anyone expected. But no one even thought how the most vulnerable populations are going to face this.

When we think at vulnerable populations most of the time we associate them with poor people or with the ones with low income or no income at all, and countries all over the world have imposed measures to help this kind of people, but there is another face of this harsh reality, in this study we want to show how the most vulnerable of them all have been affected, so we study what is happening to the Rohingya's refugees and how they have been affected by this global crissys, which is the Covid 19 pandemic.

They are so vulnerable, because they have so poor conditions of leaving, the camps where they have settled are overcrowded and even if anyone would want to offer better conditions this can't be done, even thought the UN organization is trying to do so.

2. Who are the Rohingya's

The Rohingya population is a Muslim minority group in Myanmar, which over time has been discriminated against and persecuted, denied citizenship and faced numerous restrictions from the Myanmar government.

The journalist and the news stations are describing the Rohingya's as the most persecuted minorities in the world[1] have been denied the citizenship under the 1982 Myanmar nationality law[2]

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and in the same time they are denied the right of movement, education and civil service jobs[3].

Even though all the prosecutions and denials that they are facing the Rohingya's, maintain the fact that descend from people in the preconolial Arakan and colonial Arakan, which was an independent kindom between Southeast Asia and the Indian subcontinent[4] but the Myanmar's government does not recognise them as descendent of Araken muslims.

The modern term Rohingya emerged from colonial and pre-colonial terms Rooinga and Rwangya[5]. The Rohingya refer to themselves as. In Burmese they are known as *rui hang gya*, while in Bengali they are called Rohingga. The term "Rohingya" may come from Rakhanga or Roshanga, the words for the state of Arakan. The word Rohingya would then mean "inhabitant of Rohang", which was the early Muslim name for Arakan[6].

The usage of the term Rohingya has been historically documented prior to the British Raj. In 1799, Francis Buchanan wrote an article called "A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire", which was found and republished by Michael Charney in the SOAS Bulletin of Burma Research in 2003[7]. Among the native groups of Arakan, he wrote are the: "Mohammedans, who have long settled in Arakan, and who call themselves Rooinga, or natives of Arakan."[8] The Classical Journal of 1811 identified "Rooinga" as one of the languages spoken in the "Burmah Empire". In 1815, Johann Severin Vater listed "Ruinga" as an ethnic group with a distinct language in a compendium of languages published in German[9].

3. The persecution and repression of Rohingya's

The contemporany persecution of the Rohigya population started in 2017, when Rakhine budist attacked a bunch of Rohingya men.

On 25 August 2017, the Government of Myanmar announced that 71 people (a soldier, an immigration officer, 10 police officers and 59 insurgents) had been killed overnight during coordinated attacks by up to 150 insurgents in 24 checkpoints. Police and the army base in Rakhine State[10]. The Myanmar Army said the attack began around 01:00, when insurgents armed with bombs, small arms and mock-ups blew up a bridge. He went on to say that most of the attacks took place around 3:00 - 4:00 AM [11]. The Rescue Army Arakan Rohingya (ARSA) claimed to be taking "defensive action" in 25 different locations and accused government soldiers of raping and killing civilians. The group also claimed that Rathedaung had been blocked for more than two weeks, starving the Rohingya and that government forces were preparing to do the same in Maungdaw[12].

According to the Special Rapporteur of the United Nations Human Rights Organization in Myanmar, Yanghee Lee, as of August 25, 2017, at least 1,000 people have been killed as a result of violence between government soldiers and the Rohyngia people[13]. Since October 2018, persecution of the Rohyngia people continues, with the UN Special Rapporteur describing the situation as "apartheid", with Rohingyas detained segregated by the "Rakhine ethnic community" and without "freedom of movement"[14].

On April 23, 2019, a Burmese army attacked the village of Rohingya Buthidaung. Subsequently, the army planted internationally banned landmines along the northern state of Rakhine to prevent the Rohingya

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from escaping northwest to Bangladesh. Burmese soldiers allegedly shot Rohingya civilians fleeing south. Those who remained were targeted by airstrikes. Some have described the Rohingya as being trapped in a "genocide zone."[15]

In early April 2020, the government of Myanmar issued two presidential directives: Directive no. 1/2020 and Directive no. 2/2020. These were followed by January orders issued by the International Court of Justice for the government and army to stop genocide against the Rohingya Muslim ethnic group. Directive no. 1/2020 stipulates that the authorities are responsible for ensuring that anyone under their control does not commit activities that lead to genocide. Directive no. 2/2020 prevents all ministries and the government of Rakhine State from destroying the order of the International Court of Justice in January and also required the retention of evidence of any criminal activity that could lead to genocide[16].

4. How the Covid 19 affected the Rohingya's

Displaced people and host communities are most at risk as the COVID-19 pandemic spreads. The most vulnerable are people in refugee camps, with limited access to health care, hygiene needs and where social distance is impossible. According to the International Rescue Committee, the health care system available to these groups will be overwhelmed without the capacity to cope with the COVID-19 outbreak[17].

The rapid spread of the new coronavirus has made practices such as social or physical removal and standard hand washing a fundamental part of everyday life. In any case, these measures can be particularly difficult to try in densely populated urban settlements, especially in refugee camps, where congestion makes the "two-meter division rule" virtually impossible to maintain - and where many need it. access to basic needs such as water and sanitation, the chances of having an outbreak are obvious[18].

Most Rohyngia refugees have fled to Malaysia, Indonesia and the Philippines, but the vast majority have fled to Bangladesh, where there are two official refugee camps[19]. [11]

The virus can be transmitted to Rohingya refugee camps from one person to another very easily in two ways, one through direct physical contact and the other through close indirect contact with patients with COVID-19 (through drops caused by coughing or sneezing). a person infected with COVID-19).

Given the general life characteristics of refugee camps, where there is no hygiene or adequate hygiene, and where people are forced to share toilets with their neighbors, followed by tight living conditions, the ubiquity of disease and lack of access to medical care, and clean water, leads to difficult survival and the fight against the threat of COVID-19 becomes a major threat.

Given the large number of Rohyngia refugees in Bangladesh, about 860,000, the COVID-19 virus could easily kill more than 1,600 people. The first case of Coronavirus in Bangladesh, where most Rohingya refugees are located, was reported in the Cox Bazar by a local community, followed by the recoding of the first COVID-19 death in March.

In the thick camps of Cox's Bazaar, alternatives to social separation or self-disconnection are removed, with many displaced people living in squeezed conditions in makeshift bamboo and cloth shelters.

Cleaning practices are not practical when standard hand washing becomes a luxury, as access to clean water is severely restricted. On average, 40,000 people live in every square kilometer in the camps, if a refugee is infected with this virus, many refugees will die in a short time. There are concerns about overcrowded Rohingya camps where the virus can spread and become a hotbed in no time.

The Bangladeshi government has imposed a blockade on a southern district, housing more than a million Rohingya Muslims fleeing Myanmar to prevent the spread of the coronavirus. Recent news reports in BBC News Asia say about 350,000 people displaced from Myanmar are "on the verge of a public health catastrophe," says human rights group Human Rights Watch (HRW).

The Government of Bangladesh and humanitarian agencies are trying to create the inclusion of Rohingya refugees in the Bangladesh Government's national response plan to COVID-19[20]. However, there is a constant fear of allowing foreign distributors to enter refugee camps. Food distribution agencies are thus developing new ways to eliminate contact from one person to another. The United Nations High Commissioner for Human Rights (UNHCR) has established isolated camp areas for COVID-19-infected refugees in temporarily isolated areas until they can be transferred to specially designated isolation units[21].

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5. Conclusions

What is happening is Myanmar related to the Rohigya population, is affecting deep all the entire world.

We could face a new Holocaust, if the competent authorities are not going to take more serious actions soon.

Even though the United Nations and European Union imposed sanctions to Myanmar and that International Court of Justice opened and investigation, the crimes did not stopped and the genocide is still on going.

The Myanmar Government thoes not fear the sanctions based on the fact that is not part of the Rome treaty, that goes against the crimes against humanity, so it is on going against the Rohingya.

When all this it is going to stop? Hopefully soon, because the world could not face another Holocaust and the consequences are not of those that the world would want.

Already the crisis that is on going because of huge number of Rohingya refugee, has catastrophic consequences, for the country of Bangladesh, that is overhelmed.

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LIABILITY OF THE NEW AND PREVIOUS OWNERS OF A VEHICLE FOR THE NON-PAYMENT OF ROAD TAXES

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Abstract

The present article aims to make a brief analysis of the applicable legal provisions, but also of the relevant judicial practice, regarding the application of the fine for non-payment of the necessary road taxes to the old owner by the competent authorities, despite the fact that the vehicle was already sold to the new owner. It is possible that the case presented will be considered as having a relatively simple solution, but in the context in which the new owner is in bad faith and does not fulfill its legal obligations and continues to accumulate fines for non-payment of the necessary road taxes, the previous owner will find himself in an unfair situation and which, at this point, could even be considered a legislative void.

Keywords: *sale-purchase contract, road tax, fine, contravention report, complaint, user*.

1. Introduction

The courts of justice have encountered in the recent practice numerous disputes in which the previous owner finds himself in the unfortunate situation of having to file a complaint against a contravention report, despite the fact that the vehicle already had a new owner, but the latter begins and even continues to accumulate fines for non-payment of road taxes.

Consequently, we will timidly try, using the methods of interpreting legal norms, to make the necessary distinctions, on the one hand, and on the other hand, we tend to draw attention to a situation that seems to fall under the umbrella of the concept of legislative void, regarding the following situation: when the new owner is acting in bad faith and refuses or simply unjustifiably postpones to fulfill the obligations that the legislation in force has established to be applied to him.

Thus, in addition to the interpretation of the related legal norms, we will also analyze the solutions available to the previous owner, but we will also take into account the relevant judicial practice, including but not limited to Decision no. 4/2018 pronounced by the High Court of Cassation and Justice, which gave a correct and rather interesting interpretation on the notions of transfer of ownership, user and owner, issues that we will analyze during this present article.

2. Summary of Decision no. 4/2018, pronounced by the High Court of Cassation and Justice

By Decision no. 4/2018, the High Court of Cassation and Justice admitted the appeal in the interest of the law formulated by the Board of the Court of Appeal Cluj and, consequently, establishes that, in the unitary interpretation and application of the provisions of art. 8 para. (1), referred to art. 7 and art. 1 para. (1) b) of the Government Ordinance no. 15/2002 regarding the application of the use tariff and of the road taxes on the national road network in Romania, approved with modifications and completions by Law no. 424/2002, with subsequent amendments and completions:

• in case of transfer of the ownership right over the vehicle, the former owner loses the quality of user and active subject of the contravention consisting in the fact of driving without a valid road tax;

• the proof of the transfer of the property right is made according to the common law.

Therefore, through the appeal in the interest of the admitted law, the High Court of Justice and Justice sought the unitary settlement of some issues that had different approaches from the jurisprudential point of view, interpretations of the courts that resulted in different solutions. Precisely in order to avoid a different application of the same legal issue, the appeal was allowed in the interest of the law and, on this occasion, a number of issues were clarified, such as that of the new holder being the one who needs to be fined for the lack of valid road tax, if the change of ownership is proved.

Even in the content of Decision no. 4/2018, it is clearly stipulated that, "if the ownership of the vehicle was transferred prior to the date of the contravention, by a document under private signature, the document proves until proven otherwise (...) and is opposable to other persons than those who drafted it, from the day when the date of the document became certain (...) ".

In other words, "the date of the documents under private signature becomes certain, according to the Code of Civil Procedure, as follows:

• from the day on which they were presented in order to be given a certain date by the notary public, the bailiff or another competent official in this respect;

• from the day when they were presented to a public authority or institution, this mention being made on documents;

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• from the day they were registered in a register or other public document;

• from the day of death or from the day when the physical inability to write of the person who drafted it or of one of those who subscribed it;

• from the day on which their contents are reproduced, even briefly, in authentic documents, such as conclusions, minutes for sealing or making an inventory;

• from the day on which another event of the same nature occurred which unequivocally proves the anteriority of the document"[1].

3. Analysis of the relevant provisions of the Government Emergency Ordinance no. 195/2002[2] and Government Ordinance no. 15/2002[3]

From the provisions of art. 7 and of art. 1 para. (1) b) of Government Ordinance no. 15/2002 results that the obligation to pay the road tax is incumbent on the owner or user of the vehicle that is mentioned in the registration certificate, respectively the user is the natural or legal person registered in the registration certificate, who owns or who, as the case may be, can use the vehicle under a legal right. By default, it appears that the fault of the previous owner cannot be retained in the situation when the new owner did not register in his name the vehicle already purchased at the time of the fine applied by the competent authorities.

We thus understand to discuss the provisions of art. 11 of the O.U.G. no. 195/2002 on traffic on public roads, in the sense that:

Para. (1): the owners of vehicles or their mandated holders are obliged to register them, before putting them into circulation, according to the legal provisions.

Para. (2): The registration of vehicles is continuous, from the admission to circulation until the definitive decommissioning of a vehicle from the category of those subject to this condition, according to the provisions of this emergency ordinance, and involves the following operations:

a) registration in the records of competent authorities, according to the law, of the acquisition of the property right over a vehicle by the first owner;

b) the transcription in the records of the competent authorities, according to the law, of all subsequent transfers of the ownership right over a vehicle.

Para. (3): The operations provided in para. (2) shall be made on the basis of the identification data of the vehicle and the owner and condition the issuance by the competent authorities, according to law, of a registration certificate, as well as the plates with the assigned registration number and the necessary transcripts in the registration certificate and in ID card of the vehicle.

Para. (4): In case of transfer of ownership over a vehicle, the data of the new owner shall be entered in the National Register of driving licenses and registered vehicles established by the Directorate of Driving Permits and Vehicle Registration simultaneously with the mention of termination of ownership of the registration of the former owner. In order to carry out this operation, the new owner is obliged to request from the competent registration authority the transcription of the transfer of ownership, within 90 days from the date of acquiring the ownership of the vehicle.

According to the provisions of art. 17 of the same normative act, the deregistration of vehicles is made by the authority that carried out the registration only in case of their final removal from circulation, at the request of the owner, in the following cases:

a) the owner wants and requires the final withdrawal of the vehicle and proves its storage in a suitable space, kept in accordance with the law;

b) the owner proves the dismantling, scrapping or handing over the vehicle to specialized units for dismantling;

c) upon the final removal from Romania of the respective vehicle;

d) in case of vehicle theft. Thus, it was not necessary to carry out the deregistration operation, given the express and limiting cases provided for by the legal framework in force.

Consequently, from the analysis of the mentioned legal provisions, it results that all the obligations regarding the communication to the competent authorities regarding the change of the holder of the ownership right over the vehicle belong exclusively to the new owner. Thus, the previous cannot be held liable for slippage from the legal rules of the new owner of the vehicle.

Considering the aforementioned provisions, we appreciate that the previous owner no longer had the quality of user of the car starting with the date of the sale-purchase contract, since at the moment when the fine has been applied he no longer had the quality of being the owner of the latter good. Therefore, in relation to these aspects, the previous owners cannot have the quality of offender for deeds committed after the alienation of the car, as a result of the new owner acting in bad faith and refusing or simply unjustifiably postponing the fulfillment of the obligations that the

[1] See in this respect Alexandru Boiciuc, „*Noul proprietar al mașinii trebuie amendat pentru lipsa rovinietei, nu vechiul proprietar. Decizia ICCJ, obligatorie de azi*", article published on the 7th of May 2018, on the following website: https://www.avocatnet.ro/articol_47787/Noul-proprietar-al-ma%C8%99inii-trebuie-amendat-pentru-lipsa-rovinietei-nu-vechiul-proprietar-Decizia-ICCJ-obligatorie-de-azi.html, accessed on the 17th of February 2021.

[2] Regarding traffic on public roads, published in the Official Journal of Romania no. 670 of August 3rd, 2006, with subsequent amendments and completions.

[3] Regarding the application of the use tariff and the road tax on the Romanian national road network, published in the Official Journal of Romania no. 82 of February 1st, 2002, with subsequent amendments and completions.

legislation in force has established to be applied to latter.

The contravention liability can be incurred only in the charge of a person who has committed an act provided by the contraventional law. Although, in criminal matters, no principle of personal liability has been expressly provided, as in criminal matters, however, this principle can be easily deduced both from the fact that according to ECHR case law, contraventions belong to the sphere of criminal law, as well as and for the purpose of applying a contraventional sanction.

As long as the contraventional sanctions have a punitive and preventive role and in no case reparative, it would be useless to impose a sanction on a person other than the one actually responsible for committing the illicit action or inaction.

4. Regarding the possibility of calling for a guarantee, we appreciate that a series of clarifications are needed

Currently, we can without many doubts mention that the safest solution that the previous owner has at hand, as a seller of the vehicle, is to appeal to the courts the fines received.

However, this approach can bring a number of risks and inconveniences, among which it is important to specify the mechanism of the calling for a guarantee, a concept available to the defendant, in this case, as the buyer of the vehicle.

The guarantee mechanism is one of the forms of forced intervention used on countless occasions in judicial practice, regardless of whether we consider disputes between professionals or individuals, precisely because it presents a number of advantages, the most important being that it has real and powerful potential to avoid contradictory judgments.

Thus, we understand to bring into discussion a decision recently pronounced by the Constitutional Court of Romania, namely Decision no. 854 of December 17th 2019[4], referring to the exception of unconstitutionality of the provisions of art. 73 para. (3) of the Code of Civil Procedure[5]. The latter act ruled in principle on the following:

„As regards the contention that, if, in the reply to the statement of defense, the applicant presents the true evidence on which his claims are based, the defendant would no longer be able to make a claim for guarantee, the Court finds that it cannot be retained, since, according to the rules established by art. 254 of the Code of Civil Procedure, the evidence is proposed, under the sanction of revocation, by the plaintiff by the request for summons, and by the defendant, by the counterclaim. Evidence that has not been proposed in these circumstances may no longer be required and approved during the trial, except in certain cases expressly specified by law, namely, when the need for evidence results from the changes made to the initial application, when the need for evidence arises from the judicial investigation and the party could not foresee it, when the party sees the court that, for duly justified reasons, he could not propose the required evidence in time, when the administration of the evidence does not lead to the postponement of the trial or when there is the express agreement of all parties. Therefore, the defendant will know the plaintiff's claims and the evidence on which they are based since the communication of the summons, there is, usually, no other procedural moment in which to allow the plaintiff to propose new evidence. In reply to the statement of defense, the applicant will not be able to bring evidence other than that which he has already considered necessary to prove his claims in the summons. It is true that, until the first term at which he is legally summoned, the plaintiff can modify his request for a trial, according to art. 204 para. (1) of the Code of Civil Procedure, proposing, accordingly, new evidence but this does not impede the right of the defendant to resort to the guarantee mechanism. This is because, according to the aforementioned text, in such a situation, the court will order the postponement of the case and the communication of the modified request to the defendant, in order to formulate the objections, being analogously applicable the provisions criticized in the present article, which allow him to formulate up to this new procedural moment the request for guarantee. Therefore, the criticism of the alleged infringement of the right to a fair trial cannot be upheld either, from the point of view of the defenses available to the parties during the proceedings."[6].

In the light of the argumentation of the Constitutional Court, however, we understand to bring into discussion the provisions of art. 72 of the Code of Civil Procedure, namely: „(1) The interested party may call on a third party under guarantee, against whom he may file a separate claim for guarantee or compensation. (2) Under the same conditions, the person called under guarantee may call another person under bail".

Consequently, regardless of whether the seller does not submit all the evidence he has, let's assume, at hand, in the hope that the defendant, as the buyer, will not use the guarantee mechanism, this will not be possible to achieve, in relation to the legal provisions retained even by the Constitutional Court of Romania in the aforementioned decision.

However, we consider that the defendant, as a buyer, will be able to call the person who subsequently purchased the same car as collateral, which results from the provisions already revealed, but the latter person

[4] Published in the Official Journal of Romania no. 219 of March 18th, 2020.

[5] Law no. 134/2010 regarding the Civil Procedure Code, published in the Official Journal of Romania no. 247 of April 10th, 2015, with subsequent amendments and completions.

[6] See in this respect the Constitutional Court of Romania, namely Decision no. 854 of December 17th 2010, para. 17.

will no longer have the same procedural mechanism at hand. Otherwise, it would follow that, in order to circumvent any decision of the courts, therefore in order to block an entire system, it would only be necessary to fulfill two conditions, namely: the successive alienation of the vehicle in question, respectively the non-fulfillment of the obligations imposed by the legislation on the buyers.

However, given the well-known situation at the level of the judiciary system, we can only conclude that the sale of a vehicle, in the above conditions, will be made much more quickly than a court will ever have at hand to rule on that dispute. Therefore, a whole series of calls for guarantees would be born, without reaching an effective or practical finality in any way, including violating the right to a fair trial.

On the other hand, it is important to note that, in accordance with Civil Decision no. 66 / 23.06.2016, pronounced by the Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation, "it is inadmissible the request for guarantee made by the plaintiff against third parties, in order to capitalize their claims, in the event of its rejection of the claims made in contradiction with the defendant public authority, which appears as a party to the legal report submitted to the court.

The call for guarantee thus represents that request for forced intervention by which one of the litigants requests the introduction in the litigation of a third party against whom he/she could file a separate action in guarantee or in compensations, claiming its settlement in the pending dispute.

This procedural instrument, not being regulated as a form of modification / completion of the summons by the will of the plaintiff or the defendant, is not intended to make it possible to attract a new defendant in the litigation, but, in principle, to create a new legal relationship of procedural law between the holder of the request for forced intervention and the one called in guarantee.

A characteristic element of the guarantee application is the existence of a dependency and subordination link between the main application and the guarantee application, the solution of the first application essentially influencing the solution of the guarantee application.

In other words, so far as there is a rejection of the action brought by the applicant, the legal reality is not altered as a result of the judgment given, so as to allow the conclusion that at that time the claim for damages or guarantee claimed could ne born. At the same time, an admission of the request for the initial application will result in the rejection of the request for guarantee as being without object or without interest[7]".

That is the reason why we understand to refer to the call for guarantee made by the defendant, of interest to this article and we conclude that, currently, the caller on guarantee no longer has the possibility to call, in return, another person on guarantee.

The above conclusion is supported, for example, by the arguments consulted in the content of Decision no. 3908/21 October 2014, pronounced by the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section[8], by which the following were retained: "In law, according to the provisions of art. 72 para. (1) the interested party may call on a third party under guarantee, against whom he could go with a separate claim for bail or compensation.

The High Court of Cassation and Justice, in accordance with the solution of the first instance, finds that the mentioned provisions expressly provide that "a third party" may be summoned as a guarantee, the doctrine accepting the possibility of formulating a request for guarantee between the parties in the trial only in the situation of passive procedural co-participation, by the summoning of a defendant by another defendant, and not between the plaintiff and the defendant, the former being able to capitalize his claims through the request for summons, modified according to the provisions of art. 204 Civil Procedure Code, until the first term at which he was legally summoned.

It is also noted that if in the previous regulation was provided the notion of calling another person to guarantee, the legislator through the New Code of Civil Procedure restricted this possibility".

5. Conclusions

In the case of a vehicle that has changed ownership, the new owner must be fined for driving on public roads without a valid road tax, not the previous owner. In the event that the previous user will be fined, he can appeal to the courts of justice, in compliance with the mandatory deadlines, through a complaint.

However, a really useful and fair step would be for the obligations to notify the competent authorities of the alienation of a vehicle, in this case through a contract of sales, to be found also at the disposal of the former owner, in this case having the status of seller.

An even more useful step would be to modernize and correct the databases of all the competent authorities involved, especially the databases of the Romanian police and town halls, for a much easier and correct identification of the reality of the person that can be regarded as the present owner or even user of a vehicle at a certain timeframe.

[7] Extract available at the following web address: https://www.legal-land.ro/chemarea-garantie-conditii-de-admisibilitate/, accessed on the 19th of February, 2021.

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Case-law:

- Decision no. 854 of December 17th, 2019 of the Constitutional Court of Romania;
- Civil Decision no. 66 of June 23rd, 2016 of the Bucharest Court of Appeal, Section VIII Administrative and Fiscal Litigation;
- Decision no. 3908 of October 21st, 2014 of the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section.

Legislation:

- Law no. 134/2010 on the Civil Procedure Code;
- Government Emergency Ordinance no. 195/2002 regarding traffic on public roads;
- Government Ordinance no. 15/2002 regarding the application of the use tariff and the road tax on the Romanian national road network.

Websites:

- http://www.avocatnet.ro/;
- https://www.legal-land.ro/;
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ROMANIAN OMBUDSMAN AND CONSTITUTIONAL COURT, DEFENDERS OF FUNDAMENTAL RIGHTS AND PARTNERS OF PUBLIC AUTHORITIES TO ENSURE THE RULE OF LAW, IN THE CONTEXT OF COVID-19 PANDEMIC

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Abstract

Currently, both internationally and nationally, the Covid-19 pandemic generates an atypical situation, with profound effects on the social and political aspects of society. The provocation of such an element of novelty is transposed also in the legal plan under the aspect of the regulations meant to ensure the establishment of clear rules of conduct, with obvious impact on the fundamental rights and freedoms. The present study proposes an analysis of the relations between the Ombudsman and the Constitutional Court, fundamental institutions of the state, which contributed to ensuring respect for fundamental rights. The Ombudsman raised before the Constitutional Court a series of constitutionality issues of some normative acts which urgently regulated aspects necessary for the management of the pandemic, with implications on fundamental rights, (the right to free movement, the right to health care, the right to property, free access to justice, the right to intimate, family and private life, economic freedom). These issues to be analyzed concerned the constitutionality control of some provisions regarding the adoption of measures during the state of emergency established by the Decree of the Romanian President, the establishment of sanctions for violating the rules established in the normative acts on the state of emergency, the establishment of quarantine, the establishment of the state of alert, as well as other measures in the field of public health in situations of epidemiological and biological risk.

The analysis of the activity of the two institutions highlights the efficiency of legal mechanisms that ensure the protection of fundamental rights in Romania and emphasizes, especially during this period, the need to perpetuate loyal cooperation between state authorities, in the spirit of principle and separation and balance and the rule of law, as a solid guarantee of respect for fundamental rights.

Keywords: *Ombudsman, Constitutional Court, fundamental rights protection, rule of law, constitutional review, Covid-19 pandemic.*

1. Introduction

The atypical situation generated by the Covid-19 pandemic brought to the level of social and legal reality a series of aspects that aimed at the constitutional observance of certain rights and freedoms or fundamental principles with impact on fundamental rights and freedoms.

In this context, is to be analyzed the relationship between two fundamental institutions, the Romanian Ombudsman, as guardian of the individuals rights and freedoms[1] of and the Constitutional Court in its capacity of "*guarantor of the supremacy of the Constitution*"[2], whose constitutional and legal role reveals the importance of their current functioning in the Romanian state governed by the rule of law, according to the provisions of art. 1 par. (3) of the Constitution. The importance of this analysis lies in highlighting some concrete situations that raised constitutional problems, solved by the way of constitutional review, the legal mechanism by which the rule of law and the rights and freedoms are effectively secured. Thus, the involvement of the two state institutions in ensuring and guaranteeing the observance of fundamental rights and freedoms in the rule of law is highlighted, so that their establishment by the Fundamental Law does not become a simple illusory declaration, with purely theoretical valences.

Health-crisis period of COVID-19 was marked by the adoption of legislative acts (laws and Government emergency ordinances), by which the state authorities, faced with the challenges of intense looking to protect population of the threat of COVID-19 imposed a number of measures to combat the virus and imposed a number of new rules. However, the respect for fundamental rights remained an inherent imperative of the rule of law.

In exercising its constitutional and legal role, Ombudsman raised before the Constitutional Court some issues of unconstitutionality in the case of some normative acts regulating measures during the state of emergency imposed by the Decree of the Romanian President establishing the state of emergency on the Romanian territory, the establishment of contravention sanctions for violating the rules established in the normative acts regarding the state of emergency, the establishment of quarantine, the establishment of the state of alert, as well as other measures in the field of public health in epidemiological and biological risk situations. Starting from the jurisprudence of the

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[1] See art. 58 para. (1) of the Romanian Constitution of 1991, revised by the Constitutional Law no. 29/2003, approved by referendum on 18-19 October 2003, republished in the Official Gazette of Romania, part I, no. 767 of 31 October 2003.

[2] See art. 142 para. (1) of the Romanian Constitution.

Constitutional Court, concretized for example, by Decision no. 152 of May 6, 2020[3], Decision no. 457 of June 25, 2020[4], Decision no. 458 of June 25, 2020[5], or Decision no. 751 of October 20, 2020[6], without carrying out an analysis of the opportunity of the actions of the Ombudsman in this context , which exceeds this scientific approach, the present paper proposes an analysis of the issues that have been subject to constitutional review, summarizing the criticisms of unconstitutionality brought by the Ombudsman regarding these normative acts, the solutions pronounced by the Constitutional Court in these cases and considerations that substantiated them.

2. Paper Content

As an introduction, we consider it useful to present in essence the constitutional and legal grounds that give the Ombudsman the right to refer to the Constitutional Court with exceptions of unconstitutionality, within the *a posteriori* constitutionality control[7]. In this sense relevant are the considerations stated by the Constitutional Court by Decision no. 464 of July 18, 2019 on the legislative proposal to revise the Constitution of Romania[8], according to which "limiting the power of the Ombudsman to challenge directly before the Constitutional Court the constitutionality of only those laws regarding the relations between citizens and public authorities is unconstitutional", and, "the elimination of the power of the Ombudsman to directly challenge the constitutionality of the laws before the Constitutional Court violates the limits of the revision established in art. 152 par. (2) of the Constitution, being a suppression of an institutional guarantee associated with the defence of fundamental rights and freedoms".

The Court reiterated, in this context, the fact that the constitutional protection of the citizen is an ascending one, so that the constitutional revisions must also grant an increasing protection to him ". The protection of fundamental rights and freedoms, within the meaning of art. 152 par. (2) of the Constitution can know only an ascending orientation[9].

According art. 146 lit. d) of the Constitution, "The Constitutional Court has the following attributions: [...] d) decides on the exceptions of unconstitutionality regarding the laws and ordinances, raised before the courts or commercial arbitration; the exception of unconstitutionality can also be raised directly by the People's Advocate ; ".

In applying these constitutional provisions, Law no. 35/1997 on the organization and functioning of the Ombudsman[10], provides in art. 15 para. (1) letter i): „ (1) The People's Advocate has the following attributions: [...]; i) may directly notify the Constitutional Court for the unconstitutionality of laws and ordinances;".

Symmetrically, Law no. 47/1992 on the organization and functioning of the Constitutional Court[11], provides in art. 32: "The Constitutional Court decides on the exceptions of unconstitutionality raised directly by the People's Advocate regarding the constitutionality of a law or ordinance or of a provision of a law or ordinance in force."

Based on these constitutional and legal provisions, the Ombudsman raised directly before the Constitutional Court a series of unconstitutionality exceptions that concerned provisions from Government emergency ordinances or provisions from laws that produced legal effects in the context of the COVID-19 pandemic.

2.1. Analysis of the constitutionality of some provisions regarding the establishment and application of contravention fines, in case of violation of the rules established for combating the pandemic in relation to the principle of legality and the presumption of innocence

The problem of establishing and applying contravention fines, in case of violation of the rules established for combating the pandemic was analyzed on the occasion of solving the exception of unconstitutionality[12] of the provisions of art. 9, art. 14 lit. c ^{1})-f) and art. 28 of the Government Emergency Ordinance no. 1/1999 regarding the state of siege regime and the regime of the state of emergency and of the emergency ordinance, as a whole, as well as

[3] Published in the Official Gazette of Romania, Part I, no. 387 of 13 May 2020.
[4] Published in the Official Gazette of Romania, Part I, no. 578 of July 1, 2020.
[5] Published in the Official Gazette of Romania, Part I, no. 581 of July 2, 2020.
[6] Published in the Official Gazette of Romania, Part I, no. 1264 from December 21, 2020.
[7] *"Even if the exceptions of unconstitutionality are not limited to fundamental rights or freedoms that the Ombudsman was given the power to petition the Constitutional Court, this is itself a legal instrument of intervention institutional to achieve its mission, namely the protection of human rights and fundamental freedoms".* see Benke K., M.S. Costinescu, Control of constitutionality in Romania: the exception of unconstitutionality, Hamangiu Publishing House, Bucharest, 2020, p. 117.
[8] Published in the Official Gazette of Romania, Part I no. 646 of August 5, 2019.
[9] Decision no. 80 of February 16, 2014 , published in the Official Gazette of Romania, Part I, no. 246 of April 7, 2014.
[10] Republished in the Official Gazette of Romania, Part I , no. 181 of February 27, 2018.
[11] Published in the Official Gazette of Romania, Part I, no. 807 of December 3, 2010.
[12] The object of the exception of unconstitutionality is art. 9, art. 14 lit. c ^{1}) -f) and art. 28 of the Government Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, published in the Official Gazette of Romania, Part I, no. 22 of January 21, 1999, approved with amendments and completions by Law no. 453/2004 , with subsequent amendments and completions, Government Emergency Ordinance no. 1/1999 , as a whole, as well as the Government Emergency Ordinance no. 34/2020 for the amendment and completion of the Government Emergency Ordinance no. 1/1999 regarding the state of siege and the regime of state of emergency, published in the Official Gazette of Romania, Part I, no. 268 of March 31, 2020, as a whole.

of the Government Emergency Ordinance no. 34/2020 for the amendment and completion of the Government Emergency Ordinance no. 1/1999 on the state of siege and the state of emergency, as a whole.

Ombudsman considered that art. 9 and art. 28 of the Government Emergency Ordinance no. 1/1999, violates the provisions of the Constitution contained in art. 1 par. (5) regarding the principle of legality and of art. 23 par. (11) on the presumption of innocence, arguing, essentially, that the criticised provisions impose a general obligation to respect certain rules, without criminalize a concrete act and impose sanctions, without giving minimum objective criteria in their application, which can generate arbitrariness.

By Decision no. 152 of May 6, 2020, Constitutional Court, with unanimous votes[13] decided the admission of the exception of unconstitutionality formulated by the People's Advocate and found that the provisions of art. 28 of the Government Emergency Ordinance no. 1/1999 are unconstitutional.

The Court noted that in the matter of regulating the legal regime of contraventions, the Government Emergency Ordinance no. 1/1999 is a special law that provides the sanction of a fine and, as complementary sanctions, the confiscation of goods intended, used or resulting from the contravention, the prohibition of access by applying the seal by the competent bodies, the temporary suspension of activity, the abolition of works and restoration some arrangements. The application of contravention sanctions, respectively the actual sanctioning of the subject of law for disregarding the norms of contravention law, takes place according to some principles: the principle of legality of contravention sanctions, the principle of proportionality of contravention sanctions and the principle of uniqueness in idem).

Regarding the principle of the quality of the laws, the Court reiterated its jurisprudence[14] and invoked the jurisprudence of the European Court of Human Rights[15], holding that the rule must be drafted with sufficient precision to enable the citizen to monitor his conduct so that he is able to provide for a reasonable measure, the consequences that could result from the commission of a certain deed. The law must clearly define the applicable contraventions and sanctions, being necessary that the recipient of the norm knows from the text of the applicable legal norm which are the acts, facts or omissions that can engage his contravention liability.

The Court has noted that art. 28 par. (1) corroborated with art. 9 par. (1) of the Government Emergency Ordinance no. 1/1999 does not clearly and unequivocally indicate the acts, facts or omissions that constitute contraventions, nor do they allow their easy identification, by referring to the normative acts with which the incriminating text is in connection. Thus, art. 9 par. (1), which speaks of "*all the measures established in this emergency ordinance, in the related normative acts, as well as in the military ordinances or in orders, specific to the established state*", cannot be considered a reference norm, since it is not indicates accurately the legal referenced. Thus, the legislator enacted provisions that are unable to achieve the purpose for which they were established.

The provisions of art. 28 par. (1), by the phrase "non-compliance with the provisions of art. 9 constitutes a contravention", qualifies as a contravention the violation of the general obligation to respect and apply all the measures established in the Government Emergency Ordinance no. 1/1999, in the related normative acts, as well as in the military ordinances or in orders, without expressly distinguishing the acts, facts or omissions that may attract the contravention liability. Implicitly, the establishment of the facts whose commission constitutes contraventions is left, arbitrarily, at the free discretion of the ascertaining agent, without the legislator having established the criteria and conditions necessary for the operation of ascertaining and sanctioning the contraventions. At the same time, in the absence of a clear representation of the elements that constitute the contravention, the judge himself does not have the necessary benchmarks in the application and interpretation of the law, on the occasion of resolving the complaint on the record of finding and sanctioning the contravention.

The criticized legal provisions do not respect the principle of proportionality either, a principle that has its origin in the provisions of art. 53 par. (2) of the Constitution and which allows the restriction of the exercise of certain fundamental rights or freedoms only insofar as such a limitation is necessary in a democratic society and is proportionate to the situation that determined it. The provisions of art. 28 of the Government Emergency Ordinance no. 1/1999 does not concretely foresee the facts that attract the contravention liability, but also establish for all these deeds, regardless of their nature or gravity, the same main sanction. Regarding the complementary contravention sanctions, although the law stipulates that they are applied according to the nature and gravity of the deed, as long as the deed is not circumscribed, obviously its nature or gravity cannot be determined in order to establish the applicable complementary sanction.

In conclusion, the Court found that, since the provisions of the law subject to constitutional review impose a general obligation to comply with an indefinite number of rules, with identifiable difficulty, and establish sanctions for offenses, without

[13] See the concurrent opinion formulated by two judges of the Constitutional Court.

[14] For example, Decision no. 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, no. 190 of 14 March 2016, Decision no. 405 of 15 June 2016, published in the Official Gazette of Romania, Part I, no. 517 of July 8, 2016.

[15] For example, Judgment of 15 November 1996 in *Cantoni v. France*, paragraph 29; Judgment of 12 February 2008 in *Kafkaris v. Cyprus*, paragraph 140; Judgment of 21 October 2013 in *Del Rio Prada v. Spain*, paragraphs 78, 79 and 91.

incriminating concrete facts, it violates the principles of legality and proportionality. The Court has found that art. 28 of the Government Emergency Ordinance no. 1/1999, characterized by a deficient legislative technique, do not meet the requirements of clarity, precision and predictability and is thus incompatible with the fundamental principle regarding the observance of the Constitution, its supremacy and the laws, provided by art. 1 par. (5) of the Constitution, as well as with the principle of proportional restriction of fundamental rights and freedoms, provided by art. 53 par. (2) of the Constitution.

The imprecision of the analyzed text of law affects, consequently, the constitutional guarantees that characterize the right to a fair trial, enshrined in art. 21 par. (3) of the Constitution, including its component regarding the fundamental right to defence, provided by art. 24 of the Constitution.

2.2. Issue of constitutionality concerning the affecting of some rights and fundamental freedoms by adopting a Government emergency ordinance

Ombudsman alleged the violation of art. 115 par. (6) of the Constitution, according to which "Emergency Ordinances […] may not affect the regime of fundamental state institutions, rights, freedoms and duties provided by the Constitution", arguing that the Government Emergency Ordinance no. 34/2020 which amends the Emergency Government Ordinance no. 1/1999 on the state of siege and the state of emergency, by the manner of evasive and general regulation of contraventions and of the applicable sanctions, by suspending the application of legal norms regarding decision-making transparency and social dialogue during the state of siege and the state of emergency affect fundamental rights, such as the right to private property, the right to work and social protection of labour and the right to information. The Ombudsman stressed that the premise of any regulation, even during a state of emergency, must be the rule of law, a principle that enshrines a series of guarantees to ensure respect for the rights and freedoms of citizens, and the inclusion of public authorities in the frame of law.

Analyzing these criticisms, the Constitutional Court admitted the exception of unconstitutionality and found that the Government Emergency Ordinance no. 34/2020 is unconstitutional, as a whole[16].

The Court held that the Emergency Government Ordinance no. 34/2020 modifies the legal regime of the state of siege and of the state of emergency under the aspect of contravention liability in case of non-compliance or immediate non-application of the measures established in the Government Emergency Ordinance no. 1/1999, introducing complementary contravention sanctions, such as the confiscation of the goods intended, used or resulting from the contravention and the temporary suspension of the activity. Taking into considerations the legal nature of administrative sanctions, it turns out that they affect the fundamental right to property, as well as the economic freedom.

At the same time, the suspension of legal norms on transparency in decision making and social dialogue during the emergency state affect fundamental rights such as the right to information, the right to work and to social protection of labour, as well as the regime of a fundamental institution of the state (Economic and Social Council). In these circumstances, the Court found that Government Emergency Ordinance no. 34/2020 is unconstitutional, as a whole, as it was adopted in violation of the constitutional provisions contained in art. 115 par. (6).

2.3. Analysis of the constitutionality of the legal provisions regarding the competence of the President of Romania in the establishment of the state of emergency

Ombudsman invoked also the exception of unconstitutionality of Emergency Government Ordinance no. 1/1999, arguing that its legal provisions allow Romanian President to legislate in areas where the Constitution requires the Parliament or Government intervention. The Ombudsman claimed that in applying the legal criticized provisions, by the Decree of the President of Romania no. 195/2020 on the establishment of the state of emergency on the territory of Romania and by Decree no. 240/2020 on the extension of the state of emergency on the territory of Romania were temporarily restricted, expressly, but also implicitly, a series of rights: the right to free movement, the right to work, the right to education, free access to justice, the right to strike, the right to intimate, family and private life, freedom of assembly, the right to free movement, economic freedom.

Analyzing these criticisms, the Constitutional Court rejected the exception of unconstitutionality and found that the provisions of the Government Emergency Ordinance no. 1/1999 are constitutional in relation to the criticisms made[17].

Court held essentially that Decree of the President of Romania establishing the state of emergency is an administrative normative act, setting out the concrete measures to be taken and fundamental rights and freedoms whose exercise will be restricted. This act is issued under the condition of being approved by a decision of the Parliament, the non-fulfilment of the condition entailing the immediate revocation of the decree and the cessation of the applicability of the ordered measures. The President's administrative act concerns a relationship with Parliament and is exempt from judicial review by administrative litigation, but may be subject to constitutional review by the Constitutional Court, whether or not Parliament approves the state of emergency.

Court observed that the Emergency Government Ordinance no. 1/1999 rigorously establishes the limits

[16] See Decision no. 152 of 6 May 2020, cited above.
[17] See Decision no. 152 of 6 May 2020, cited above.

within which the President can act, and there are no equivocal provisions regarding the character of an administrative act for the execution of the law by the President's decree.

The restraint of certain rights is not done by presidential decree, the provisions of art. 14 lit. d) of the Government Emergency Ordinance no. 1/1999 constituting only the norm by which the primary legislator empowers the administrative authority (the President of Romania) to order the execution of the law, respectively of the provisions of art. 4 of the same normative act which expressly provides for the possibility of restricting the exercise of rights. Acting within the limits of his legal powers, the President identified the rights and freedoms whose exercise was to be restricted (free movement, right to privacy, family and private life, inviolability of home, right to education, freedom of assembly, right to private property, right to strike, economic freedom).

The Court also found that no legal provision in Government Emergency Ordinance no. 1/1999, does not entitle the President to adopt norms with the rank of law, so that the Constitutional Court did not hold the violation of the invoked constitutional norms.

Also Court said that accepting the state of emergency, the Romanian Parliament was required to verify the fulfilment of constitutional and legal conditions that presidential decree must comply with.

Regarding the criticism of unconstitutionality in relation to art. 115 par. (6) of the Constitution, in terms of affecting certain fundamental rights, the Court held that the Government Emergency Ordinance no. 1/1999, by its very incidence hypothesis - crisis situations that impose exceptional measures that are instituted in cases determined by the appearance of serious dangers to the defence of the country and national security, of constitutional democracy or to prevent, limit or eliminate the consequences of disasters - it is aimed at restricting the exercise of certain fundamental rights or freedoms. Therefore, a normative act with such an object of regulation affects both the fundamental rights and freedoms of the citizens, as well as the fundamental institutions of the state, falling within the scope of the interdiction provided by art. 115 par. (6) of the Constitution. Therefore, the legal regime of the state of siege and the state of emergency, in the current constitutional framework, can be regulated only by a law, as a formal act of the Parliament, adopted in compliance with the provisions of art. 73 par. (3) lit. g) of the Constitution, in the regime of organic law.

At the same time, the Court noted that Government Emergency Ordinance no. 1/1999 was adopted and entered into force prior to the amendment of the Romanian Constitution in 2003, and the provisions of art. 115 par. (6) invoked as being violated were introduced by the Law on the revision of the Romanian Constitution no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of October 29, 2003. Therefore, at the date of adoption of the criticized normative act, the constitutional norm did not limit the legislative prerogative of the Government to affect the regime of fundamental state institutions or the rights and freedoms provided by the Constitution, so that Government Emergency Ordinance no. 1/1999 was considered to be adopted in compliance with the constitutional framework in force at that time , retaining its constitutional character.

2.4. Analysis of the constitutionality of the establishment of the state of alert in relation to the right of free access to justice and the right of person injured by a public authority

The issue of establishing the state of alert was submitted to the constitutionality control on the occasion of solving the exception of unconstitutionality[18] of the provisions of art. 4 par. (3) and (4), as well as of art. 65 lit. s) and ş), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ş) and t) and of art. 67 par. (2) lit. b) regarding the references to art. 65 lit. s), ş) and t) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic.

The Ombudsman invoked the violation of the constitutional provisions contained in art. 1 par. (4) and par. (5) regarding the principle of separation and balance of powers in the state and the quality of the law, art. 21 on free access to justice, art. 52 regarding the right of the person injured by a public authority, art. 108 regarding the acts of the Government and in art. 126 par. (6) regarding the courts , claiming that the provisions of art. 4 par. (3) and (4) of Law no. 55/2020 are unconstitutional because they allow an intervention of the Parliament on the Government's decision to establish the state of alert and exclude this decision from the scope of administrative acts subject to judicial control.

Regarding the provisions of art. 65 lit. s) and ş), of art. 66 lit. a), b) and c) and of art. 67 para. (2) lit. b) of Law no. 55/2020, the Ombudsman claimed that they lack clarity and predictability, as the material object of the contravention is uncertain and ambiguous, due to the reference to a legal norm that does not exist in the active substance of the legislation , contrary the constitutional provisions of art. 1 par. (5) regarding the quality of the law.

By Decision no. 457 of June 25, 2020 , the Constitutional Court admitted the exception of unconstitutionality raised directly by the People's Advocate and found that the provisions of art. 4 par. (3) and (4) of Law no. 55/2020 are unconstitutional[19].

[18] The object of the exception of unconstitutionality is the provisions of art. 4 par. (3) and (4), of art. 65 letters s) and ş), of art. 66 lit. a), b) and c) and of art. 67 para. (2) lit. b) of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 396 of May 15, 2020.

[19] Regarding the provisions of art. 65 lit. s) and ş), of art. 66 lit. a), b) and c) regarding the references to art. 65 lit. s), ş) and t) and of art. 67 para. (2) lit. b) regarding the references to art. 65 lit. s), ş) and t) of Law no. 55/2020 ,the Court found that the provisions governing in

The Court held that the provisions of art. 4 par. (1) of Law no. 55/2020 set up the competence of the Government to establish, by decision, the state of alert. The concept of alert state is defined in art. 2 of the same law, by which is meant "*the response to an emergency situation of special magnitude and intensity, determined by one or more types of risk, consisting of a set of temporary measures, proportional to the level of severity manifested or forecast and necessary for the prevention and removal of imminent threats to life, health, the environment, important material and cultural values or property*."

According to art. 4 par. (2) of Law no. 55/2020 , "The state of alert is established on the entire territory of the country or only on the territory of some administrative-territorial units, as the case may be." For the situation in which the state of alert is established on at least half of the administrative-territorial units on the territory of the country, the legislator provided the rule according to which the measure established by Government decision it is subject to the approval of Parliament, which may approve it in full or with amendments. Thus, the "approval in full or with modifications" presupposes the intervention of the Parliament on the Government's decision to establish the state of alert. Thus, a new institution appears configured through the criticized legal texts, namely that of the Government decision approved / modified by the Parliament, an institution created probably by "analogy" with the institution of the decree establishing the state of siege or state of emergency , which benefits of constitutional consecration and express constitutional rules.

Instead, the institution of the state of alert is an exclusive creation of the legislator. This institution must comply - pursuant to art. 1 par. (5) of the Constitution which enshrines the observance of the Constitution and its supremacy - the constitutional framework of reference, respectively, in this case, the constitutional regime that governs the relations between the Parliament and the Government and their acts .

But, by "approval in full or with modifications" on the Government decision on the state of alert, Parliament combines the legislative and executive functions, contrary to the principle of separation and balance of powers enshrined in art. 1 par. (4) of the Constitution . At the same time, a confusing legal regime of the Government decisions is created , such as to raise the issue of their exemption from judicial control, with the consequence of violating the provisions of art. 21 and art. 52 of the Constitution , which enshrines the free access to justice and the right of the injured person by a public authority.

Hence, the Court held that the formulated criticisms are well-founded, with the consequence of the unconstitutionality of art. 4 para. (3) and (4) of Law no. 55/2020.

2.5. Analysis of the constitutionality regarding the Minister of Health competence on the establishment by its order, the prevention and management of emergencies caused by epidemics and transmissible diseases, treatment or hospitalization and to decide the measure of quarantine in relation to individual freedom, right to free movement and the right to intimate, family and private life

The issues on the Minister of Health competence to establish by its order the measures on prevention and management of emergencies caused by epidemics and communicable diseases for which declaration, treatment or hospitalization are required and the establishment of quarantine were subject to constitutional review with the occasion of solving the exception of unconstitutionality[20] of the provisions of art. 25 par. (2) of Law no. 95/2006 on the reform in the field of health and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 on emergency medical stocks, as well as some measures related to the establishment of quarantine.

The Ombudsman claimed that the criticized legal provisions infringed the provisions of the Constitution contained in : art. 1 par. (5) regarding the obligation to respect the Constitution, its supremacy and the laws, art. 23 par. (1) regarding the inviolable character of the individual freedom and of the security of the person, art. 25 on free movement, art. 26 regarding intimate, family and private life, art. 53 regarding the restriction of the exercise of some fundamental rights or freedoms and art. 115 para. (6) regarding the interdiction to affect by emergency ordinances the rights and freedoms provided by the Constitution, as well as art. 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, on the right to liberty and security of person.

The Ombudsman claimed that the provisions of art. 25 par. (2) of Law no. 95/2006 and those of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 are unconstitutional because they assign the power of an administrative authority, the minister of health, to set the mandatory quarantine and hospitalization to prevent the spread of contagious diseases, which involve measures restricting fundamental rights without being established in legislation the conditions, the procedure and the limits within which the public administration authorities can act in the sense of restricting these rights, respectively

contravention area proved lack of accessibility, clarity, precision and predictability, being contrary to art. 1 para. (5) of the Constitution which enshrines the principle of legality, the component regarding the quality of the law.

[20] The object of the exception of unconstitutionality is art. 25 para. (2) of Law no. 95/2006 on health care reform, republished in the Official Gazette of Romania, Part I, no. 652 of August 28, 2015, and art. 8 para. (1) of the Government Emergency Ordinance no. 11/2020 on medical emergency stocks, as well as some measures related to the establishment of quarantine, published in the Official Gazette of Romania, Part I, no. 102 of February 11, 2020.

the guarantees that protect the citizens from a possible illegal, discretionary or abusive application of these measures.

By Decision no. 458 of June 25, 2020, with unanimous votes, regarding the provisions of art. 25 par. (2) the first sentence of Law no. 95/2006 and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 , and with a majority of votes[21], regarding the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 , the Constitutional Court admitted the exception of unconstitutionality and found that the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 and of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 are unconstitutional. Also, the Constitutional Court rejected, as unfounded, the exception of unconstitutionality and found that the provisions of art. 25 par. (2) the first sentence of Law no. no. 95/2006 are constitutional in relation to the formulated criticisms.

Thus, the Court held that art. 25 par. (2) of Law no. 95/2006 obviously aims to face critical situations, which call firm, coherent and adequate interventions for the defence of public health, which may also involve restrictions on the exercise of certain rights or fundamental freedoms.

The art. 25 par. (2) the first sentence of Law no. 95/2006 , which enshrines the competence of the Minister of Health to issue orders in order to establish measures for the prevention and management of emergencies generated by epidemics, is not contrary to the provisions of the Constitution, but is an expression of the role of public administration to ensure law enforcement and to satisfy the general interest of society - the protection of public health. An eventual exceeding of the constitutional and legal framework in which the Minister of Health acts in application of the analyzed text of law may be subject to the control of the administrative contentious courts, not representing an aspect that belongs to the control of the Constitutional Court.

Regarding art. 25 par. (2) the second thesis of Law no. 95/2006 , the Court noted that Health Minister has the power to determine diseases for which declaration, treatment or hospitalization are required. As the regulation does not establish the criteria on the basis of which the Minister decides in the sense indicated above, it appears that he enjoys, in reality, the freedom to establish the conditions under which, in the case of certain communicable diseases, the declaration, treatment or compulsory hospitalization are required. The provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 expressly refers to the measures regarding the obligation of the persons who have been diagnosed with some communicable diseases to declare this diagnosis, to follow treatment or to be hospitalized, even without their consent. This text of the law is the only regulatory framework for these measures and, consequently, the only ground for primary legislation under which the Minister can issue orders to oblige citizens to declare, receive treatment or hospitalize if they have a transmissible disease. The provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 , having a incomplete character, entrust the Minister of Health with the fulfilment of the obvious legislative omissions in the regulated matter, by issuing orders.

Recalling its jurisprudence, which stated the principle that any law must meet certain qualitative conditions, among them the predictability[22], the Court held that the task of the minister is to complete the regulation regarding the conditions in which the persons with communicable diseases are obliged to declare, to undergo treatment or to be hospitalized, as well as the freedom to modify at any time and without respecting certain limits, the provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 acquire an unpredictable, uncertain and difficult to anticipate character , being contrary to the provisions of art. 1 par. (5) of the Constitution , from which derive the conditions regarding the quality of the legal norm.

However, the effects of the found unconstitutionality issues appear even more significant if it is taken into account that the compulsory hospitalization of persons with communicable diseases involve measures that infringe fundamental rights and freedoms (individual freedom, free access to justice, the right to free movement.

In its analysis, the Court started from the regulation of individual freedom through the provisions of art. 23 of the Constitution, also retaining the provision in this matter from international legal acts[23] and aspects of the case law of the European Court of Human Rights[24].

Court held that the legal detention of a person liable to transmit a contagious disease is a deprivation of liberty that can be accepted in a society to ensure public health and safety, but is only allowed with the conditions and procedure established by law, being excluded arbitrariness. Also, any person must enjoy the possibility of challenging in court the measure of social medical detention in a short time, so that, in case of finding the illegality of the ordered measure, the person can be released.

[21] See the separate opinion formulated by one of the judges of the Constitutional Court.

[22] See, to that effect, Decision no. 903 of July 6, 2010, published in the Official Gazette of Romania, Part I, no. 584 of August 17, 2010 or Decision no. 447 of January 29, 2013, published in the Official Gazette of Romania, Part I, no. 674 of November 1, 2013.

[23] Article 3 of the Universal Declaration of Human Rights: "*Every human being has the right to life, liberty and security of person*" ; Article 9, paragraph 1, of the International Covenant on Civil and Political Rights : "*Every individual has the right to to the liberty and security of his person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except for legal reasons and in accordance with the procedure laid down by law.* "; Article 5 of the Convention for the Defense of human rights and fundamental freedoms regarding the right to liberty and security.

[24] See Judgment of 25 January 2005 in *Enhorn v. Sweden* , Judgment of 8 January 2009 in *Kuimov v. Russia* , Decision of 7 May 2013 in *Koufaki and Adedy v. Greece,* or Judgment of 20 March 2018 in *Mehmet Hasan Altan v. Turkey.*

Analyzing the domestic legislation regulating the measure of involuntary hospitalization[25], the Court noted that provisions of art. 25 par. (2) the second thesis of Law no. 95/2006 , referred to a hypothesis that the legal texts mentioned above do not cover, respectively the one in which the hospitalization can be ordered against the will of the person in order to prevent the spread of a communicable disease. However, the provisions of Law no. 95/2006 are not accompanied by safeguards appropriate to you and, through this legislative omission, violated the constitutional provisions of art. 23 par. (1), art. 53 and art. 20, by reference to the provisions of art. 5 paragraph 1 letter e) and paragraphs 4 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms and of art. 9 paragraph 1 of the International Covenant on Civil and Political Rights.

The mere mention of a measure of deprivation of liberty, such as compulsory hospitalization to prevent the spread of transmissible diseases, cannot, however, be regarded as sufficient to satisfy the condition of legality. Only the law, not the subsequently acts, must provide the reasons and conditions under which such a measure may be ordered, the person's right to appeal against the act under which the measure was taken and ensure safeguards for effective access to justice. The legislator must also keep in mind that the provisions on compulsory hospitalization are the last option that the authorities can use to achieve the goal of preventing the spread of a transmissible disease, so it is necessary to regulate other measures of lower severity to be applied, if effective. The legislature should not ignore the impact that compulsory hospitalization can have on people in care or in the care of the person admitted.

The hospitalisation to prevent the spread of communicable diseases involves the restriction of other fundamental rights such as the right to free movement and, in some cases, the right to intimate, family and private life, enshrined in art. 25 and 26 of the Constitution and therefore, it is necessary to comply with the constitutional requirements of art. 53 regarding the restriction of the exercise of certain rights or freedoms.

Regarding the provisions of art. 8 para. (1) of the Government Emergency Ordinance no. 11/2020, the Court addressed a similar argument and noted that they provide, essentially, the quarantine and competence of the Minister of Health on this measure, representing the only regulatory primary legislation on establishing quarantine measure. Thus, the legislator left it to this administrative authority to establish the types of quarantine, the conditions for the establishment and termination of the measure, ignoring the need to regulate guarantees for the observance of the fundamental rights of the persons to whom this measure was applied. The regulation is therefore lacking in clarity and predictability, so that a person cannot reasonably anticipate the concrete manner and extent of the restrictive measures of rights. Therefore, the provisions of art. 8 par. (1) of the Government Emergency Ordinance no. 11/2020 do not meet the conditions regarding the quality of the normative acts deriving from the constitutional provisions of art. 1 par. (5).

The unconstitutional character of the norm appears all the more obvious since, similar to the obligatory hospitalization to prevent the spread of a transmissible disease, quarantine involve, depending on the form of the measure, the restriction, if not the deprivation of liberty of the person. Therefore, it is necessary to establish by law, the conditions for the establishment of quarantine, the forms that this measure may take, and its procedure, so as to represent a legal framework flexible for the appropriate intervention of the administrative authorities. It is also imperative to ensure an effective right of access to justice, especially when quarantine acquires all the characteristics of a deprivation of liberty.

Court also stated that "in exceptional circumstances, such as the one determined by spreading virus infection COVID-19, the establishing of energetic, prompt and appropriate measures is, in fact, a response of authorities to the obligations set forth in art. 34 par. (2) of the Constitution , according to which "the *State is obliged to take measures to ensure hygiene and public health* ". Also, both compulsory hospitalization in order to prevent the spread of transmissible diseases and the quarantine measure are restrictions on the exercise of fundamental rights and freedoms that can be justified given the reasons for the need to ensure public safety and health. However, the measures in question have severe effects on the person rights and freedoms and therefore the relevant regulations must strictly comply with all constitutional requirements. The exceptional, unpredictable nature of a situation cannot be a justification for violating the rule of law, legal and constitutional provisions regarding the competence of public authorities or those regarding the conditions under which restrictions may be imposed on the exercise of fundamental rights and freedoms. National authorities - especially the central and local authorities - are best placed to identify and establish the set of actions needed for appropriate intervention at each stage of the pandemic, but the measures can only be based on a primary legal framework, which is subject to the constitutional and international provisions regarding the restriction of the exercise of certain rights or freedoms. Given that the crisis situation generated by a pandemic is the inevitable premise of such restrictions, national legislation must be accompanied by clear and effective safeguards against any abuse or discretionary or illegal act"

[25] See for example, art. 108 letter b), art. 109 para. (2) and art. 110 Criminal Code, art. 184 para. (5), art. 247 and 248 of the Code of Criminal Procedure , Law on mental health and protection of persons with mental disorders no. 487/2002 , republished in the Official Gazette of Romania, Part I, no. 652 of September 13, 2012.

2.6. Analysis on the constitutionality measure of isolation in a sanitary unit or in an alternative location attached to the sanitary unit in relation to access to justice and individual freedom

The regulation of the measure of isolation in a sanitary unit or in an alternative location attached to the sanitary unit was subject to the constitutionality control on the occasion of solving the exception of unconstitutionality[26] of the provisions of art. 8 par. (3) - (9) and of art. 19 of Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk.,

The Ombudsman claimed that the criticized legal texts infringed the constitutional provisions of art. 147 par. (4) regarding the effects of the decisions of the Constitutional Court, with the consequence of affecting art. 21 and art. 23 on the free access to justice and individual liberty, as well as art. 1 par. (5) on the obligation to respect the Constitution , its supremacy and the laws.

The Ombudsman argued, in essence, that the legislative solution regarding isolation in a health unit or in an alternative location attached to the health unit is constitutional, only insofar as this type of isolation is required as a last resort measure, after all other measures, of a lower severity, were exhausted. The solitary confinement in a health unit or at an alternative location attached to the health unit, established *ope legis* , without regulating the possibility of doctors, the public health directorate and judges to order the application of a less severe form of isolation (isolation at home) proved the non-observance by the legislator of the Constitutional Court Decision no. 458 of June 25, 2020 and the violation of free access to justice since the judge is limited to solving the action for annulment of the decision regarding the measure of isolation or extension of isolation in health units ordered by the public health directorate. Another vice of unconstitutionality raised by the Ombudsman was about the lack of provisions on competent authorities with enforcement of the measure of isolation in a health facility when the contagious person opposes the measure.

By Decision no. 751 of October 20, 2020 , with unanimous votes, regarding the provisions of art. 8 par. (3) - (9) and of art. 19 par. (2) - (6) of Law no. 136/2020 and with a majority of votes, regarding the provisions of art. 19 par. (1) of the same law, the Constitutional Court rejected as unfounded the exception of unconstitutionality and found that the provisions of art. 8 par. (3) - (9), with reference to the phrase "isolation in a sanitary unit or to an alternative location attached to the sanitary unit", and of art. 19 of Law no. 136/2020 are constitutional in relation to the criticisms made.

The Court held, in essence, that the provisions of art. 8 par. (3) - (9) of Law no. 136/2020 regulates the conditions under which the isolation of persons in situations of epidemiological and biological risk may be ordered.

The provisions of Law no. 136/2020 establish the standards that the authorities and the persons involved in the decision-making process regarding the disposition and application of the isolation measure must respect so as to create a correct balance between the need to prevent the spread of a contagious infectious disease. imminent community transmission and the freedom of individuals. According to the law, the need to ensure a correct balance between the general interest of public health protection and the imperative to respect the person's freedom, as well as the proportionality of the isolation measure with the considered situation are established as mandatory benchmarks when ordering the isolation of persons.

As it appears from the content of art. 8 of Law no. 136/2020 , there are two types of isolation : preventive isolation of the person for at least 48 hours, for the purpose of clinical examinations, laboratory and biological evaluations until receiving the results thereof and the extension of it the measure of isolation in a health care facility or in an alternative location attached to the health unit or, as the case may be, at the person's home or at the location declared by him.

According to the law, the isolation measure ceases on the date of confirmation of the person as cured based on clinical and para clinical examinations or on the recommendation of the doctor who finds that the risk of transmitting the disease no longer exists. Also, the isolation ceases as a result of the finding of illegality of the measure by the court.

Court noted that the measure of preventive isolation of a sick person with suggestive signs and symptoms specific to the case definition or of a person carrying the highly pathogenic agent, even if he does not show suggestive signs and symptoms, for a maximum of 48 hours, in a health unit or a another location attached to the health unit is an adequate and proportionate measure with the purpose pursued by the legislator, namely to ensure the medical examination of the person and to guarantee, at the same time, the protection of public health and the protection of the person's health. The legislator has the freedom to establish the concrete measures to ensure the achievement of the objectives shown above, being essential the observance of their proportional character.

The modality of application of the measures provided by Law no. 136/2020 is made by order of the Minister of Health, this being the authority which, depending on the concrete situation of epidemiological and biological risk, assesses the most appropriate measures necessary to be applied in order to prevent the spread of infectious diseases. In elaborating this decision, the Minister of Health will have to

[26] The object of the exception of unconstitutionality is constituted by the provisions of art. 8 para. (3) - (9), with reference to the phrase "isolation in a sanitary unit or to an alternative location attached to the sanitary unit", and of art. 19 of Law no. 136/2020 on the establishment of measures in the field of public health in situations of epidemiological and biological risk, published in the Official Gazette of Romania, Part I, no. 634 of July 18, 2020.

circumscribe all the guarantees that Law no. 136/2020 regulates them in order to respect the fundamental rights and freedoms of persons, so that all measures are proportionate to the situation that determined them, limited in time to it and applied in a non-discriminatory manner.

Therefore, Law no. 136/2020 enshrines a set of measures that can be instituted in situations of epidemiological and biological risk. However, the application of these measures is not done directly, based on the legal provisions, but in a mediated way, by order of the Minister of Health, ensuring at the same time a balance between the public interest and the imperative of respecting the fundamental rights of persons. Equally, the obligation to ensure fairness and proportionality of the measure isolation lies doctor examining the state of the sick person and the test results and will assess and recommend complicated those measures which are best suited his situation fits within the limits set by the Minister of Health. The same obligation belongs to the health directorates, which analyze the measure recommended by the doctor, and may mention or reject it.

Hence, the task of ensuring a gradual application of the measure of isolation, so that the restriction of the exercise of fundamental rights and freedoms of the person is achieved only to the extent strictly necessary to prevent the spread of an infectious disease belongs to several institutional actors who, given both data on the existence and the evolution of an epidemiological and biological risk situation and the risks it presents for public health, but also the concrete situation of the examined patient, will determine the necessity, place and duration for which this measure can be ordered.

The hypothesis that, in certain extraordinary circumstances, the Minister of Health may consider that the most appropriate measure to prevent the spread of an infectious disease can only be to isolate infected persons in health facilities or in alternative locations attached to them cannot be ruled out. This hypothesis does not contradict *per se* those established by the Constitutional Court by Decision no. 458 of 25 June 2020 as long as this measure is ordered for a limited time, in a non-discriminatory manner and in proportion to the factual situation that determines it, aims to prevent the spread of an infectious disease, dangerous to human safety and public health and is established to protect the public interest and do not create an imbalance between the need to protect public health and the imperative to respect the person's freedom.

In order to guarantee the observance of all these conditions, the provisions of art. 15 par. (4) of Law no. 136/2020 provide for the possibility of challenging in court, by any interested person, the administrative acts of a normative nature regarding the establishment, modification or termination of the measures provided by law. Also, pursuant to art. 17 of Law no. 136/2020**,** the person against whom the measure of isolation in a health unit or a location attached to the health unit was ordered has the possibility to challenge in court the individual administrative act by which this measure was instituted.

Thus , Law no. 136/2020 ensures the guarantees of exercising the right of access to justice, so that, as provided by art. 21 par. (1) of the Constitution , the person concerned " *may apply to the judiciary for the defence of his rights, freedoms and legitimate interests* ". The fact that the provisions of the criticized law do not provide for the possibility for the court to order another measure than the one ordered by the doctor or by the public health director cannot be considered as infringing the right of free access to justice or the right to defence, while the person concerned can obtain in court the solution of not applying an administrative measure that is disproportionate or illegal. In conclusion, the Court has appreciated that the provisions of art. 8 par. (3) - (9) of Law no. 136/2020 complied with the invoked constitutional provisions.

3. Conclusions

The observance of fundamental rights and freedoms, established as supreme values of the rule of law, requires therefore that the public authorities, in achieving essential purposes of their work, to act continuously within the constitutional and legal framework so that potential discretionary tendencies can be avoid or removed. In this way, "the rule of law ensures the supremacy of the Constitution , the correlation of laws and all normative acts with it, the existence of the principle of separation of public powers which must act within the law, namely within a law expressing the general will" and "enshrines a series of guarantees, including jurisdictional ones, to ensure the observance of the rights and freedoms of the citizens through the self-limitation of the state, respectively the inclusion of the public authorities in the coordinates of the law "[27].

Thus, the rule of law and the observance of fundamental rights and freedoms are constantly in a relationship of interdependence, not being conceivable the existence of one in the absence of the other, even in the situation generated by the COVID-19 pandemic.

The issue of respect for fundamental rights during the Covid-19 pandemic has also been a concern of the European Commission for Democracy through Law (Venice Commission), an advisory body to the Council of Europe, which in the documents issued during this period stressed the need to compliance with democracy, the rule of law and human rights in the context of the health crisis. Thus, in the Information Document of 7 April 2020 entitled "Respect for democracy, the rule of law and human rights in the context of the health crisis caused by COVID-19. A set of tools for Member

[27] See the Constitutional Court Decision no. 17 of January 21, 2015, published in the Official Gazette of Romania, Part I, no. 79 of January 30, 2015.

States", the Venice Commission noted that: the Governments face terrible challenges in seeking to protect its populations from the threat of COVID-19 virus. It is also understood that the normal functioning of the society cannot be maintained, in particular in view of the main protection measures needed to combat the virus, namely isolation. In addition, it is accepted that the measures taken will inevitably infringe on the rights and freedoms that are an integral and necessary part of a democratic society governed by the rule of law. The main social, political and legal challenge that our Member States will face will be their ability to respond effectively to this crisis, while ensuring that the measures taken will not undermine our special long-term interest in protecting the fundamental values of democracy, the rule of law and human rights in Europe". The Venice Commission also emphasized that: "Even in emergencies, the rule of law must prevail" (see point 2.1. *The principle of legality,* point 2. *Respect for the rule of law and democratic principles in situations emergency* in the information document referred to above).

The interaction between the Romanian Ombudsman and the Constitutional Court at the beginning of the pandemic COVID-19 resulted in confirming the constitutionality of some normative adopted during this time, thus validating the effort of the state authorities to respond effectively in front of the health crisis. The result of this interaction was also the removal from active legislative fund those provisions that violated the Constitution, while the Constitutional Court decisions created eloquent constitutional benchmarks for the primary and delegated legislator, allowing to legislate appropriate norms to combat the Covid-19 pandemic, while ensuring, in the conditions of deviation from the usual, the respect for fundamental rights and freedoms, without which it can not be conceived the existence of the rule of law.

From the analyzed perspective, it is useful to reiterate that for the proper functioning of the rule of law it is permanently necessary the cooperation between public authorities in the sphere of state powers, which should be manifested in the spirit of constitutional loyalty norms, loyal behaviour being an extension of the principle of separation and balance of powers[28]. As the Constitutional Court stated[29] "loyal collaboration presupposes, beyond the respect for the law, the mutual respect of the state authorities/institutions, as an expression of some assimilated, assumed and promoted constitutional values. Constitutional loyalty can therefore be characterized as a value-principle intrinsic to the Fundamental Law, while loyal collaboration between state authorities/institutions has a defining role in the implementation of the Constitution". Such a loyal cooperation is also materialized in the fair and adequate reception of the actions undertaken in good faith by all participants in the state life. Otherwise, the constitutional norms would be purely declaratory, which is an inadmissible situation for a state that shares the democratic values part of European public order, as foreshadowed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union[30].

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[28] See Constitutional Court Decision no. 1431 of November 3, 2010, published in the Official Gazette of Romania, Part I, no. 758 of November 12, 2010.

[29] See Constitutional Court Decision no. 611 of October 3, 2017, published in the Official Gazette of Romania, Part I, no. 877 of November 7, 2017.

[30] See Constitutional Court Decision no. 233 of February 15, 2011, published in the Official Gazette of Romania, Part I, No. 340 of May 17, 2011.

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ENSURING AND GUARANTEEING THE PETITION RIGHT IN ROMANIA AND THE REPUBLIC OF MOLDOVA

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Abstract

The aim of the present study is to analyze the ensuring and guaranteeing the petition right in Romania and Republic of Moldova as a consequence for ensuring of a good administration. The objectives of this study were to analyze the petition right as a fundamental guarantee and the correlation with ensuring of a good administration. In this research we have highlighted the importance of granting the petition right for the citizens and the contribution to the developing of a good administration of the state in the favor of the citizens.

Keywords: *petition right in Romania, petition right in the Republic of Moldova, Romanian Constitution of the Republic of Moldova, fundamental rights, guarantees rights, good administration.*

1. Introduction

This study is intended to analyse and identify how the petition right is ensured and guaranteed in Romania and the Republic of Moldova.

The structure of the study is the following: an analysis of some selective aspects of ensuring the petition right in Romania and some selective aspects regarding the guarantee of the petition right in the Republic of Moldova.

The studied matter is important because granting the right to petition as a fundamental right ensures the protection of citizens' manifestations of will in relation to public authorities and also in relation to other citizens' rights, freedoms and interests, and thus it ensures good administration of the state in favour of its citizens.

The present paper intended to answer to the studied matter by analysing the evolution of the petition right in Romania and in the Republic of Moldova and how it is secured and guaranteed, the constitutional provisions in force, as well as how good administration is ensured.

As regards the relation between this paper and the existing relevant literature, this paper approaches a topic which has been rather rarely analysed so far, namely securing and guaranteeing the right to petition in Romania and in the Republic of Moldova. Moreover, the author has drawn a correlation between granting this right-guarantee (in Romanian, 'drept garanție' – a right that is a guarantee) and ensuring good administration.

In the current context, I have considered that the aspects approached in this piece of research have some special importance having regard to societal tendencies towards ensuring good administration for the development of social sciences and of the relations between public institutions and citizens, thus achieving good administration of a state governed by the rule of law.

2. Selective aspects of ensuring the petition right in Romania

The petition right is part of the category of fundamental citizens' rights, freedoms and duties set out in the Constitution of Romania[1].

Therefore, the petition right was brought under regulation in Romania by Article 51 of the Constitution of Romania: "(1) Citizens have the right to address public authorities through petitions formulated only in the name of their signatories. (2) Legally established organisations have the right to address petitions exclusively in the name of the groups they represent. (3) The exercise of the right to petition is free of charge. (4) Public authorities have the obligation to answer petitions within the terms and under the conditions established by law."

The petition right has been guaranteed in the European Union, being stipulated by Article 44 of the Charter of Fundamental Rights of the European Union [2]: *"Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament."*

The petition right, a fundamental right of the Romanian citizen, is a legal guarantee by its nature since it benefits, on one hand, from the systems granting the constitutional rule and, on the other, from the legal guarantee of a subjective right.

In legislative terms, the right to petition in Romania has been set out by the Government Decree

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[1] *Constitution of Romania*, republished, Official Gazette of Romania, Part I, no. 767 of 31 October 2003.

[2] The Charter of Fundamental Rights of the European Union was published in the Official Journal of the European Union, the edition in Romanian, C83/02/30 March 2010.

no. 27/2002[3] on the settlement of petitions, approved with amendments and additions by Law 233/2002. According to Article 2 of this regulatory document, "*a petition is understood as being a request, a complaint, a notification or a proposal formulated in writing, or by electronic mail, which a citizen or a legally established organisation may address to central and local public authorities and institutions, to decentralised public services of the ministries and of other central bodies, to national companies, to businesses of interest at county or local level, as well as to autonomous municipal companies, hereinafter called public authorities and institutions."*

Fundamental rights are essential rights for the Romanian citizens. Since fundamental rights and freedoms are supreme values guaranteed by the Constitution, they form a system of legal guarantees for Romanian citizens and for their dignity, values and way of life.

The petition right has the value of a right-guarantee (in Romanian, 'drept garanție' – a right that is a guarantee), representing a person's right to call for the involvement of the state through its administrative bodies anytime their intervention is required.

Good administration is, in my opinion, about how the state ensures good governance with regard to its citizens, where the citizens benefit from the legal protection of their fundamental rights, as well as the realization of rights that are guarantees, which ensure for citizens the realization of all fundamental rights in a state governed by the rule of law.

The petition right is a fundamental citizen's right which grants a right to demand and to make requests before the authorities of the state. Therefore, this right to demand, being an essential right, guarantees the existence and the observance of all other fundamental citizens' rights.

Therefore, several types of petitions have been defined and how they should be settled by public authorities, thus securing a citizen's right to address any authority and establishing in correlation also the obligation for the authorities to answer citizens' petitions within the legal term.

The petition right has also been characterised as "a citizens' right with tradition in the Romanian legal system, belonging to the category of rights that are guarantees, and being also a general legal guarantee for other rights and liberties."[4]

We regard to the guarantee of the petition right, professors Ioan Muraru and Elena Simina Tănăsescu stated that it is "a citizens' right with tradition in the Romanian legal system, belonging to the category of rights that are guarantees, and being also a general legal guarantee for other rights and liberties."[5]

Professors Ioan Muraru and Elena Simina Tănăsescu held that the petition right *"is considered as being a first generation right*".[6] They also mention that this fundamental right has been qualified in the doctrine as a *"right that is a guarantee"*[7].

Furthermore, professors Ioan Muraru and Elena Simina Tănăsescu held that through the petition right "citizens enter a direct relationship with the state authorities at their own initiative and have a possibility to solve both personal problems and matters of general interest."[8]

Professor Ioan Muraru has analysed the Romanian Constitutions, beginning with "Statutul dezvoltatoriu al Convenţiei de la Paris" (the Developing Status of the Paris Convention) of 7/19 August 1858 and until the 1991 Constitution of Romania, and identified therefore the petition right in its various forms until its current regulation in the 2003 Constitution of Romania.

The petition right has been acknowledged by professors I. Muraru and E.S. Tănăsescu as being *"a citizens' right with tradition in the Romanian legal system"*[9].

The Romanian doctrine held that "through the petition right, citizens enter a direct relationship with the state authorities at their own initiative and have a possibility to solve both personal problems and matters of general interest."[10]

The petition right has been qualified as "a right that is a guarantee, meaning a right by means of which, in fact, effective legal protection is secured for other rights and legitimate interests, at the same time with the protection of some form of citizens' manifestation."[11]

Professors Nicolae Pavel and Vasile Gionea held that the petition right is one of the *"main human rights (...) which is free of charge".*[12]

Professor Nicolae Pavel has defined and analysed citizens' fundamental rights and completed a comparative study on the identification of fundamental

[3] Government Decree no. 27/2002 on the settlement of petitions, approved with amendments and additions by Law 233/2002, published in the Official Gazette of Romania, Part I, no. 84 of 1 February 2002.

[4] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice, Ediția 15, Volumul I* (*Constitutional Law and Political Institutions, 15th edition, Volume I*), C.H. Beck, Bucharest, 2016, p. 186.

[5] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice, Ediția 15, Volumul I* (*Constitutional Law and Political Institutions, 15th edition, Volume I*), C.H. Beck, Bucharest, 2016, p. 186.

[6] Coordinators I. Muraru, E.S. Tănăsescu, *Constituția României, Comentariu pe articole* (*Constitution of Romania. Articles Commented*), C.H. Beck, Bucharest, 2008, p. 512.

[7] Ibidem.

[8] Idem, p. 511.

[9] Coordinators I. Muraru, E.S. Tănăsescu, *Constituția României, Comentariu pe articole* (*Constitution of Romania. Articles Commented*), C.H. Beck, Bucharest, 2008, p. 511.

[10] Ibidem.

[11] Ibidem.

[12] V. Gionea, N. Pavel, Curs de drept constituțional (A Course of Constitutional Law), Scaiul, Bucharest, 1996, p. 66.

rights, including the right to petition and the right of a person aggrieved by a public authority, in the reviewed Constitution of Romania of 2003, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The petition right has been characterised as "a citizens' right with tradition in the Romanian legal system, belonging to the category of rights that are guarantees, and being also a general legal guarantee for other rights and liberties."[13]

Therefore, the petition right secures and guarantees the right of any citizen to petition and, correlatively, the obligation for the authorities to answer petitions within the terms and under the conditions set forth by organic law. Depending on the type of petition, the legislator defined various ways of settlement. Petitions may be formulated in several forms of applications, complaints, proposals or notifications. In the Constitution of Romania, the petition right is free of charge. Therefore, the petition right *ensures legal protection for citizens, for all their fundamental rights, in general*[14] and also contributes to ensuring good administration of the state, in particular.

The fundamental right to petition has been called in the doctrine *"a right that is a guarantee"* (in Romanian, 'drept garanţie' – a 'right-guarantee'), playing the role of a constitutional guarantee by means of which efficient legal protection is secured for citizens, as well as for other rights and their legitimate interests.

Pursuant to Article 51 of the Constitution of Romania, the petition right is granted to citizens and to legally established organisations, that formulate petitions only in the name of their signatories and exclusively on behalf of the groups they represent. The right to petition refers to *assuming responsibility by the petitioner* and *does not encourage anonymous petitions*.

The subjects of the petition right are "citizens individually or groups of citizens, irrespective of whether they are established ad hoc or organised in the forms provided by law".[15] Entitled people may be both natural and legal persons.

The responsibility assumed by signing the petition and the fact that petitions can only refer to issues concerning the petitioner reinforce the moral aspects of this constitutional provision.

With regard to the status of a foreigner who has not been granted the right of residence in Romania, the Constitutional Court of Romania held that *"with reference to the criticism concerning the breach of Article 47 (*Article 51 now – author's note*) of the Constitution, which governs the right to petition, the Court finds that the aforesaid constitutional provision is not applicable in the case, since it is concerned with individuals who are Romanian citizens.*"[16]

The petition right is guaranteed in the European Union by Article 44 of the Charter of Fundamental Rights of the European Union[17]: *"Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament."*

In my opinion, the petition right is characterised by unicity with regard to its scope and the legal effects it generates. Through its effects, it guarantees all fundamental rights and freedoms of citizens.

It is also my opinion that, correlatively with citizens' right to petition in their name or on behalf of the legal organisations they represent, an obligation also subsists in the fundamental law for the state to answer – through its public authorities – the petitions that have been put forward.

The petition right guarantees the good administration of the state in favour of its citizens by granting the citizen's right to petition any public authority and through the correlative obligation of the notified authorities to provide an answer.

Professor I. Deleanu[18] stated about the petition right that "it has some special significance for the relations between a person and the public authorities, being not only a means to request them to fulfil the duties that fall on them, but also a means of control on their activity."

The opinion of professor T. Drăganu[19] on the petition right is that "citizens' petitions may tend to enforce not only rights, but also some simple personal interests. Consequently, even if a personal interest, not protected by the possibility sanctioned by law to request a third party to accomplish an action or to

[13] I. Muraru, E.S. Tănăsescu, *Drept constituțional și instituții politice, Ediția 15, Volumul I* (*Constitutional Law and Political Institutions, 15th edition, Volume I*), C.H. Beck, Bucharest, 2016, p. 186.

[14] Pavel Cătălin-Radu, *Aspecte selective cu privire la garantarea dreptului de petiționare* (*Selective aspects on the guarantee of the petition right*), in Materials of the International Scientific Symposium with the topic: "Forensic investigation of violent crimes", Association of Romanian Forensic Scientists, Bucharest, 2017.

[15] Decision of the Constitutional Court of Romania no. 389 of 24 March 2011, published in the Official Gazette of Romania, Part I no. 471 of 5 July 2011.

[16] Decision of the Constitutional Court of Romania no. 151 of 17 April 2003 published in the Official Gazette of Romania, Part I no. 290 of 25 April 2003.

[17] The Charter of Fundamental Rights of the European Union was published in the Official Journal of the European Union, the edition in Romanian, C83/02/30 March 2010.

[18] I. Deleanu, *Instituții și proceduri constituționale – în dreptul român și în dreptul comparat* (*Constitutional Institutions and Proceedings in Romanian Law and in Comparative Law*), C.H. Beck, Bucharest, 2006, p. 529.

[19] T. Drăganu, Drept Constituțional și Instituții Politice – Tratat Elementar – Volumul I (Constitutional Law and Political Institutions – An Elementary Treaty), Lumina Tipo, Bucharest, 1997, p. 185.

refrain from it, is not a subjective right, that interest can still be protected through the right to petition."[20]

Also, professor T. Drăganu held that, in respect of the petition right, "it can be applied both in the political field, and in the economic, social and cultural one, which confers as a matter of fact its characteristic of social-political right."[21]

According to paragraph 4 of Article 51 of the Constitution of Romania, *"the exercise of the right to petition is free of charge"*, securing a free and unconditioned right for citizens to have access to public authorities. Equally, under paragraph 4 of the same article *"public authorities have the obligation to answer petitions within the terms and under the conditions established by law"*, the fundamental law ensuring the citizen's right to receive an answer to their request addressed to public authorities within the legal term.

The concerned public authorities have the obligation to answer a citizen who formulated a petition within 30 days from its registration at the latest, irrespective of whether the solution is favourable or unfavourable, according to Article 8 of the Government Decree no. 27/2002[22] on the settlement of petitions, approved with amendments and additions by Law 233/2002.

The Constitutional Court of Romania pronounced a decision to settle an exception of unconstitutionality concerning the fact that "*the object of the Government Decree no. 27/2002 is to regulate how citizens exercise their right to address petitions formulated in their name to public authorities and institutions, as well as how these petitions are settled, as an expression of the right to petition stipulated by Article 51 of the Constitution, determining the responsibilities of the public authorities and institutions to which the petitions are addressed, as well as the terms in which they have to settle the petitions, as provided for in paragraph (4) of the same article"*[23]

Pursuant to Article 2 of the regulatory document mentioned above, "a petition is understood as being a request, a complaint, a notification or a proposal formulated in writing, or by electronic mail, which a citizen or a legally established organisation may address to central and local public authorities and institutions, to decentralised public services of the ministries and of other central bodies, to national companies, to businesses of interest at county or local level, as well as to autonomous municipal companies, hereinafter called public authorities and institutions."

Therefore, several types of petitions have been defined and how they should be settled by public authorities, thus securing a citizen's right to address any authority and establishing correlatively also the obligation for the authorities to answer citizens' petitions within the legal term, which guarantees the good administration of their interests by public authorities.

In my opinion, citizens enjoy the petition right as a fundamental right, this being a subjective citizen's right, an essential right for the safeguard of fundamental rights and a legal guarantee for the citizen, ensuring and guaranteeing good administration of the state in favour of the citizen.

The subjective nature of the petition right gives prerogatives to citizens to benefit from its regulatory force, to expect some appropriate conduct from the passive subject, and if the passive subject fails in its duty, the citizens may resort to the coercive force of the state for the realisation and the safeguard of their right.

3. Selective aspects regarding the guarantee of the petition right in the Republic of Moldova

In the Republic of Moldova, the right to petition was set out by the Constitution of the Republic of Moldova[24] in Article 52, which provided that: "(1) Citizens have the right to address public authorities through petitions formulated only in the name of their signatories. (2) Legally established organisations have the right to address petitions exclusively in the name of the groups they represent."

With regard to Article 52 of the Constitution of the Republic of Moldova, i.e. the right of petition, we can see that this right is granted to citizens and legally established organisations.

The examination of anonymous petitions has been declared unconstitutional by the Constitutional Court of the Republic of Moldova: *"Citizens have the right to address public authorities with petitions formulated only in the name of their signatories (...) it is therefore clear that any petition is to be signed, so it must contain the identification data of the petitioner. The Court held that, through its express formulation, the constitutional text neither establishes, nor provides legal protection for a right to anonymous petitioning."*[25]

Professors B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A.

[20] Ibidem.

[21] Ibidem.

[22] Government Decree no. 27/2002 on the settlement of petitions, approved with amendments and additions by Law 233/2002, published in the Official Gazette of Romania, Part I, no. 84 of 1 February 2002.

[23] Decision of the Constitutional Court of Romania no. 307 of 29 March 2007, published in the Official Gazette of Romania, Part I no. 279 of 26 April 2007.

[24] Constitution of the Republic of Moldova, published in the Official Gazette of the Republic of Moldova no. 1 on 12 August 1994.

[25] Judgment no. 25 of 17 September 2013 for the control of the constitutionality of some provisions referring to the examination of anonymous petitions, published in the Official Gazette of the Republic of Moldova no. 276-280/44 of 29 November 2013.

Armeanic, D. Pulbere, [26] held that: *"the petition right has an unquestionable tradition in the history of law (...) the concerned right has been known ever since the time of feudal Moldova, when those who were seeking justice were taking their grievances to the boyar, the High Steward, the Lord, etc. The petition right was brought under regulation in the Constitution of the Soviet Union, including in the Constitutions of the Union Republics, which took over its provisions. The 1978 Constitution of the Moldavian Socialist Soviet Republic stipulated in Article 47 that every citizen is entitled to address the bodies of the state and the community organisations with proposals concerning the improvement of their activities and to criticise the shortcomings of their work. People in positions of responsibility were obligated to examine the citizens' petitions and requests, to give answers and undertake the necessary measures. Oppression for criticism was prohibited and punished by law. However, in the circumstances of a totalitarian state, it was impossible to have petitions in connection with the exercise of political rights, the freedom of information and expression, the freedom of conscience, the respect for private and family life, the secrecy of correspondence, etc."*

Also, professors B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A. Armeanic, D. Pulbere[27] held that "*Bacause it belongs to the category of rights that are guarantees, the petition right is also a general legal guarantee for other human rights and fundamental freedoms."*

Moreover, according to the doctrine professors B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A. Armeanic, D. Pulbere, *"the Constitution of the Republic of Moldova does not expressly provide for an obligation for the public authorities to answer petitions, take measures in connection with their examination, and nor does it provide a term for their examination. The manner and the procedures applied are governed by the Petition Law (Articles 8-9, 12-14, 16, etc.)."*[28]

Professor Teodor Cârnaț held that the petition right "presents itself also as a guarantee of the effective exercise of all other rights, being a general legal guarantee."[29]

Professors Teodor Cârnaț and Marina Cârnaț mentioned about the petition right that "its exercise is a way of solving some personal problems or problems concerning a collective."[30]

Professor Ion Guceac held that the petition right is part of the category of "rights that are guarantees"[31], and this "suggests their significance of being constitutional guarantees".[32]

The petition right was brought under regulation in legislative terms with the provisions of Law 190-XIII of 19 July 1994 on petitioning, published in the Official Gazette of the Republic of Moldova no. 4/47 of 8 September 1994.

Law 190 on petitioning in the Republic of Moldova defined the petition as being "any request, complaint, notification addressed to the relevant bodies, including the preliminary application appealing against an administrative act or the failure to settle a request within the term provided by law"[33].

At the same time, the regulatory document also set out the procedure for protecting the citizen with regard to the petition right: *"(2) The preliminary application is addressed to the issuing body. In case that the issuing body has another hierarchically superior body, the preliminary application may be addressed, at the petitioner's choice, to the issuing body or to the hierarchically superior body. (3) The petitioner who is not satisfied with the answer received to the preliminary application or has not received an answer within the term provided for by the law is entitled to notify the competent administrative dispute court."*[34]

Petitions are examined by the authorities in the Republic of Moldova within the term of a month according to Article 8 paragraph 1 of the law above. Equally, pursuant to paragraph 2 of the same article, in some special cases, the term may be extended by a month and the petitioner is informed thereof.

Compared to the regulations studied before, we can see that "in the Republic of Moldova, there is no mention in the Constitution or in other laws that petitions are free of charge, in comparison with the rules of the petition right in the Constitution of Romania, and this fact may lead to petitioners being

[26] B. Neagu, N. Osmochescu, A. Smochină, C. Gurin, I. Creangă, V. Popa, S. Cobăneanu, V. Zaporojan, S. Țurcan, V. Șterbeț, A. Armeanic, D. Pulbere, *Constituția Republicii Moldova, Comentariu* (*The Constitution of the Republic of Moldova. A Commentary*), Arc, Chișinău, Republic of Moldova, 2012, p. 205.

[27] Ibidem.

[28] Ibidem.

[29] T. Cârnaț, *Drept Constituțional* (*Constitutional Law*), Print-Caro SRL, Chișinău, 2010, p. 306.

[30] T. Cârnaț, M. Cârnaț, *Protecția juridică a drepturilor omului* (*The Legal Protection of Human Rights*), Reclama, Chișinău, 2006, p. 90.

[31] I. Guceac, *Curs elementar de drept constituțional, Volumul II* (*An Elementary Course on Constitutional Law. Volume II*), Tipografia Centrală, Chișinău, 2004, p. 120.

[32] Ibidem.

[33] Article 4 paragraph (1) of Law 190-XIII of 19 July 1994 on petitioning, published in the Official Gazette of the Republic of Moldova no. 4/47 of 8 September 1994.

[34] Article 4 paragraphs (2) and (3) of Law 190-XIII of 19 July 1994 on petitioning, published in the Official Gazette of the Republic of Moldova no. 4/47 of 8 September 1994.

asked by the public authorities to pay post charges, clerical duties, travel costs etc."[35]

The petition right, being a fundamental right guaranteed by the Constitution of the Republic of Moldova, secures the citizens' legal protection and ensures good administration of the state.

4. Conclusions

The petition right is a fundamental citizen's right which grants a right to demand and to make requests before the authorities of the state. This right to demand, being an essential right, guarantees the existence and the observance of all other fundamental citizens' rights and ensures good administration of the state in favour of its citizens.

The petition right is part of the category of fundamental citizens' rights, liberties and duties provided for in the Constitution of Romania.

As regards the right to petition in the Constitution of the Republic of Moldova, it was held that this right is granted to citizens and to legally established organisations.

The petition right, as a fundamental right, both in Romania and in the Republic of Moldova, guarantees the citizen's civil liberties.

The petition right has the value of a right-guarantee, representing a person's right to call for the involvement of the state through its administrative bodies anytime their intervention is required.

The petition right is part of the category of rights-guarantees, which are rights that confer legal protection to the citizen and ensure good administration of the state in favour of its citizens. The petition right grants a citizen's right to address a public institution and to receive an answer within the legal term.

The fundamental right to petition has the role of a constitutional guarantee by means of which efficient legal protection is ensured for citizens and for their other rights and legitimate interests.

The subjects of the petition right are citizens individually or groups of citizens, irrespective of whether they are established ad hoc or organised in the forms provided by law. Entitled people may be both natural and legal persons.

Correlatively with citizens' right to petition in their name or on behalf of the legal organisations they represent, an obligation also subsists in the fundamental law for the state to answer – through its public authorities – the petitions that have been put forward.

Therefore, with the realisation of the petition right, this also contributes to ensuring good administration in favour of citizens, both in Romania and in the Republic of Moldova.

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THE RIGHT TO EDUCATION OR THE RIGHT TO HEALTH - GOOD GOVERNANCE CAN CHOOSE BETWEEN THEM?

Oana ŞARAMET*

Abstract

Any human society will seek to educate its next generations, passing on to them its most precious values, thus it will ensure that this supreme values will be forwarded in the future. But anyway it will put at least the same price on the health of its members. Moreover, in any contemporary society in which democratic values, such as freedom and dignity of the human being, but also fundamental rights and freedoms are declared and guaranteed by the fundamental, constitutional law, the education and health of its members must be central elements of any government. Good governance must be individual-centered, it must aim every member of society concerned.

But when a society struggles to pass by a deep crisis, there is a risk of conserving its resources to use them only for what it needs to get out of that crisis. In our opinion, there is even more risk of doing so when that crisis is a public health crisis, such as the one from nowadays.

In such situations, we ask ourselves if at least the values mentioned above are protected, but also if and which of them should be guaranteed to the human being, perhaps more than ever in such periods. Indeed, any government will have to appreciate and decide, fully assuming the decision taken, how it will still be able to ensure good governance in such unfavourable conditions, ensuring and guaranteeing not only the right to health but also the right to education, among other fundamental rights and freedoms.

In this paper, we will search for answers to the above, as we will try to find out if there is a legitimate and moral possibility to give priority to one of the two rights, if we could use the principle of proportionality to answer this dilemma, but also if good governance, in special situations, can be realised by prioritizing one of these rights. In this paper, we will search for answers to the above, we will try to find out if there is a legitimate and moral possibility to give priority to one of the two rights, but also if we could use the principle of proportionality to answer this dilemma, and if good governance, in special situations, can be realised by prioritizing one of these rights.

Keywords: *fundamental right, health, education, proportionality, good governance.*

1. Introduction

Good governance, although not a modern concept has become a fashionable concept in recent years, being „a major ingredient in analyses of what's missing in countries struggling for economic and political development" [1].

Besides, the Commission on Global Governance in its report from 1995 has defined the governance as „the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest"[2].

This is just one of the many definitions given to this concept, reinforced by the opinion that, in fact, „while good governance has gained prominence in the literature, there is little agreement on the essence of the concept"[3].

So whenever we discuss about good governance, whenever governements discuss about this concept, we should be able to identify measures decided by governments in the interest of all of us.

In our opinion, the effectiveness of veritable good governance should be all the more visible in times of crisis, as is the Covid-19 pandemic, a crisis we are still going through. The competence and ability of the political leaders to ensure a government that responds to the needs caused by such a crisis, will be able to be identified in the measures they take precisely to ensure not only a government, but good governance. Such good governance would also be able to provide a framework and climate as close as possible to the one familiar until then, to exercise of fundamental rights, such as the right to education and the right to health.

In a time of crisis, especially in a time of public health crisis, the exercise of fundamental rights and freedoms may be affected or even restricted by measures taken by the authorities to protect the population, within the limits set by constitutional

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regulations such as those relating to the nature of exception of the restriction of the exercise of some fundamental rights or freedo In a time of crisis, especially in a time of public health crisis, the exercise of fundamental rights and freedoms may be affected or even restricted by measures taken by the public authorities to protect the population[4], within the limits set by constitutional regulations such as those relating to the exceptional character of the restriction on the exercise of certain rights or freedoms, provided by art. 53 of the Romanian Constitution.

In a time of profound public health crisis, such as the one generated by the current pandemic, there is no doubt that any government in a constitutional democracy will focus on taking those measures that will at least preserve the health of the population. This crisis, as well as the fundamental right to health, will be the ones that will be prioritized to the detriment of other aspects of our lives and other rights. When measures taken to protect the population and its health are concentrated in a short period of time, the impact on other rights and their exercise is not major. However, as the crisis continues, the impairment of other rights and of the exercise of these rights, such as the right to education, becomes more and more serious.

In this context, in this article, we will emphasize relevant aspects, in our opinion, of the concept of good governance, as well as of the right to education and the right to health, as they emerge from the literature, legislation, jurisprudence. Taking into account our own pedagogical experience from last year since the onset of this public health crisis, we will try to identify the causes that determine the governments to choose between exercising two fundamental rights, through the measures taken, possible solutions to avoid such a decision.

2. Good governance

The concept of good governance is tempting and tender at the same time.

„Good governance is a good idea”[5] because it provides a minimum framework with principles that should be followed by governments so that the governed ones can have an effective governance that meets their needs in a constitutional, legal, and practical framework where public institutions are „[f]air, judicious, transparent, accountable, participatory, responsive, well-managed, and efficient”[6].

Although it is a concept with multiple dimensions[7], reiterated and developed by the World Bank, through its 1992 report[8], good governance is not a new concept[9], as we already have mentioned, but once reiterated in the twentieth century XX, has become a necessity in any state governed by democratic principles or which tends to become so.

On the other hand, good governance is a concept that has not only been imposed in the public system, and which we will take into consideration in this article, but also the private one[10]. In fact, the development of this concept in the private environment is not accidental as long „[t]he initial debate over good governance was concerned less with improving the political leadership of democracy and integrating economic and social goals…..than with reversing decades of state-dominated economic and social development”[11].

Good governance is a good concept for states founded and developed on democratic principles, as well as for those who strive to be like those because it is also a complex concept that considers „multiparty elections, a judiciary and a parliament, which have been emphasised as the primary symbols of Western-style democracy”[12], but also „formidable: universal protection of human rights; non-discrimatory laws; efficient, impartial and rapid judicial processes;

[4] See the two presidential decrees regarding the establishment of the state of emergency on the Romanian territory, namely Decree no. 196 of 16.03.2020, published in the Official Gazette of Romania, Part I, no. 212 of 16.03.2020, and Decree no. 240 of 14.04.2020, published in the Official Gazette of Romania, Part I, no. 311 of 14.04.2020, as well as the last of the government decisions regarding the establishment, respectively the extension of the alert state on the Romanian territory, namely: Government Decision no. 293 of 10.03.2021 on the extension of the alert status on the Romanian territory starting with March 14, 2021, as well as the establishment of the measures applied during it to prevent and combat the effects of the COVID-19 pandemic, published in the Official Gazette of Romania, Part I, no. 245 of 11.03.

[5] M. S. Grindle, *op. cit.*, p.1.

[6] Ibidem.

[7] For more definitions of good governance from different perspectives of different international institutions, see, for example:

Th. G. Weiss, *Governance, Good Governance and Global Governance: Conceptual and Actual Challenges*, in Third World Quarterly, Vol. 21, No. 5 (Oct., 2000), pp. 796 – 798.

[8] See, World Bank, *Governance and Development*, 1992, p. 1, but also the introductory remarks regarding the concept of governance, but also the one of good governance, available at: http://documents1.worldbank.org/curated/en/604951468739447676/pdf/multi-page.pdf.

[9] For example, some authors have mentioned that „the concept of ‘governance’ has a long and distinguished pedigree. From the Greek city-state to the modern nation-state, governance—or the art of governing—has been a constant preoccupation for rulers and political philosophers”, and added that „in the 1990s, aid donors and a range of international institutions, including the multilateral development banks, the International Monetary Fund (IMF), the Organization for Economic Cooperation and Development (OECD), and the United Nations Development Program (UNDP), formally adopted ‘governance’ agendas”. See V. Collingwood, editor, based on research by E. Drake, A. Malik, Y. Xu, I. Kotsioni, R. El-Habashy, and V. Misra, *Good Governance and the World Bank*, Nuffield College, University of Oxford, 2001, p. 4. Also see, for the meaning of governance: Y. Keping, *Governance and Good Governance: A New Framework for Political Analysis*, in Fudan J. Hum. Soc. Sci. (2018) 11:1–8, pp. 1-2. Also see: M. S. Grindle, *op. cit.*, p.3.

[10] Regarding the good governance and even the codes of governances – „a set of ‘best practice’ recommendations regarding the behavior and structure of the board of directors of a firm”, see, for example, R. V. Aguilera and A. Cuervo-Cazurra, *Codes of Good Governance Worldwide: What is the Trigger?*, in Organization Studies 25(3) SAGE Publications, London, Thousand Oaks, CA & New Delhi, 2004, pp. 415 – 417.

[11] Th. G. Weiss, *op. cit.*, p. 805.

[12] Idem, p. 801.

transparent public agencies; accountability for decisions by public officials; devolution of resources and decision making to local levels from the capital; and meaningful participation by citizens in debating public policies and choices"[13]. So, taking into account these elements, we also can appreciate that a shot definition of good governance can sound like this: „[a] mode or model of governance that leads to social and economic results sought by citizens"[14].

Being an attractive concept, „a seductive idea"[15], perhaps not so much for states as for international organizations and citizens, it is a concept that enjoys „popularity among researchers and practitioners"[16]. Therefore, „the conceptual and operational battles about governance and good governance are a few decades old, but the journey to explore global governance has just begun"[17].

Even if it is such a broad concept, we appreciate the importance and necessity to identify its defining elements, elements necessary to be found in the content, substance of the concept of good governance in any historical context - influenced or not by a fundamental crisis - provided that state it remains a democratic one. Thus, elements of good governance, which must be respected by any democratic state, are: „[e]ffectiveness, efficiency, transparency, accountability, predictability, sound financial management, fighting corruption, the respect for human rights, democracy and the rule of law"[18]. On the other hand, „[t]he state and its administrative capacities play a crucial role in the good governance debate"[19], so „improving governance, therefore, means building and strengthening state institutions and capacities"[20], which is, in our opinion, a natural phenomenon that such a state should go through to ensure good true governance.

Based on the reports of various international organizations or their structures, as The United Nations Development Program (UNDP), the juridical doctrine has highlighted the identification of principles of good governance, such as those identified by UNDP in „Governance and Sustainable Human Development, 1997"[21]: legitimacy and voice – by participation and consensus orientation, direction – by strategic vision, performance – by responsiveness and effectiveness and efficiency, accountability and transparency, and fairness – by equity and rule of law[22]. The same authors have mentioned that these five principles represent „a set of principles that, with slight variations, appear in much of the literature"[23] and also that „there is strong evidence that these UNDP – based principles have a claim to universal recognition"[24].

Certainly, the identification and definition of these principles of good governance is a „difficult and controversial"[25] process. Thus, for example, the Council of Europe, by Centre of Expertise for Good Governance, identifies 12 such principles, namely: „Participation, Representation, Fair Conduct of Elections; Responsiveness; Efficiency and Effectiveness; Openness and Transparency; Rule of Law; Ethical Conduct; Competence and Capacity; Innovation and Openness to Change; Sustainability and Long-term Orientation; Sound Financial Management; Human Rights, Cultural Diversity and Social Cohesion; Accountability"[26] – principles designed to ensure „the responsible conduct of public affairs and management of public resources"[27], meaning good governance[28].

On the other hand, „the concept of governance may be applied to any form of collective action"[29] which means, as these authors point out, that when it is about governance and, implicitly, good governance, that it must "govern" the actions of international organizations and other supranational structures, of public authorities from national, regional and local level, but also of private organizations. Moreover, in

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[13] Ibidem.

[14] T. Plumptre & J. Graham, *Governance and Good Governance: International and Aboriginal Perspectives*, Institute On Governance, 1999, p. 8.

[15] M. S. Grindle, *op. cit.*, p.1.

[16] Idem, p. 6.

[17] Th. G. Weiss, *op. cit.*, p. 806.

[18] T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, pp. 6-7. In this article, the authors summarize a number of opinions regarding the concept of good governance, expressed by different authors from various point of view.

[19] John *Pierre, Introduction: Understanding Governance, in: Pierre, John: Debating Governance: Authority, Steering, and Democracy*, Oxford, 1999, 1-12; Rudolf Dolzer, *Good Governance: Neues transnationales Leitbild der Staatlichkeit?*, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 64: 3, 2004, 535-546; *Emma C Murphy, Good Governance: Ein universal anwendbares Konzept?* in: Internationale Politik 57: 8, 2002, 1-, quoted by T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, p.8.

[20] T. A. Börzel, Y. Pamuk, A. Stahn, *op. cit.*, p.8.

[21] J. Graham, B. Amos and T. Plumptre, *Principles for Good Governance in the 21st Century*, Policy Brief No.15, Institute On Governance, Ottawa, Canada, 2003, p 3.

[22] Ibidem, also for more details regarding this topic.

[23] Ibidem.

[24] Ibidem.

[25] Ibidem.

[26] Council of Europe, 12 Principles of Good Governance, available at: https://www.coe.int/en/web/good-governance/12-principles.

[27] Ibidem.

[28] Ibidem. On the other hand, we can observe that different kinds of sets of principles regardin good governance are identified by many and various organisation to respond to their specific needs. Thus, The British and Irish Ombudsman Association (BIOA) identified 6 such principles: independence, openness and transparency, accountability, integrity, clarity of purpose. See, British and Irish Ombudsman Association, *Guide to principles of good governance*, 2009, available at: https://www.ombudsmanassociation.org/sites/default/files/2020-12/BIOAGovernanceGuideOct09.pdf.

[29] J. Graham, B. Amos and T. Plumptre, *op. cit.*, p. 2.

our opinion, good governance does not imply involvement only at one level or another of those mentioned before. On the contrary, we appreciate that the collaboration, especially in times of profound crises, such as the current public health crisis, between national authorities at different levels, for example, will be able to ensure veritable good governance or, at least, to create the premises in this sense[30].

It is also necessary to emphasize that the actors on the political scene have different views on what is supposed to be good governance. Thus, „for those on the political right, good governance has meant order, rule of law, and the institutional conditions for free markets to flourish"[31], instead „for those on the political left, good governance incorporates notions of equity and fairness, protection for the poor, for minorities, and for women, and a positive role for the state"[32]. Moreover, some of them confuse good governance with the possession and exercising of power only under the conditions and limits agreed by them, moving away from the will of the majority who elected them. Actually, „governance is about governing, and governing is predominately about making decisions"[33], but good governance does not involve making decisions only unilaterally, even dictatorially, ignoring, sometimes even completely, the connection with the governed people.

Perhaps this is also the reason why the constitutions do not provide much about governance. In the constitutions of the Member States of the European Union, the reference to governance and good governance, in particular, does not usually exist. By art. 10, the Constitution of Poland[34] settles about „the system of government of the Republic of Poland" that „[s]hall be based on the separation of and balance between the legislative, executive and judicial powers". The art. 17 of the Constitution of Portugal[35] stipulates about governance saying that the existence of „the set of rules" that are „[g]overning rights, freedoms and guarantees shall apply to those set out in Title II and to fundamental rights of a similar nature". The Constitution of Slovakia[36] stipulates, in its preamble, that one of the puroposes of Slovak people recognized at constitutional level is „seeking the application of the democratic form of government", and the Instrument of Government[37] of Sweden[38], as the effective constitution is officially called, identifies in its first articles, especially in art. 1 - art. 10, "basic principles of governance"[39] and which correspond to any rule of law.

However, we could appreciate that the recognition, through the constitutional provisions, of the fact that a state has the specific features of a rule of law, implies, implicitly, the recognition, but also the assumption, of the achievement of good governance. In this sense are, for example, the provisions of art. 2 of the Constitution of Poland according to which „the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice", or those of art. 2 of the Constitution of Slovenia[40] according to which „Slovenia is a state governed by the rule of law and a social state"[41], of those of Constitution of Romania[42] which, by art. 1 para. (3), state, among othe provisions, that „Romania is a democratic and social state, governed by the rule of law…".

There are also constitutions, such as that of Nicaragua[43], which, although it provides, by art. 6, that this state „[i]s organized as a democratic and social state based on the rule of law", by art. 98 para. (2), speaking about the national economy, mentions that „the State must play the role of facilitator in the production sector which creates the conditions which allow the private sector and the workers to pursue their economic, productive and labor activities in a

[30] J. Gaskell and G. Stoker, *Centralized or Decentralized - Which Governance Systems are Having a "Good" Pandemic?*, in Democratic Theory, Volume 7, Issue 2, Winter 2020, p. 34, available at: https://www.berghahnjournals.com/view/journals/democratic-theory/7/2/dt070205.xml.

[31] M. S. Grindle, *op. cit.*, p.3.

[32] Ibidem.

[33] B. G. Peters and Jon Pierre, *Comparative Governance*, 2016, Cambridge: Cambridge University Press, apud. J. Gaskell and G. Stoker, *op. cit.*, p. 34.

[34] This Constitution is available at: https://www.constituteproject.org/constitution/Poland_2009?lang=en, accessed on: 22.03.2021.

[35] This Constitution is available at: https://www.constituteproject.org/constitution/Portugal_2005?lang=en, accessed on: 22.03.2021.

[36] This Constitution is available at: https://www.constituteproject.org/constitution/Slovakia_2017?lang=en, accessed on: 22.03.2021.

[37] For details, see: Ș. Deaconu, coordinator, I. Muraru, E. S. Tănăsescu, S. G. Barbu, *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, vol. II, Monitorul Oficial Publishing House, Bucharest, p. 653.

[38] This Constitution is available at: https://www.constituteproject.org/constitution/Sweden_2012?lang=en, accessed on: 22.03.2021.

[39] Ibidem.

[40] This Constitution is available at: https://www.constituteproject.org/constitution/Slovenia_2016?lang=en, accessed on: 22.03.2021.

[41] Dispoziții în acest sens se regăsesc și în alte constituții, precum preambulul Constituției Lituaniei unde se prevede că unul dintre obiectivele acesteia este „striving for an open, just, and harmonious civil society and State under the rule of law" (This Constitution is available at: https://www.constituteproject.org/constitution/Lithuania_2019?lang=en, accessed on: 22.03.2021), sau în art. 1.1 din Constituția Spaniei care prevede că „Spain is hereby established as a social and democratic State, subject to the rule of law" (This Constitution is available at: https://www.constituteproject.org/constitution/Spain_2011?lang=en, accessed on: 22.03.2021), or in art. B para. (1) of Hungarian Constitution according to „Hungary shall be an independent, democratic rule-of-law State" (This Constitution is available at: https://www.constituteproject.org/constitution/Hungary_2016?lang=en, accessed on: 22.03.2021), or in the preamble to the Constitution of Honduras, which states that its purpose is inclusive „to strengthen and perpetuate a rule of law which ensures a politically, economically and socially just society …. within a context of justice, liberty, security, stability, pluralism, peace, representative democracy and the common good" (This Constitution is available at: https://www.constituteproject.org/constitution/Honduras_2013?lang=en, accessed on: 22.03.2021).

[42] This Constitution is available at: https://www.constituteproject.org/constitution/Romania_2003?lang=en, accessed on: 22.03.2021.

[43] This Constitution is available at: https://www.constituteproject.org/constitution/Nicaragua_2014?lang=en, accessed on: 22.03.2021.

framework of democratic governance and full legal certainty…". Also, the same constitution, by art. 131 para. (4), provides good governance among the principles according to which it must be „the centralized, decentralized or deconcentrated Public Administration to serve the general interest with objectivity".

Starting from the provision of this constitution, we will be able to emphasize that good governance must be a principle, but also a goal for any government in a state governed by the rule of law. On the other hand, democracy also involves the exercise of power, inclusively by public administration, but not only centralized, but also decentralized in order to be closer to the needs of those governed, to understand and satisfy them. The better you understand the needs of the people as a government, the more you will be able to find and implement the best solutions to satisfy them, through the decisions you make because „multi-level governance benefits from both centralized and decentralized capacity, mutual learning and integration, and celebrating and exploiting differences"[44].

„Equating good governance arrangements to good COVID-19 response outcomes is not straightforward"[45]. However, we wonder whether good governance necessary to enable the exercise of two fundamental rights - the right to education and the right to health, can not be better achieved through real, effective collaboration between central and local authorities.

In this regard, we also agree that can be „[h]ighlighted how four positive qualities of multi-level governance can contribute, when combined, to greater chances of positive practical outcomes in times of crisis:

- a strong central capacity - in terms of the ability to implement rapid, decisive action;
- decentralised capacity – to mobilise different resources to tackle the outbreak;
- mutual learning and integration;
- celebrating differences - by providing local governance centre with the freedom and resources to undertake what they feel is needed for their communities"[46].

3. The right to education

For any human being, education is a fundamental right recognized by international, regional or national regulations[47]. Obviously, in a state governed by the rule of law, education and the right to education are essential even for the existence of the state, education being interconnected with democracy[48] because „to render democratic governments safe, the people's "minds must be improved to a certain degree""[49].

Through education we can transmit knowledge, we explain it, but also we can contribute essentially to the training of the youngest of, as the ECHR pointed out mentioning „that the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development"[50].

We are living in a world full of challenges that forces us to adapt continuously, permanently, and the Covid-19 pandemic has shown us that such challenges, of different natures and intensities, can occur at any time. Rather, we believe that the current pandemic reminded us that "history repeats itself," but also that we should not forget its lessons as soon as the event occurred. Maybe now at least we will work harder to prepare for almost any future event, little or not at all predictable in terms of size, duration and consequences.

In our current existence, as we have already mentioned, education is an essential element, and its providing by the main actors, including the public authorities of the states, is a permanent challenge whose intensity has increased during this pandemic period. Thus, in a world already aware that „was already facing formidable challenges in fulfilling the promise of education as a basic human right"[51], we faced a new challenge - the COVID-19 pandemic that „has caused the largest disruption of education in history, having already had a near universal impact on learners and

[44] J. Gaskell and G. Stoker, *op. cit.*, p. 34.

[45] Ibidem.

[46] See J. Gaskell and G. Stoker, *Centralised or multi-level: which governance systems are having a 'good' pandemic?* in British and Irish Politics and Policy, 2020, pp. 2-3, available at: https://blogs.lse.ac.uk/politicsandpolicy/governance-systems-covid19/, accessed on: 22.03.2021.

[47] See, for example, art 26 of Universal Declaration of Human Rights, at the international level, art. 13 of Charter of Fundamental Rights of the European Union, at the regional level, or art. 32 of Romanian Constitution.

[48] E. Berger, *The education right to under the South African Constitution* in Columbia Law Review 103 (2003), p. 614, available at: https://digitalcommons.unl.edu/lawfacpub/26, accessed on: 22.03.2021.

[49] Thomas Jefferson, Notes on the State of Virginia 148 (William Peden ed., Univ. of N.C. Press 1955) (1787), quoted by Eric Berger, *op. cit.*, p. 614.

[50] CASE OF CAMPBELL AND COSANS v. THE UNITED KINGDOM, paragraph 33, Court Judgment, 25.02.1982, (application no 7511/76 and 7743/76), ECLI:CE:ECHR:1982:0225JUD000751176,

[51] United Nations, *Policy Brief: Education during Covid-19 and beyond*, 2020, p. 5, available at: https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sg_policy_brief_covid-19_and_education_august_2020.pdf, accessed on: 22.03.2021. Besides, in this document is pointed out that „despite the near universal enrolment at early grades in most countries, an extraordinary number of children – more than 250 million – were out of school and nearly 800 million adults were illiterate", according to different data from websites as: http://uis.unesco.org/en/topic/out-school-children-and-youth, or http://uis.unesco.org/en/topic/literacy. The same document revealed many other practical problems regarding education and the implementation of the right of education existing even before the Covid-19 pandemic.

teachers around the world, from pre-primary to secondary schools, technical and vocational education and training (TVET) institutions, universities, adult learning, and skills development establishments"[52].

To protect our health and not only, we had to adapt by resorting to a solution used occasionally and only for certain types of education such as distance or part-time higher education. Thus, „the virtual world has come to the rescue"[53] and „many of schools and universities closed turned to technology to try to continue the teaching and learning process"[54].

Thus, we tried to continue to educate, respectively to learn, as the case, from a distance, through various learning platforms in the online environment. But, it is very difficult, complicated and demanding to involve the student in the activities carried out through online platforms, as we could do in face-to-face learning. Certainly, educating and learning through online tools is a constant challenge, especially when this process takes place in the area of legal sciences, with first-year students who at that moment meet for the first time, most often, with legal notions and terms. The inventiveness and adaptability of the teacher will be decisive in making such abstract notions as understandable as possible. These issues are mentioned only to highlight some of the challenges that have arisen in learning law through online platforms, but to these are added challenges that affect the entire education system, such as:

- „the lack of Internet or almost non-existent Internet connectivity in educational centers across the board in the poorest geographical areas"[55]
- the lack of equipment with a laptop or computer to be able to actively participate in teaching activities; most of the time a phone, although it is a useful, device, is not enough - assertion valid for the pupil, student, but also for the teacher;
- the lack of specific skills of teachers or the existence of such skills, but only at an acceptable level;
- the increased temptation to look for the answers to the teacher's requests during the teaching activities in the virtual environment, without checking their correctness [56].

Social and economic disparities have negatively influenced the way this education has been done through the means offered by the internet. Thus, „in high-income countries, the closure of educational centers to this unknown level has been alleviated by providing the necessary coverage from homes"[57], affirmation that we appreciate to be largely true even when we refer to middle and high income families.

„The right to education, also in distance modalities, is once again a threatened and non-realized right for children in the most impoverished societies, and for those belonging to the most disadvantaged and vulnerable groups, ranging from women to students with special educational needs"[58]. All the more so as the exercise of the right to education will suffer when the central public authorities of a state fail or have difficulty in adopting measures to manage the crisis situation for a considerable period of time. Or when they grope by adopting and, especially, amending normative acts without predictability, without the participation and consultation, perhaps only superficial sometimes, of the representatives of all participants in the educational process, wanted an absolute centralization of the decision, the risk that the measures taken further affect the right to education is even greater.

It must not be forgotten that „the right to education it is a precondition for the exercise and understanding of other rights civil and political rights"[59], „freedom of information and the right to vote depend on a minimum level of education"[60]. More than that „through education individuals can be taught values such as tolerance and respect for human rights"[61]. Thus, we have the same opinion according to which „education is not merely an end in itself, but also a means to address many other social problems"[62], and when we are „[d]efining educational adequacy"[63] it is necessary for the „[g]overnment to provide its citizens with better schools"[64].

The configuration of a general framework, of some general principles, at national level in which education can be continued in such a crisis situation is welcome, but the role of a central decision-making public authority in the field of education must not be

[52] Ibidem.

[53] S. Jain, M. Lall and A. Singh, *Teachers' Voices on the Impact of COVID-19 on School Education: Are Ed- Tech Companies Really the Panacea?*, in Contemporary Education Dialogue 18(1), 2021, p. 60, available at: https://journals.sagepub.com/doi/full/10.1177/0973184920976433, accessed on: 22.03.2021.

[54] Ibidem.

[55] L. M. Lázaro Lorente, A. Ancheta Arrabal and C. Pulido-Montes, *The Right to Education and ICT during COVID-19: An International Perspective*, in Sustainability 2020, 12, 9091, p. 12, available at: https://www.mdpi.com/2071-1050/12/21/9091, accessed on: 22.03.2021.

[56] Regarding these challenges as well as others, see, for example, A. Maguire and D. McNamara, *Human rights and the post-pandemic return to classroom education in Australia*, in Alternative Law Journal, 2020, vol. 45(3), p. 206, available at: https://journals.sagepub.com/doi/full/10.1177/1037969X20954292, accessed on: 22.03.2021

[57] Idem, p. 11.

[58] Idem, p. 12.

[59] P. du Plessis, L. Conley and C. Loock, *The right to education: are we facing the challenges?*, in Educational Research and Review, vol. 2 (8), p. 198, 2007, available online at http://www.academicjournals.org/ERR, accessed on: 22.03.2021.

[60] Ibidem.

[61] P. du Plessis, L. Conley and C. Loock, *op. cit*, p. 199.

[62] E. Berger, *op. cit*, p. 661.

[63] Ibidem.

[64] Ibidem.

absolutized. Just as it has to take into account the implications of the principle of university autonomy, so it should take into account the actual needs and possibilities of schools from different counties and allow the adaptation of the way of achieving education according to them. As we mentioned above, it is important to have a central public authority with a real capacity to identify measures, to make prompt decisions, but it is equally important to use the best resources, taking into account the regional and / or local specifics, in order to identify the best appropriate form of education that works as optimally as possible and for as long as possible.

In the end „education is a socio-cultural practice, where young people are given access to formal knowledge codes in mediated relationships with others"[65]. On the other hand, schools are institutions „within which vastly different experiences may be provided"[66] which, because of the „[l]ink with nation-building and social cohesion"[67] or „[l]abour markets to provide, or close off, access to jobs"[68], „[t]end to reproduce the patterns of inequality and privilege of their broader societies, rather than change them"[69].

But education must presuppose equality, at least in the opportunities offered to any child to access it and to reap its benefits. Thus, „the deployment of online distance learning (together with radio and television), should only be seen as a temporary solution aimed at addressing a crisis, and the digitalization of education should never replace onsite schooling with teachers"[70]. This way we have certainly discovered new and „[u]nlimited drive, and untapped resources"[71], that will be needed for „[t]he restoration, not only of education's essential services, but of its fundamental aspirations"[72]. But, even in our opinion, if „[d]istance education become the new paradigm for education after the end of the pandemic, it would affect the heart and purpose of the right to education. Onsite and face-to-face education enables teachers not only to provide content, but to ensure it is understood and well received. Besides, education goes much beyond a single objective of transmitting didactic knowledge, and aims at developing socio-emotional skills, critical spirit and creativity, citizenship and mutual understanding between groups that need to interact and mix in order to live in and build a peaceful society, and at connecting children to nature and to their environment. Education is a social act of a community of learners that require real human interactions."[73]

And we also considered that „it is the responsibility of governments and the international community to stay true to principles and conduct reforms"[74] to configure solutions tailored to the specific needs of each community for possible other future crisis situations in order to allow, as optimally as possible and non-discriminatory, the full exercise of the right to education.

4. The right to health vs. right to education?

Any „state constitution is a charter document expressing citizens' values, priorities, and aspirations"[75], and one of these ia our health, and this is why, indeed, „the centrality of health as an important aspect of the human condition is universally recognized"[76].

The Universal Declaration of Human Rights, by art. 25, provides that „everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". The Charter of Fundamental Rights of the European Union, by art. 35, states that „everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices", and also that „a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities." Even at national level, by constitutional provisions, it is usually

[65] P. Christie, Opening the Doors of Learning: Changing Schools in post-Apartheid South Africa. Heinemann, Johannesburg, 2008, quoted by P. Christie, The complexity of human rights in global times: The case of the right to education in South Africa, in International Journal of Educational Development no. 30, 2010, p. 8, available at: https://www.sciencedirect.com/science/article/abs/pii/S0738059309000935, accessed on: 22.03.2021.

[66] P. Christie, op. cit., p. 8.

[67] Ibidem.

[68] Ibidem.

[69] Ibidem.

[70] Human Rights Council, Forty-fourth Session, Right to education: impact of the COVID-19 crisis on the right to education; concerns, challenges and opportunities, Report of the Special Rapporteur on the right to education, A/HRC/44/39, 2020, point 47, p. 12, available at: https://undocs.org/A/HRC/44/39, accessed on: 22.03.2021.

[71] United Nations, op. cit., p. 26.

[72] Ibidem.

[73] Human Rights Council, op. cit., point. 47, p. 12.

[74] Ibidem.

[75] See E. Weeks Leonard, State Constitutionalism and the Right to Health Care, in Journal of Constitutional Law [Vol. 12:5], 2010, p. 1401, available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1135&context=jcl, accessed on: 22.03.2021.

[76] S. D. Jamar, The International Human Right to Health, in Southern University Law Review, Vol. 22, 1994, p. 3, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093085, accessed on: 22.03.2021.

regulated that „everyone has the right to the protection of health”[77].

The right to health, enshrined, usually, in fundamental normative acts, such as the right to health care, is "a complex, ambivalent right, with two components, one substantial and the other procedural"[78]. If every human being should enjoy the right to health, the international community, but especially the states, through specific mechanisms, are obliged to configure the legal framework and not only of the health system to ensure the protection of the health of each of us. In other orders, we can affirm that „the right to health is therefore better thought of as '[w]hat we as a society do collectively to ensure the conditions in which people can be healthy'”[79].

Therefore, it is the obligation of each state to respect, and as regards the right to health and its protection, especially in public health emergencies, fundamental principles, such as:

- „equality and non-discrimination whereby governments must refrain from acting in a manner that either directly or indirectly discriminates against individuals or groups, including avoiding unintended consequences of policies and programmes and protecting against third party discrimination;
- communities must have access to accountability mechanisms and remedies in situations where their rights have been, or are at risk of being, breached.”[80]

We can identify some neighboring rights – as the right to food, the right to a decent standard of living, and the right to work, and some other rights – as the right against torture, the right to life, and the rights of prisoners, the enforcement or nonenforcement of which contribute to or detract from the state of human health”[81]. But, we also can mentione some „certain rights which are stand-alone rights are also part of the right to health and have particularized meaning in defining the right to health”[82], and one of them is the right to education[83]. Indeed, in this situation it is mainly about the right to health education and its protection, but even for this it is necessary to ensure a minimum of general education, which is why, in our opinion, it is more than obvious that these two fundamental rights of any human being - the right to education and the right to health - are interconditioned. Even that sometimes „without the right to health other rights have less meaning and importance”[84], this does not mean that in cases of crisis, such as a pandemic, any other fundamental rights, such as the right to education, must be restricted or even abolished. We consider such a assertation to be valid especially when, acting responsibly, predictably and in a timely manner, public authorities can set up an optimal framework in which the two rights are exercised simultaneously, with minimum conditions and restrictions.

We support the above mentioned because, even we agree that „[g]ood health does not depend only on health care. It also depends on nutrition, lifestyle, education, women's empowerment, and the extent of inequality and unfreedom in a society”[85].

In crisis situations, such as the Covid-19 pandemic, it is natural for state authorities to take measures to protect every citizen, to configure the framework in which they can protect their health and, if necessary, to appeal, of the means, procedures, legal institutions to protect their health. However, these measures must be taken so as not to affect the substance of other rights, such as the right to education.

Thus, it is necessary that our governments to design an ethical framework, which is also a legal one, to represent „a constellation of values and considerations that ought to be considered by decision-makers in this context”[86]. Such values[87] can be:

- substantive values: individual liberty, protection of the public from harm, proportionality, privacy, duty to provide care, reciprocity, equity, trust, solidarity, stepward-ship;
- procedural values: reasonable, open and transparent, inclusive, responsive, accountable.

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[77] In this regard, see, for example, art. 28 of Estonian Constitution (This Constitution is available at: https://www.constituteproject.org/constitution/Estonia_2015?lang=en, accessed on: 22.03.2021), or art. 55 of Albanian Constitution (This Constitution is available at: https://www.constituteproject.org/constitution/Albania_2016?lang=en, accessed on: 22.03.2021), or art. 12 point 5) of Constitution of Oman (This Constitution is available at: https://www.constituteproject.org/constitution/Oman_2011?lang=enaccessed on: 22.03.2021), or art. 34 of Romanian Constitution.

[78] Decision 1252/2010 of Romanian Consitutional Court regarding the exception of unconstitutionality of the provisions of art. 208 para. (3) first sentence, art. 211 para. (1) and art. 213 para. (4) of Law no. 95/2006 on health care reform, published in Official Gazette of Romania, Part I, no. 759 from 19.11.2010.

[79] T. Evans, *A human right to health*?, in Third World Quarterly, Vol 23, No 2, p. 198, 2002, where is quoting International Federations of Red Cross and Red Crescent Societies and Francois-Xavier Bagnoud Centre for Health and Human Rights, 1999: 29, available at: https://www.jstor.org/stable/3993496?seq=2#metadata_info_tab_contents, accessed on: 22.03.2021.

[80] UNAIDS, *Rights in the time of COVID-19. Lessons from HIV for an effective, community-led response*, Geneva, 2020, p. 5, available at: https://www.unaids.org/en/resources/documents/2020/human-rights-and-covid-19, accessed on: 22.03.2021.

[81] See Steven D. Jamar, *op. cit*., p.5.

[82] Ibidem.

[83] Ibidem.

[84] See Steven D. Jamar, *op. cit*., p.34.

[85] A. Sen, Why and how is health a human right?, in The Lancet 372, no. 9655, 2008, p. 2010, available at: https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(08)61784-5/fulltext, accessed on: 22.03.2021.

[86] M. Smith and R. Upshur, *Pandemic Disease, Public Health, and Ethics*, in A. C. Mastroianni, J. P. Kahn, and N. E. Kass, The Oxford Handbook of Public Health Ethics, 2019, p. 8, available at: https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190245191.001.0001/oxfordhb-9780190245191-e-69?print=pdf, accessed on: 22.03.2021.

[87] University of Toronto Joint Centre for Bioethics Pandemic Influenza Working Group, 2005, quoted by M. Smith and R. Upshur, *op. cit.*, p. 9 -13.

We consider that it is appropriate to emphasize that when we are speaking about individual liberty and proportionality, as substantive values, „[i]n a public health crisis, restrictions to individual liberty"[88] may be decided by the governements only if it „[i]s necessary to protect the public from serious harm"[89]. Such „restrictions to individual liberty should be proportional, necessary, and relevant, employ the least restrictive means, and be applied equitably"[90]. So, these „restrictions to individual liberty and measures taken to protect the public from harm should not exceed what is necessary to address the actual level of risk to or critical needs of the community"[91].

5. Conclusions

Good governance will focus on the needs of those governed, building on state, regional and local possibilities, but will also require the obligation of governments to identify and develop other mechanisms, procedures, institutions through which to strengthen and develop good governance.

Five principles are considered critical to guiding the reforms of global governance and global rules[92]: common but differentiate responsibilities and respective capacities, subsidiarity, inclusiveness, transparency and accountability, coherence, responsible sovereignty.

Adapting[93] these principles and their essence, we consider that in a crisis situation as Covid-19 pandemic, when there are discussions about the priority of these two fundamental rights - the right to education or the right to health, our governments must act taking into consideration the following:

- the diversity of national circumstances and policy approaches that requires common but differentiate responsibilities and respective capacities at national and local level;
- in respect of subsidiarity and proportionality, some problems can be handled well and efficiently at the local or regional levels reducing the number of issues that need to be tackled at national level;
- the institutions that participate in a real good governance, need to be representative of, and accountable to, the entire community, while decision-making procedures need to be democratic, inclusive and transparent;
- enhanced coherence is also needed between the local or regional and national spheres of policymaking, an improved coordination among various stakeholders and enhanced information sharing is also needed.

Human health is „a claim, interest, need, or demand which is cognizable under law and which proceeds from moral precepts necessary for respect for human dignity"[94], but also the right to education has its role in defining the human dignity. There are two rights that, in our opinion, must be able to be exercised simultaneously, especially since „in the case of a right to health, there is increasing evidence that globalisation itself will lead to greater levels of disease"[95] that can be preventable and avoidable or at least managable, as the movement of people, goods and ideas continues to increase on a global scale[96].

On the other hand, „while we might think COVID-19 will pass and this will all be over soon, other disasters might warrant more online delivery, such as earthquakes or floods"[97]. „Our ability to learn from this pandemic will determine not only our success in responding to future pandemics but also other global challenges"[98], so it is necessary „to build protection systems and resilience"[99].

Governments need to discover mechanisms and procedures to ensure the realization of education in such situations of severe crisis, when education in classical way is difficult or impossible to carry out. And for those possible situations in which it is necessary for the educational process to take place in the online environment, the governments are obliged to ensure, in advance, that any participant in this process has the necessary technical equipment, but also has assimilated essential knowledge, methods and techniques to use this kind of teaching or learning, as the case.

As we can still observe, „it is essential that in today's digital world, teachers can switch from face-to-face teaching to online when required and that they can support all of their students no matter from which section of society"[100].

Even in our opinion, in any situation „teachers should have autonomy and liberty in deciding when and

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[88] University of Toronto Joint Centre for Bioethics Pandemic Influenza Working Group, 2005, quoted by M. Smith and R. Upshur, *op. cit.*, p. 11.

[89] Ibidem.

[90] Ibidem.

[91] Ibidem.

[92] United Nations, *Global governance and global rules fordevelopment in the post-2015 era, 2014*, p. vii, available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2014-cdp-policy.pdf, accessed on: 22.03.2021

[93] For details reffering to these principles, see United Nations, *op. cit.*, p. vii.

[94] Goler Teal Butcher, an oft-repeated statement to the author in their conversations, quoted by Steven D. Jamar, *op. cit*., p.8.

[95] T. Evans, *op. cit*., p.208.

[96] See, T. Evans, *op. cit*., p.208.

[97] S. Jain, M. Lall and A. Singh, *op. cit*., p. 84.

[98] United Nations, *Covid-19 and human rights. We are all in this together*. *Human rights are critical – for the response and the recovery*, 2020, p. 20, available at: https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf, accessed on: 22.03.2021.

[99] Ibidem.

[100] S. Jain, M. Lall and A. Singh, *op. cit*., p. 84.

where to integrate technology to support their teaching practices"[101]. And this is another reason why the governments must create clear, predictable, simple procedures that allow for the decentralization of educational processes, but also of some decisions in this area, in order to adapt them to the specific needs and possibilities of the each local community.

Consequently, veritable good governance will find optimal solutions so that in crisis situations, such as a pandemic, the governments do not have to choose between the right to health and the right to education, to the detriment of the latter.

On the other hand, good governance must not be perceived as a chameleon-like concept that is determined or at least influenced exclusively by the discretionary power of national governments.

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LONG AWAITED ROMANIAN LAW ON FOOD SUPPLEMENTS FINALLY ENACTED

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Abstract

The aim of this study is to raise awareness and to improve knowledge of food supplements legislation in Romania.

Special attention should be given to the new piece of legislation applicable in Romania – Law no. 56/2021 on food supplements, which is intended to bring light and transparency in this field, after transposing the Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements as amended by other European Union legislative acts.

After several years of legislative struggle, the Law no. 56/2021 has been promulgated on March 31, 2021 through the Presidential Decree no. 256/2021. Since the fines are consistent, attention should be given by the private players on the Romanian food supplements' market in order to comply with the new rules.

Therefore, this study intends to provide guidance for both legal professionals, and non-specialist legal professionals working in the field of food supplements.

Keywords: *food supplements, dietary supplements, Law no. 56/2021, Health Ministry, Romania.*

1. Introductive Remarks – What About Food Supplements in Romania?

Food (dietary) supplements are products that are becoming, each day, worldwide more attractive for the consumers. Their increasing interest in everyday consumption of food supplements push the international and national legislators to rule effectively in order to protect the health of the consumers, who should be correctly and completely informed by the producers or importers of such products.

In Romania the legal framework for food supplements is very complex, being applicable both European and national specific legislation.

Very recently the Romanian legislation applicable to food supplements has been amended through the promulgation of the Law no. 56/2021 on food supplements (hereinafter "*the Law no. 56/2021*"). Special attention should be given to this new law which is intended to align the Romanian applicable legislation to the European legislation, and to prevent unfair commercial practices in this field.

Since the fines provided by the Law no. 56/2021 are consistent, attention should be given by the private players on the Romanian food supplements' market in order to comply with the new rules.

In Romania, the regulation of food supplements is an attribute of the Health Ministry, and of the National Institute of Research and Development for Food Bioresources (in Romanian "*Institutul National de Cercetare-Dezvoltare pentru Bioresurse Alimentare*" – hereinafter abbreviated "*IBA*"), as we will emphasize in the second part of the study.

Please note that the National Agency for Medicines and Medical Devices of Romania (hereinafter abbreviated "*NAMMDR*"), the public institution operating as a legal entity subordinated to the Health Ministry, and which develops national strategies and policies in the field of medicines and medical devices, is not competent to regulate food supplements (as well as cosmetic products, controlled substances, and veterinary medicines). Therefore, we emphasize that the food supplements legislative framework is clearly different that the one regulating medicines.

According to the applicable legislation, food supplements may not legally claim a medicinal effect or combat diseases. In order to establish the medicinal product status of a product marketed as a food supplement, the NAMMDR has to investigate first its ingredients and to study its public presentation.

2. Certain Aspects Regarding the Applicable Legal Framework in Romania

Please note that the food supplements market in Europe "presents a less permissive specific comparative to the US"[1], whereas a specific legislative framework was created starting with the European Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements[2] (hereinafter "*the Directive*

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[1] Emilia Stancu, Adriana-Elena Taerel, Valentina Soroceanu, Cristina Rais, Manuela Ghica, *Ethical Aspects of Food Supplements in EU and Romania*, in Farmacia, vol. 67, no. 4/2019, p. 736.

[2] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02002L0046-20170726 (consolidated version).

2002/46/EC"). The aim of this Directive is to create a legal framework for the food supplements' producers/importers in order to ensure consumer protection in the European Community.

Among the most important aspects regulated by this Directive, we mention the creation of the list of vitamin and mineral supplements, the definition and the establishment of the purity criteria for substances and of the maximum amount of vitamins and minerals per daily portion of consumption, the setting up of the classification of micronutrients in a risk category.

Through art. 10 of the Directive 2002/46/EC, it was imposed to notify the food supplements in each Member State to the competent authority: "*[t]o facilitate efficient monitoring of food supplements, Member States may require the manufacturer or the person placing the product on the market in their territory to notify the competent authority of that placing on the market by forwarding it a model of the label used for the product*".

As for the Romanian legislation, please bear in mind that the most relevant food supplements normative acts are:

- Emergency Government Ordinance no. 97/2001 regarding the production, circulation and commercialization of food (hereinafter abbreviated "*EGO 97/2001*") approved by Law no. 57/2002;
- Joint Order no. 243/402/2005 of the Minister of Agriculture, Forests and Rural Development and Health Minister on the approval of technical rules for the production, processing, processing and marketing of medicinal and aromatic plants;
- Joint Order no. 1228/244/63/2005 of the Minister of Agriculture, Forests and Rural Development, Health Minister and President of the National Sanitary Veterinary and Food Safety Authority approving the Technical Norms on the commercialization of pre-dosed food supplements of animal and vegetal origin and/or of their mixtures with vitamins, minerals and other nutrients (hereinafter "*the Order no. 1228/2005*");
- Health Minister Order no. 1069/2007 on approving the Norms on food supplements (hereinafter "*the Order no. 1069/2007*");
- Law no. 56/2021 on food supplements.

Please note that, according to art. 15 para. (1) of the Law no. 56/2021, in 90 days from the entry into force of this law, the Health Ministry shall elaborate the technical norms for manufacturing, marketing, and use of food supplements (hereinafter "*the Norms on food supplements*") which shall be approved through a government decision and shall abrogate the Order no. 1069/2007.

Moreover, please bear in mind that according to the art. 15 para. (2) of the Law no. 56/2021, on the date of entry into force of the technical norms above-mentioned, the Health Minister Order no. 1069/2007 on approving the Norms on food supplements shall be abrogated.

But what are more precisely the food supplements? Pursuant to art. 2 letter a) of the Directive 2002/46/CE, food supplements means „*foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities*"[3].

According to art. 10 of the Directive 2002/46/EC, „*[t]o facilitate efficient monitoring of food supplements*", a manufacturer or the person placing on the market a food supplement shall notify the competent authority of that placing on the market, by forwarding it a model of the label used for the respective product.

Depending on the composition of foodstuffs, food supplements in Romania, have to be notified either before the Health Ministry or before the IBA.

As regards the notification before the Health Ministry, attention should be given to the Norms on food supplements, because once these Norms shall be adopted, the actual procedure set-up in the Order no. 1069/2007 shall be changed, although in the present the Health Ministry already represents the competent authority for the notification of food supplements consisting of nutrients (i.e. vitamins and minerals).

The notification procedure set-up by the Order no. 1069/2007 is quite simple, having an informative purpose, rather than an analythical one. According to art. 10 para. (1) of the norms contained in the Order no. 1069/2007, this procedure consists of submitting a notification form together with a template of the food supplement's label (in hard and soft copy). According to art. 11 of the norms contained in the Order no. 1069/2007, the Health Ministry representatives shall evaluate the information on the label and shall issue the form attesting the registration of the notification within 48 hours from the moment of the notification submission, while in 15 days shall deliver the notification.

As regards the notification before the IBA, the provisions of the Order no. 1228/2005 are relevant, taking into consideration that certain products may be commercialized on the Romanian market only further to a prior notification to this institute.

Having in view the novelty character of the Law no. 56/2021, which has been published in the Romanian Official Gazzette no. 332 dated April 1st, 2021, we shall further analyse it, considering the high interest in this piece of legislation.

[3] Please note that this is also the exact definition used by the Romanian legislator in art. 2 letter a) of the Law no. 56/2021.

3. The Legislative Process of the Law no. 56/2021

We consider that the legislative process[4] of the Law no. 56/2021 is very interesting to follow, reason for which we shall further analyse it. Even from the beginning we must emphasize that the Law no. 56/2021 has been promulgated after 8 years from the moment it was put on the table of the parliamentariens (i.e. no. L333/10.09.2012 / PL-x 468/12.11.2012[5]).

The first Chamber of the Parliament was the Senate, and the initiator of the law was the Government.

On October 30, 2012, the Senate has rejected the bill of law, and on November 12, 2012 it was presented in the Permanent Office of the Chamber of Deputies.

After receiving the notices from the Juridical, Discipline and Immunities Commision (on January 15th, 2013) and from the Commission for education (on February 19th, 2013), as well as the favorable report from the Commision for agriculture, silviculture, food industry and specific services and the Commission for health and family (on September 30, 2020), it has been submitted to debates on October 14th, 2020 and October 20th, 2020.

On October 20th, 2020, the Chamber of Deputies has adopted the bill of law establishing the legal framework regarding food supplements, commercialized as foodstuffs, bill that has been sent for promulgation, on October 26th, 2020, to the Romanian President.

On November 25th, 2020, the Romanian President, Mr Klaus Werner Iohannis, has attacked the bill of law to the Constitutional Court, arguing that, by means of its adoption, the law violates art. 61 para. (2) and art. 75 para (1) of the Romanian Constitution, being breached the competence of the Senate as the first chamber seized of the Parliament.

Arguing that the form of the initiator of the law provided a shared competence of several authorities[6] depending on the composition of the food supplements, the Romanian President underlined that the final form of the piece of law overruled the constitutional principle of bicameralism.

On March 24, 2021, the Constitutional Court has rejected the objections of unconstitutionality through the Decision no. 902 dated December 16, 2021.

On March 31st, 2021, through the Presidential Decree no. 256/2021, the bill of law was enacted, becaming the Law no. 56/2021. The following day, on April 1st, 2021, the law has been published in the Romanian Official Gazzette no. 332, and it came into force in 3 days after its publication date according to the first thesis of the art. 78 of the Romanian Constitution[7].

4. The Provisions of the Law no. 56/2021 Under the Magnifying Lens

Establishing the legal framework of the food supplements[8], please note that the provisions of this law are not applicable for (i) the drugs defined in title XVIII „Drug" of the Law no. 95/2006 regarding the reform in the health domain, republished, with the subsequent amendments and completions and for (ii) the food supplements based on medicinal and aromatic plants, as well as beehive products, ruled by the Law no. 491/2003, republished, with subsequent amendments and completions.

Even from the beginning of the law, the Romanian legislator clarifies on the establishment of the "*Health Minister as the **competent authority in the field of the food supplements based on*** [emphasis added]*:*

a) vitamins, minerals;

b) mixtures of vitamins and/or minerals;

c) substances having a nutritional or physiological effect other than vitamins and minerals[9];

d) mixtures of vitamins and/or minerals with substances having a nutritional or physiological effect other than vitamins and minerals;

e) mixtures of vitamins and/or minerals with vegetable and/or animal extracts;

f) mixtures of vitamins and/or minerals with plant and/or animal extracts, with substances having a nutritional or physiological effect, with plants and/or beehive products[10]." [11].

Please note that according to art. 1 para. (3) of the Law no. 56/2021, in the use of mixtures containing vitamins, minerals, or substances having a nutritional or physiological effect other than vitamins and minerals; "*consumed as ingredients foreseen in para. 2 letters d)-f), the notification*[12] *shall be made to the*

[4] Please see the information available on the website of the Chamber of Deputies (http://www.cdep.ro/pls/proiecte/upl_pck.proiect?idp=12983) or of the Senate (https://senat.ro/legis/lista.aspx?nr_cls=L333&an_cls=2012).

[5] The number of the bill of law, given by the Senate and by the Chamber of Deputies.

[6] E.g. the Health Minister, the Agriculture Minister and the Anti-Dopping National Agency instead of the Health Minister as unique competent authority in this field.

[7] For the English version of the Romanian Constitution, please see the website of the Romanian Constitutional Court - https://www.ccr.ro/en/constitution-of-roumania/.

[8] According to art. 1 para. (1) of the Law no. 56/2021.

[9] By the expression "substances having a nutritional or physiological effect other than vitamins and minerals" the Romanian legislator understands "*amino acids, enzymes, prebiotics and probiotics, essential fatty acids, plant extracts, including plants, algae, lichens, fungi, as well as their essential extracts and oils and/or animal extracts, bioactive substances authorised and included in the Novel-Food Catalogue - new foods, of the European Union*" – please see art. 2 letter c) of the Law no. 56/2021.

[10] I.e. pollen, propolis, honey and royal jelly according to art. 1 para. (2) letter h) of the Law no. 491/2003 regarding medicinal and aromatic plants, as well as beehive products.

[11] According to art. 1 para. (2) of the Law no. 56/2021.

[12] By "notification" it should be understood notifying the competent authority of the placing on the market of a food supplement.

Health Ministry, after receipt of the technical advisory opinion issued by the Technical Committee referred to in art. 5 of Law no. 491/2003 regarding medicinal and aromatic plants, as well as beehive products, republished, with the subsequent amendments and completions, and for vegetal extracts, medicinal and aromatic plants, as well as for beehive products, the technical advisory opinion shall be requested by the Health Ministry."[13].

The notification procedure in order to place a food supplement[14] on the Romanian market has to be performed either by the manufacturer, the importer or the responsible person for placing the product on the market. The placing on the Romanian market is subject to the obtention of the notification certificate for the respective food supplement, and we underline that it shall not be possible to place a product on the market before the obtention of such certificate[15].

The notification procedure is provided by art. 5 of the Law no. 56/2021, depending on the type of the ingredients of the food supplement to be placed on the Romanian market:

a) for the food supplements containing *only vitamins and minerals and/or mixtures of vitamins and minerals*[16]: the notification file consisting in a printed notification request, the notification form, accompanied by the model of the label for the product concerned, in electronic and *folio* form; the file shall be transmitted to the Health Ministry;

b) for the food supplements based on *substances with nutritional or physiological effect, other than vitamins and minerals, mixtures of vitamins and/or minerals with substances having a nutritional or physiological effect, other than vitamins and minerals, mixtures of vitamins and/or minerals with plant and/or animal extracts, mixtures of vitamins and/or minerals with plant and/or animal extracts, medicinal and/or aromatic plants and/or beehive products*: the notification file (in two copies, with the exact content) shall be notified to the institutions under the authority of the Health Ministry. A copy of the notification file submitted on which it shall be applied the visa for conformity with the original (in Romanian "*viza de conformitate cu originalul*") shall be returned to the applicant with the notification certificate issued by the specialised structure of the Health Ministry.

Please note that the notification certificate to be issued by the competent authority is an administrative act[17], which can be attacked according to the provisions of the Law no. 554/2004 on contentious administrative, with the subsequent amendments and completions.

The notification certificate shall be canceled in case of amendment of the quality and composition of the respective food supplement[18], no information being provided regarding the annulment procedure.

Article 6 of the Law no. 56/2021 brings new solutions to the problems existing on the food supplements Romanian market regarding the placing on the market of certain products:

"(1) The food supplements referred to in art. 5 paras. (1) and (6) notified in another Member State of the European Union and/or in the European Economic Area [emphasis added], can be placed for the first time on the Romanian market by notification to the competent authority, accompanied by a model of the product label and documents attesting that it is legally placed on the market in a Member State of the European Union and/or in the European Economic Area, in accordance with the provisions of the Regulation (EU) no. 515/2019 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully traded in another Member State and repealing the Regulation (EC) no. 764/2008. In this case, the competent authority shall issue a notification certificate.

2. For food supplements originating in third countries [emphasis added], manufacturers, importers or the person responsible for placing them on the market shall apply for a notification certificate from the competent authority in accordance with the provisions of the rules referred to in art. 15.".

These new provisions of Law no. 56/2021 do not answer, unfortunately, to essential questions, in our oppinion.

Firstly, according to the Law no. 56/2021, it might be possible to notify food supplements containing plant and/or animal extracts not listed neither in the list of permitted ingredients, nor in the list of forbidden ingredients? A partial answer to this question can be found in art. 2 letter c) of the Law no. 56/2021 which provides that the ingredients of the food supplements must be authorised and included in the Novel Food Catalogue of the European Union. Taking into consideration the procedure to authorise and include new ingredients in the Novel Food Catalogue, it results that a new ingredient can be used for food supplements after it has been proven with safety and efficacy trials that the respective ingredient is safe for human use consumption.

Secondly, will it be sufficient for the notification of a new food supplement to file the certificate of notification issued by the country of origin? We cannot imagine, at this stage, this situation, having in view that before the Law no. 56/2021, these type of food supplements could not be notified upon IBA except the situation the food supplement contained ingredients

[13] According to art. 1 para. (2) of the Law no. 56/2021.
[14] Each food supplement shall be marketed to the final consumer only in prepackaged form.
[15] According to art. 5 para. (7) of the Law no. 56/2021.
[16] Please see art. 5 para. (1) of the Law no. 56/2021. We underline that for the manufacture of food supplements only vitamins and minerals provided in the European Union's legislation can be used.
[17] Please see Marta-Claudia Cliza, Constantin-Claudiu Ulariu, *Drept administrativ*, *revised edition according to the amendments of the Administrative Code*, Pro Universitaria Publishing House, Bucharest, 2020, p. 12.
[18] According to art. 3 para. (2) of the Law no. 56/2021.

authorised by IBA. It is obvious that the Norms will be essential in order to answer this question.

Thirdly, during the notification procedure, in order to accept the health claims of a new food supplement, will the Health Ministry accept as proof the clinical trials conducted in third countries where domestic legislation accepts these trials on food supplements[19] which do not treat any disease, just helps maintaining the health of the consumer?

We cannot imagine this situation because in Romania, the central authorities involved in the approval of any clinical trial are NAMDMR and the National Bioethics Committee for Medicines and Medical Devices (for ethical reasons) for drugs and medical devices only, and not competent (yet) for food supplements. If the Health Ministry decides to authorise NAMDMR for food supplements notification and research, NAMDMR will become as like a "Food and Drugs Administration" authority.

Fourthly, under the Law no. 56/2021, will IBA continue to notify food supplements containing medicinal and aromatic plants, as well as beehive products? Having in view that (i) at the moment of the entry into force of the Law no. 56/2021, IBA has suspended the activity of notification for new products according to Order no. 1228/2005, and that (ii) art. 15 para. (1) of the Law no. 56/2021 provides that in 90 days from the entry into force of this law, the Health Ministry shall elaborate the Norms which shall be approved through a government decision and shall abrogate the Order no. 1069/2007, we consider that the decision of IBA is either premature, or it betrays the direction in which the Norms shall be construed. In any case, the Norms will clarify which authority will be competent to notify the categories of food supplements in Romania.

As a result of the fact that the Health Ministry is the competent authority according to Law no. 56/2021, please bear in mind that it must display on its official website[20] several lists of:

a) documents necessary for the notification of food supplements;

b) plants accepted in food supplements, taken from the Ministry of Agriculture and Rural Development;

c) substances having a nutritional or physiological effect permitted in food supplements;

d) food supplements already notified to the Health Ministry, through the specialized structures, i.e. the regional public health centres, from 2007 until the date of entry into force of Law no. 56/2021;

e) food supplements to be marketed in Romania, as well as their label and their leaflets. This list shall be updated monthly.

According to the art. 14 para. (1) of the Law no. 56/2021, it is underlined that food supplements already notified *before* the entry into force of this law, will not require any other notification if are respected the conditions that have stood at the issuance of the notification certificate. However, please note that the food supplements that do not comply with the provisions of the Law no. 56/2021 may be marketed on the Romanian market "*until the expiration of the date of minimum durability, but not later than 12 months*", provided that:

i. they do not contain ingredients other than those listed in the list of plants accepted in food supplements, taken from the Ministry of Agriculture and Rural Development or in the list of substances having a nutritional or physiological effect permitted in food supplements [art. 8 para. (1) letters b) and c) of the Law no. 56/2021]; *or*

ii. they do not constitute a risk for consumers and to be labeled in accordance with the legal provisions in force at the time of placing on the Romanian market[21].

It is also important to underline that "[i]n the case of information (our note – not suspicion!) according to which a food supplement endangers human health even if it is in accordance with the provisions of this law, the competent authority (our note – the Health Ministry) may temporarily suspend or restrict the marketing of the food supplement in question in Romania; the European Commission shall be notified promptly in accordance with the legislation in force."[22].

As for the transitional provisions mentioned in the Law no. 56/2021, a few aspects deserve to be pointed out in order to discover how the correlation with other rules was thought by the legislator, so that the implementation of the Law no. 56/2021 proceeds naturally and avoids retroactivity or the conflict between successive norms.

As mentioned before, please note that, according to art. 15 para. (1) of the Law no. 56/2021, in 90 days from the entry into force of this law, the Health Ministry shall elaborate the Norms which shall be approved through a government decision and shall abrogate[23] the Order no. 1069/2007.

It is also expressly provided that, within 30 days from the entry into force of the Law no. 56/2021, "*the central public authorities that have attributions regarding the food supplements modify and/or complete the subsequent legislation in the field according to the provisions of the present law*"[24].

As regards the purpose of preventing unfair

[19] Please see the case of a clinical trial conducted upon *Antrodia camphorata* used in a food supplement. *Antrodia camphorata* it is a rare and endemic fungus species originated in Taiwan island forestries. This trial is available at https://www.clinicaltrials.gov/ct2/show/NCT01007656.

[20] According to art. 8 of the Law no. 57/2021. At the moment of writing this study, we made a research on the website of the Health Ministry, but these lists were not yet available on www.ms.ro.

[21] According to art. 14 para. (2) of the Law no. 57/2021.

[22] According to art. 14 para. (4) of the Law no. 57/2021.

[23] According to art. 15 para. (2) of the Law no. 56/2021.

[24] According to art. 15 para. (3) of the Law no. 56/2021.

commercial practices, please have in mind that "[*i*]*n the labelling, presentation and commercial communications relating to food supplements addressed to the consumers and health professionals, it is prohibited to assign the properties of prevention, treatment or cure of a human disease or to refer to such properties.*"[25]. It is also prohibited "*the use of direct or suggesting statements that varied and balanced nutrition cannot provide adequate amounts of nutrients.*"[26].

Emphasis should be made that "[*w*]*ithout prejudice to the rules in force on food labelling, the labelling of food supplements shall contain the following additional mentions:*

a) the names of categories of nutrients and/or other substances having a nutritional or physiological effect characterising the product;

b) the daily dose recommended by the manufacturer;

c) the warning not to exceed the daily dose recommended by the manufacturer;

d) the warning that food supplements should not replace a varied and adequate diet;

e) *the warning that products must be kept out of the reach of children.*"[27].

Additionally, please note that "[c]ommercial communications for the promotion of food supplements shall comply with the provisions of this law and of the special regulatory acts on advertising; in commercial communications to promote the properties of food supplements, shall be used only the information on the label and in the food supplement leaflet, information approved by the competent authority, in accordance with the provisions of the national/European legislation in force."[28]. By "commercial communication" the legislator understands "any form of communication intended to promote, directly or indirectly, the products, services, image, name or corporate name, firm or emblem of a trader or of a member of a liberal profession"[29] without being made any reference to the clinical trials, scientific communication and fairs, usually considered as professional communication Should we include here the reference to clinical trials made for the respective product? We consider that, in order to protect the innovation and the scientific progress, the citations should be permitted having in mind that the Law no. 56/2021 does not exppresly prohibits it.

5. Control and Sanctions Imposed by the Law no. 57/2021. Final Provisions of the Law

The Health Ministry, in its capacity of competent authority according to the Law no. 56/2021, "shall ensure compliance with the provisions of this law, being able to establish infringements and apply penalties for the non-compliance with the provisions thereof."[30].

The following deeds, foreseen in art. 9 para. (1) of the Law no. 56/2021, constitute offences according to the table below (made by us in order to simplify the legal information):

Letter	Offence	Sanction
a)	labelling noncompliant with the legislation in force for food supplements	civil fine from 3,000 to 10,000 RON and temporary stop from marketing until the entry into legality
b)	classifying food supplements in other category of foodstuffs or medical devices for the purpose of circumventing the provisions of this Law	civil fine from 10,000 to 12,000 RON and temporary stop from marketing until the misconduct is remedied
c)	marketing of food supplements exceeding the date of minimum durability	civil fine from 7,000 to 9,000 RON and definitive stop from marketing
d)	marketing of food supplements without a certificate of notification	civil fine from 13,000 to 15,000 RON and definitive stop from marketing
e)	failure to comply with the legal provisions relating to the plants and substances having a nutritional or physiological effect, permitted in food supplements[31]	civil fine from 13,000 to 15,000 RON and definitive stop from marketing
f)	advertising non-compliant with the legislation in force for food supplements	civil fine from 3,000 to 10,000 RON and temporary stop from marketing until the entry into legality

[25] According to art. 7 para. (2) of the Law no. 56/2021.
[26] According to art. 7 para. (3) of the Law no. 56/2021.
[27] According to art. 7 para. (4) of the Law no. 56/2021.
[28] According to art. 7 para. (5) of the Law no. 56/2021.
[29] Please see art. 2 letter j) of the Law no. 56/2021.
[30] According to art. 10 par. (1) to the Law no. 56/2021.
[31] Please note that the non-compliance shall be notified on the rapid alert system for food and feedingstuffs and the notification certificate shall be cancelled by the Health Ministry.

Please note that the rules regarding the offences and sanctions provided in the Law no. 56/2021 shall be completed with the legal provisions of the (i) Government Decision no. 857/2011 on the establishment and sanctioning of offences of public health rules, with subsequent amendments and completions, issued on the basis of Law no. 254/2010 for the repeal of Law no. 98/1984 on the establishment and sanctioning of the offences to the legal rules of hygiene and public health, as well as with the provisions of the (ii) Government Decision no. 2/2021 on the regime of offences, approved with amendments and completions through Law no. 180/2002, with subsequent amendments and completions.

Additionally, please bear in mind that "the deed of the person to prepare or manufacture counterfeit food supplements, as well as to introduce, offer, sell or distribute such food supplements on the market, knowing that they are counterfeit, constitutes a crime and it is punished according to the provisions of Law no. 286/2009 on the Criminal Code, with subsequent amendments and completions."[32].

6. Concluding Remarks – What the Future Holds for the Romanian Food Supplements Market?

Having in view that it is undisputed that the global consumption of food supplements is fastly growing, even in Romania, we consider that the topic of our study will be of high interest for both legal professionals and non-specialist legal professionals working in the field of food supplements.

Containing vegetal and animal substances, together with minerals, vitamins, and other micro- or macronutrients, the food supplements have the role to complete a normal diet in order to maintain health or to improve it, and not to treat it.

Although the Law no. 56/2021 has been waited among the years to change certain things in the food supplements market, things are quite unclear until the Norms on food supplements will be adopted further on.

The Norms on food supplements are being awaited by the food supplements market. Many questions arise to all the players in the market, out of which we mention the following:

i. What institution of the Health Ministry shall be competent to analyse the notification file – the NAMMDR?

ii. What will contain the notification file?

iii. Besides the documentation required, would it also be required a statement of commitment of the applicant?

iv. What will contain the notification certificate?

Hoping that the new legislation's requirements, contrary to the Order no. 1228/2005, shall not go beyond the notification requirements imposed under the Directive 2002/46/EC and shall not affect the goal of this Directive, namely affecting the free movement of such food supplements and the creation equal conditions of competition for the players acting in the internal market. We strongly believe that the placing on the Romanian market must be in line with the European law.

In order not to be victims of the food supplements market, the consumers found on the Romanian territory must benefit of a clear and coherent legalframe.

Of course that special attention should be given to the online marketing of food supplements because in the recent years many alert signals had been given regarding the charlatanism with certain food supplements[33].

Even though many questions arise and, in the present, the Romanian legislation seems unclear and incomplete, we shall see very soon what the future reserves to us, when the Norms shall be adopted.

Until then, stay connected and informed about all the changes in the food supplement market.

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[32] According to art. 13 of the Law no. 56/2021.

[33] Please see, for example, the recent investigation made by the Recorder.ro specialists, revealing a a business worth tens of millions of euros, investigation published online on 25 February, 2021, on https://recorder.ro/uriasa-escrocherie-a-suplimentelor-alimentare-milioane-de-euro-din-minciuni-care-impanzesc-internetul/.

BRIEF CONSIDERATIONS REGARDING THE PUBLIC SERVANTS ADMINISTRATIVE-DISCIPLINARY LIABILITY

Elena Emilia ȘTEFAN*

Abstract

The recent legal changes in the field of administrative law have led to a unitary regulation of many judicial institutions, by means of codification. However, in the Administrative Code, we can notice an insufficient allocation of regulation space for administrative liability. Legally, on one hand, there are general provisions regarding the public servants' liability, the administrative-disciplinary liability regulated by the Administrative Code, and, on the other hand, we have special Statutes for a whole series of categories of public servants. Therefore, we speak of common law in the matter of administrative liability, represented by the Administrative Code, but also by special legislation, namely "Statues", on different domains.

In recent jurisprudence, the Romanian Constitutional Court has ruled regarding disciplinary sanctions, analyzing the „warnings" method taken in the matter of police officers, as prevention measure against committing disciplinary misconduct. Therefore, the pretext that we use in the present study is to check the validity of the current legislation regarding the administrative-disciplinary liability, having as starting point the adopting of the Administrative Code, in the sense of observing what is administrative-disciplinary misconduct and what are the administrative-disciplinary sanctions applicable to public servants.

In the end, we will present the conclusions we reached through our study, based on the legislation, doctrine and judicial practice.

Keywords: *Administrative Code, public servants, disciplinary misconduct, disciplinary sanction, Romanian Constitutional Court.*

1. Introduction

Adopting the administrative Code[1] in our law system gave us the joyous occasion to reanalyze a very important subject for scientific research in the legal domain, namely, judicial liability[2]. With this occasion we continue the analysis dedicated to liability in administrative law[3], developing the subject of public servants' administrative-disciplinary liability[4], one of the three forms of administrative liability. The doctrine showed that: "liability presupposes that a person or authority has to explain and justify its own actions. In administrative law, this would translate through the fact that any administrative body must respond for its acts in before the administrative, legislative or judicial authority"[5].

If in philosophy everything is transient, "All things before our eyes are changing very quickly: they will either vanish, if it is true that substance is a unit, or they will disperse"[6], in the life of the city, society evolves, knowledge discoveries are amazing and law is static, requiring a permanent (re)correlation of legislation to the social life. At the same time, we mention another aspect that we considered in the analysis performed on the personnel from public administration[7], namely that the national administration was forced to adapt to the communitarian acquis: "in the conditions of acceding to the European Union, member states have taken on the obligation to incorporate the EU judicial norms in their judicial order"[8].

The suggested topic is current, referring to the analysis of recent legislation, bringing to light the Constitutional Court jurisprudence that refers to disciplinary sanctions applied, regulated by special Statutes, more precisely pertaining to police employees. The administrative Code philosophy

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[1] Government Emergency Ordinance regarding the administrative Code no. 57/2019, published in the Official Journal no. 555 from 5th of July 2019, last modified through Government Emergency Ordinance no. 4/2021 (...), published in the Official Journal no. 117 from February 3rd 2021.

[2] E. E. Stefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

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[8] A. Fuerea, *Manualul Uniunii Europene*, 6th edition, revised and added after the Lisbon Treaty (2007/2009), Universul Juridic Publishing House, Bucharest, 2010, p.241.

regarding the categories of personnel that undergo activities that involve the public power regime is, on one hand, to submit the public servants to the rules mentioned by the administrative Code and, on the other hand, to allow the existence of special Statutes.

Administrative liability is mentioned in the Administrative Code Part VII, named „*Administrative liability*", articles 563-579, but, regarding the administrative-disciplinary liability of public servants there is also Part VII, *Public servants' Statute*, Chapter VIII – *Disciplinary sanctions and public servants liability*, articles 490-497. We agree with the doctrine, according to which "we use the phrase *administrative-disciplinary liability* because, on one hand, we do not consider that the idea of *discipline* must necessarily be tied to the idea of service and to public authority/public servant and, on the other hand, we appreciate that it is just a phrasing that allows a clearer delimitation from the other two forms of administrative liability (...)"[9].

The objective of this study is to briefly observe what are the actions that represent administrative-disciplinary misconduct and which are the administrative-disciplinary sanctions applied to public servants, by using the prevailing scientific research methods such as logical, deductive and comparative analyses.

2. The public servants' administrative-disciplinary liability

2.1. Disciplinary misconduct according to the Administrative Code

As the specialty literature indicates, "administrative-disciplinary liability represents the first form of liability that is specific to administrative law and it intervenes for committing actual administrative crimes, in the form of disciplinary misconduct"[10]. We mention the fact that disciplinary misconduct expressions are listed not in the public servants' administrative-disciplinary liability, but in Part IV, *Public servants' statute*, Chapter VII – *Disciplinary sanctions and public servants' liability*. Also, the Administrative Code has retained from former legislation on public servants (Law no. 188/1999 on the public servants' Statute[11]), which it abolished, the provisions regarding the liability of public servants.

Thus, according to article 492, para. 2 of the Administrative Code, the following actions are considered disciplinary misconduct:

a. „Systematic delay in carrying out work;
b. Repeated negligence in performing work;
c. Unjustified absence from work;
d. Failure to comply with work schedule;
e. Interference or efforts to solve a demand outside the legal framework;
f. Failure to comply with keeping the professional secret or confidentiality of secret work;
g. Manifestations that affect the prestige of the public authority or institution in which the public servant performs their activity;
h. Conducting activities with political character, during work hours;
i. Unjustified refusal to comply to work attributions;
j. Unjustified refusal to subject to work medicine control and medical expertise, following the recommendations made by work medicine doctor, according to the law;
k. Breach of provisions that refer to duties and interdictions established by the law for public servants, other than those referring to conflict of interests and incompatibilities;
l. Breach of provisions that refer to incompatibilities, if the public servant does not act to cease them within 15 calendar days from the date that the incompatibility occurred;
m. Breach of provisions that refer to conflict of interests;
n. Other deeds regarded as disciplinary misconduct in the normative acts in the field of public function and public servants or applicable to them".

2.2. Disciplinary sanctions according to the Administrative Code

According to the doctrine, "there is a general principle of law according to which the breach of an obligation that comes from a judicial norm triggers the author's liability and the obligation to settle the resulted prejudice"[12]. As it has been noticed on a previous occasion, "disciplinary sanctions are[13]:

"**According to the legislation prior to the Administrative Code:**

a. Written reprimand;
b. Diminishing the wage rights by 5-20% for a period up to 3 months;
c. Suspending the right to advance in wage ranks or, if necessary, to promote in public office, for a period from 1 to 3 years;
d. Demotion to a lower function for a period up to 1 year, with the corresponding diminishing of wage;
e. Public office destitution.

According to the Administrative Code:

a. Written reprimand;
b. Diminishing the wage rights by 5-20% for a period up to 3 months;

[9] D. A. Tofan, Drept administativ, Volume II, 5th edition, C.H.Beck Publishing House, Bucharest, 2020, p.299.
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[11] Law no.188/1999 on the public servants Statute, published in the Official Journal no. 600 from December 8, abolished by Government Emergency Ordinance no.57/2019 regarding the administrative Code.
[12] R. M. Popescu, Introducere în Dreptul Uniunii Europene, Universul Juridic Publishing House, Bucharest, 2011, p.189.
[13] E. E. Ștefan. Manual de drept administrativ. Partea I. Caiet de seminar, Universul Juridic Publishing House, Bucharest, 2019, pp.255-256.

c. Diminishing the wage rights by 10-15% for a period up to one year;

d. Suspending the right to be promoted for a period of 1 to 3 years;

e. Retrograding to a lower public office, for a period of up to one year, with the corresponding wage diminishing;

f. Public office destitution".

Analyzing the two normative acts, Law no. 188/1999 on the public servants' Statute (applicable legislation prior to the Administrative Code) and the current legislation (the Administrative Code), we notice there are few novelties regarding disciplinary sanctions:

- There is one new sanction: the diminishing of the wage rights from 10% to 15%, for a period up to one year
- "The right to advance" is rephrased and it is replaced with „the right to be promoted"
- "Demotion to a lower function" is rephrased and it is replaced by "retrograding to a public office of inferior level".

2.3. Disciplinary misconduct according to the special Statutes

Regarding the Special Statutes, the Administrative Code, on one hand, expressly lists the special Statutes categories when it comes to a certain domain and, on the other hand, allows the performing of special activities, exceptional in character, for a certain category of public servants, expressly indicated, according to article 380, corroborated with article 370.

Thus, according to article 380, para. 1: "the public servants who fulfill the activities indicated in article 370, para. 3 (activities with special character in exercising the prerogatives of public power) may benefit of special statutes, if working within:

a. Special structures of the Parliament of Romania;

b. Special structures of the Presidential Administration;

c. Special structures of the Legislative Council;

d. Diplomatic and consular services;

e. Institutions of public order and national security system;

f. Customs structures;

g. Any other public services established by law that meet the activities indicated in article 370, para. 3, letter h"[14].

In the Administrative Code, "implicitly, two categories of public servants are established, **to whom the general statute applies** and those who benefit of, and to whom the **special statutes** apply, regulated by special organic laws"[15]. The cited author continues: "the sectors in which **special statutes** may be added are, on one hand, listed by the Code but, on the other hand, there is a possibility to complete them with *other public services established by law*, that perform the activities indicated in article 370, para. 3, letter h"[16].

Next, we are going to briefly present two special Statutes for the public servants categories: police personnel and penitentiary police personnel, with respect to disciplinary misconduct and disciplinary sanctions.

2.3.1. The Statute of police personnel

The judicial regime of disciplinary liability applied to police personnel is regulated by Law no. 360/2002 on the Statute of police personnel[17]. Thus, according to article 57 of Law no. 360/2002 on the Statute of police personnel, the following acts constitute "disciplinary misconduct, if they were not committed in such ways that according to criminal law they are considered criminal offences, acts guiltily committed:

a. Unfit behavior in work, family or society that affects the honor, professional probity of the police personnel or the prestige of the institution;

b. Negligence, manifested in carrying out service duties or dispositions received from hierarchical superior or from authorities that indicated by the law;

c. Repeated or unjustified delay in performing work;

c¹. Unjustified refusal to fulfill a work attribution mentioned in the job description;

d. Overlap of work attribution or lack of solicitude in relating with the citizens;

e. Unmotivated absence or repeated tardiness for work;

f. Causing material damage to the unit that the person is a part of or to the patrimony of the Ministry of Internal Affairs;

g. Breach of norms regarding confidentiality for the undertaken activities

h. Non-compliance with the pledge of allegiance provisions;

i. Illegal interference in the activity of another police employee;

j. Intervention to influence the solving of certain requests regarding the satisfaction of any person;

k. Breach of provisions that refer to tasks, incompatibilities, conflicts of interest and interdictions established by law".

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[14] Article 370, line 3, letter h) - „other activities with special character that regard the exercising of public authority in domains of exclusive competence of the state, according and in executing the laws and other normative acts".

[15] V. Vedinaș, *Codul administrativ adnotat. Noutăți. Examinare comparativă. Note explicative*, Universul Juridic Publishing House, Bucharest, 2019, p.247.

[16] *Ibidem.*

[17] Law no. 360/2002 regarding the police person's Statute, published in the Official Journal no. 440 from 24 June 2002, last time modified by Government Emergency Ordinance no. 36/2020 for modification and completion of some normative acts (…), published in the Official Journal no. 268 from 31 March 2020.

2.3.2. The Statute of penitentiary police personnel

The judicial regime of disciplinary liability that applies to penitentiary police personnel is regulated by Law no. 145/2019[18] regarding the Statute of penitentiary police personnel. The following are considered disciplinary misconduct, according to article 140 of Law no. 145/2019 (...):

a. „Manifestations that affect the prestige of the authority or public institution where the persons work;

b. Negligence and superficiality manifested while carrying out the work attributions, the legal dispositions or dispositions received from one's hierarchical superior or the authorities named by law;

c. Repeated and unjustified tardiness in performing work tasks;

d. Unjustified refusal to fulfill a work attribution that is part of the job description;

e. Manifesting unfit behavior towards the detained persons, which is against the law on the execution of punishments, or towards other persons that they have contact with during work;

f. Unmotivated absence or repeated tardiness to work;

g. Unjustified departure from work during work hours;

h. Causing material damage to the unit that the person is a part of or to the patrimony of the National Penitentiary Administration;

i. Breach of norms regarding confidentiality about activity or work;

j. Exceeding the work attributions or illegal interference in the activity of another penitentiary police employee;

k. Intervention to influence the solving of a request regarding the satisfaction of any person;

l. Failure to comply to obligations foreseen by legal dispositions in their task, including those that are part of the penitentiary police personnel's Ethical Code and the provisions that refer to incompatibilities, conflicts of interest and interdictions;

m. Prohibiting or preventing the exercise of public liberties and union rights of penitentiary police personnel ;

n. Tolerant attitude of hierarchical superiors regarding committing certain disciplinary misconduct acts by their subordinates;

o. Conducting activities that are not related to work duties, of a nature to impact the execution of work attributions during work hours;

p. Failure to comply to the obligations foreseen in article 119".

Comparatively analyzing the disciplinary misconduct acts nominated by both special Statutes, we notice that when it comes to the penitentiary police personnel there is a greater number of acts that are considered disciplinary misconduct. For example, "Tolerant attitude of hierarchical superiors regarding committing certain disciplinary misconduct acts by their subordinates" is mentioned only for the penitentiary police person; We consider that a rethinking of the existence of this extremely general disciplinary misconduct is necessary, because the current text can lead to abuse in interpreting its content.

Also as an example, we present an act that is mentioned as disciplinary misconduct just for police personnel, but not for penitentiary police personnel, namely "Failure to comply with the provisions of the pledge of allegiance". Well, we consider that this act may be considered disciplinary misconduct for all public servants, be it under the Administrative Code, be it under the special Statutes.

2.4. Disciplinary sanctions according to the special Statutes

Speaking about police officers, there are five disciplinary sanctions, gradually mentioned:

a. "Written reprimand;

b. Wage diminishing by 5-20% for a period of 1-3 months;

c. Postponement of promotion in professional ranks or superior functions for a period between 1-3 years;

d. Demotion to an inferior office, up to, at most, the base level of the professional rank held;

e. Dismissal from the police force".

It is interesting to mention the definition of reprimand's in para. 2 of the same article, namely: "*written reprimand consists of the official reprimand, addressed in written to the guilty policeperson*".

We also mention that there is jurisprudence about article 58¹ on which the Constitutional Court[19] has recently ruled, appreciating that this article is not constitutional. The content of article 58¹ is: *"In order to prevent disciplinary misconduct from happening, the person mentioned in article 52, para. 2 may order the police person's warning. In this case, the measure is taken in writing, it has administrative-prevention character and does not produce consequences on the work report".*

Thus, in the case judged by the Constitutional Court, the authors of this unconstitutional[20] exception have shown that "the measure of warning has produced effects on their work report, being taken into account

[18] Law no. 145/2019 regarding the Statute of penitentiary police personnel, published in the Official Journal no. 631 from 30 July 2019, last modified by Government Emergency Ordinance no. 36/2020 (…), published in the Official Journal no. 268 from 31 March 2020.

[19] Romanian Constitutional Court decision no. 833 from 17 November 2020, published in the Official Journal no. 114 from 03 February 2021.

[20] For more on unconstitutional exception see: S. G.Barbu, C. M. Florescu, *Aspects concerning the admissibility of the exception of unconstitutionality*, Bulletin of the Transilvania University Braşov, Series VII, Vol 13 (62) No.2-2020, http://webbut.unitbv.ro/Bulletin/Series%20VII/2020/BULETIN%20I/23_Barbu-Florescu.pdf, pp.293-298, last accessed on 08.03.2021, 20.00 or I. Muraru, N. M. Vlădoiu, A. Muraru, S.-G. Barbu, *Contencios constituțional*, Hamangiu Publishing House, Bucharest, 2009, p.208 and the following.

when the approval to be named in the Judicial Police structures was withdrawn, respectively when the request to be promoted in function was rejected (par. 30)".

We extract some arguments of the Constitutional Court in accepting the unconstitutionality exception of article 58¹ of Law no. 360/2002 on the Statute of police personnel:

"The Court establishes that the dispositions of article 58¹ of Law no. 360/2002 indicate the warning is a managerial measure that is ordered in writing, has preventive character, but has no effect on the police person's work report (...) (*par. 31*);

The Court establishes that, although, according to legal dispositions the warning does not represent a disciplinary sanction and does not have any effects on the work report, in fact, applying this measure is linked to the idea of intervention with a role in disciplining the police person's conduct when a disciplinary misconduct of little gravity has occurred (...) (*par. 33*);

Besides, even if the police person's work report presupposes his/her subordination to their hierarchical superiors, the Court appreciates that this subordination must clearly be circumscribed to fulfilling the work duties and must not create the possibility to generate abusive or awkward situations, either from the hierarchical superior or from the subordinate, capable of affecting their dignity. Or, the fact that the legal text does not condition the warning on the existence of concrete, objective situations that could justify this measure of the hierarchical superior, may constitute the grounds for the manifesting of actions based merely on the desire to exercise authority towards a person who is in a subordinate position and who cannot properly defend themselves (...) (*par. 36*)"[21].

Regarding the penitentiary police personnel , the disciplinary sanctions that may be applied are six:

"a. Written reprimand;

b. Diminishing of the salary rights for the function with 5-10% for a period between 1-3 months;

c. Postponement of the promotion to professional ranks or superior functions for a period of 1-2 years;

d. Transfer to a lower function, up to the base level of the rank held;

e. Revocation from a leadership position;

f. Dismissal from function".

3. Conclusions

With respect to the judicial regime of the liability of public servants, the Administrative Code has taken on the content of Law no. 188/1999 regarding the public servants' Statute, without bringing any important changes regarding the listing of disciplinary misconduct and disciplinary sanctions.

From the analysis of the law, we derive that there is, on one hand, the common law of administrative-disciplinary liability for the public servants, and for this we analyzed the Administrative Code and, on the other hand, there are special statutes. For this, we have shown examples of what disciplinary misconduct and disciplinary sanctions are in case of two special categories, namely the police personnel and the penitentiary police personnel. For the penitentiary police personnel there is a greater number of disciplinary sanctions (six), in comparison to the police staff (five).

In conclusion, a gradual regulation for the sanctions was noticed, starting from the easiest written reprimand and ending with the worst, the termination of the employment contract or destitution from office. This philosophy of the lawmaker is in accordance to what our doctrine noticed, namely "*the educational character of the sanction*" that "aims at the social rehabilitation of the author"[22].

At this moment, no analysis was performed on other aspects of the administrative-disciplinary liability, such as disciplinary investigation or disciplinary sanction individualization, but we envisage future research perspectives that could develop these subjects, as well.

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[21] *Ibidem.*

[22] M. Bădescu, *Teoria răspunderii și sancțiunii juridice*, Lumina Lex Publishing House, Bucharest, 2001, p.86.

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CERTAIN ASPECTS REGARDING THE ADMNISTRATIVE ACTS ISSUED BY PUBLIC AUTHORITIES

Elena Emilia ȘTEFAN*

Abstract

Amongst the most debated judicial acts issued by the President of Romania, in exercising his constitutional attributions, through which he adopted measures, from 1990 to the present day, were, on one hand, the individual pardon and, respectively, the pardon revocation decree and, on the other hand, the establishing of the state of emergency on the territory of Romania.

In the first case, in 2004, the theoretical debates amongst law theoreticians, but also in the public opinion in general, were abundant, and the problem developed by these doctrinal analyses moved into the courts of law. Pending on the docket before the administrative and fiscal contentious section there was a case in which was decided on the illegality exception of the decree through which the individual pardon given by decree by the President of Romania was revoked.

17 years after that case we notice a reprise of the same effervescence at the public opinion level, but this time we are in an exceptional situation, during the SARS CoV19 pandemic. Thus, in March 2020 there came a moment of reflection on the public agenda regarding another measure taken by the President of Romania, a measure that is seen as controversial, namely the establishing of the state of emergency on the territory of Romania.

Therefore, in this study, based on the analysis of the legislation, doctrine and jurisprudence, we will present our point of view on the administrative acts of the President of Romania, all in a personal approach and, in the end, we will present the conclusions reached following this analysis.

Keywords: *Constitution, administrative act, public authorities, individual pardon, state of emergency.*

1. Introduction

The analysis of the decrees issued by the President of Romania is not new. On one hand, this was developed in doctrine[1], but a scientific research such as the one we propose, was not done before. On the other hand, the subject is current, the decree of state of emergency on the territory of Romania being recently brought to the attention of the public opinion, in March 2020, in the context of a global pandemic such as the one generated by the Covid virus, an epidemic like no other that humankind has faced before. The importance of the study resides in the emphasis of the idea that, although in the history of a state there may be exceptional situations (states of emergency or alert), respecting the citizens' fundamental rights and freedoms by the public authorities is a non-negotiable must.

In this regard we mention, as shown in our doctrine: "The evolution of human society, the complex and sinuous character of the relations coming to existence within states, as well as at supra-state level, be it regional or global, determines the need to identify new judicial, as well as politico-economical instruments, certain protection measures of the fundamental human rights and liberties, seen in general, of the individual freedom, in particular, as constant counterweight to the tendency of state repression that any government manifests towards its citizens, sometimes openly, other times discretely, under reasonable or imaginary pretexts"[2].

The research objective for this study is to prove the importance and actuality of the administrative act in the contemporary society, as a main judicial form of activity of the public authorities. The research methods that we are going to use in this study are the informational method, the comparative method or the logical method.

2. Judicial acts of the President of Romania

2.1. The individual pardon

According to article 100, para. (1) of the Constitution: "In the exercise of his duties, the President emits decrees that are published in the Official Journal of Romania. Failure to publish brings forth the non-existence of the decree". Our analysis regards only the individual pardon, this being the exclusive attribute of the President of Romania, unlike the collective pardon[3], where the authority lies with the Parliament of Romania. We will not analyze this

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[1] V. Vedinas, *Drept administrativ*, 12th Edition revised and updated, Universul Juridic Publishing House, Bucharest, 2020; D. Apostol Tofan, *Drept administrativ*, volume II, 5th Edition, C.H.Beck Publishing House, Bucharest 2020; C.S.Săraru, *Drept administrativ.Probleme fundamentale ale dreptului public*, C.H.Beck Publishing House, Bucharest, 2016; M.V.Cărăușan, *Drept administrativ*, volume I, Economica Publishing House, Bucharest, 2012 etc.

[2] S.G.Barbu, *Dimensiunea constituțională a libertății individuale*, Hamangiu Publishing House, Bucharest, 2011, p. 4.

[3] Law no. 546/2002 regarding the pardon and the pardon giving procedure, published in the Official Journal no. 755 from October 18 2002 and republished in the Official Journal no. 287 from April 18 2004, last modified by Law no. 255/2013 (...), published in the Official Journal no. 515 from August 14 2013.

thoroughly, but will only look at those elements essential in accomplishing the objective of this study.

From the analysis of the constitutional provisions of article 100 para. (1) and article 94 letter d), the following judicial regime of the individual pardon is evident:

- A single person is individually pardoned, the authority lying with the President of Romania. Our Constitution does not detail any other formal details of this decree in the sense of limiting the number of individual pardons in a year or what categories of crimes are being pardoned.
- The individual pardon has to be countersigned by the Prime-minister, ad validitatem.
- The individual pardon must be published in the Official Journal of Romania, under the express sanction of non-existence.

From the analysis of the constitutional texts, we understand that in Constitution there is no imperative norm regarding the pardon decision taken by the President. He only has the possibility to pardon, not the obligation to do so. However, the Constitution imposes the countersigning and publishing in the Official Journal, formalities following the pardon decision taken by the chief of state through decree. In fact, at first glance, the decision to individually pardon a person is more a political decision, which, still, has a legal form, although this is the case of a public authority that performs the activity of public administration[4].

At the same time, in our analysis, we also indicate other relevant legislative provisions, such as article 1 para. (5) of the Constitution: "In Romania, respecting the Constitution, its supremacy and laws is compulsory", as well as also article 6 of the Administrative Code, with the marginal title - the principle of legality: "the authorities and institutions of public administration, as well as their personnel, have the obligation to act with the observance of the applicable legal provisions and treaties and international conventions to which Romania is party". Moreover, as the doctrine showed, "the fundamental law governs the principle of legality as one of the essential elements of public administration, which ultimately signifies the administration's subordination to the Constitution and the law, and represents a warranty of those being administered against abuse or mistakes following the actions of the authorities"[5]. This reference from the Administrative Code restates the constitutional provisions that refer to the harmonization of the national law and the community acquis[6] but also with the priority of the international regulations regarding the fundamental human rights.

The case study that we briefly present in this section refers to individual pardon no. 1164/December 15th, 2004, on certain individual pardons[7], revoked by decree no. 1173/December 17th, 2004, on the revoking of the individual pardon of certain individuals[8]. Practically, the legal problem that was stated at that moment was referring to the question: can an administrative act published in the Official Journal still be revoked by the issuing authority? Obviously, the answer was not easy to give, especially since the issuing authority was not any public authority, but the President of Romania and, corroborated with the provisions of article 126 para. (6) of the Constitution and article 5 of the Law of the administrative contentious no. 554/2004, the problem raised was if that administrative act – the revoking decree of individual pardon may or may not be subjected to the legality control coming from the administrative contentious courts, respectively if, in the meaning of the law, it does not fall into the category of administrative acts that regard the relations with the Parliament.

The doctrine stated that: "within the current constitutional framework, the administrative acts that regard the relations with the Parliament refer either to the direct relation between the legislative and the executive (for example, the appointment of the Government – article 85 of the Constitution, the dissolution of the Parliament – article 89 of the Constitution), or the indirect relation that gives them the character of complex administrative acts, such as the countersigning of the President's decrees by the Prime-minister, who, in his turn, is subjected to Parliamentary control (art. 100 para. 2 of the Constitution)[9]".

Through decision no. 1840/2005, the Administrative and Fiscal Contentious Section[10] of the High Court of Cassation and Justice notices that: "the decrees regarding individual pardon are unilateral judicial acts of public law through which two wills are manifested, but which have the same effect, and, regardless of the fact that these are called complex administrative acts or atypical administrative acts, certainly these judicial acts cannot be assimilated to another category of administrative acts, because they are the result of relations of a constitutional nature, on

[4] See also: R.M.Popescu, *Jurisprudența CJUE cu privire la noțiunea de „administrație publică" utilizată în art. 45 alin. (4) TFUE*, in CKS ebook 2017, pp. 528-532.

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[8] Decree no. 1173/17 December 2004 regarding the revoking of individual pardon of certain individuals, published in the Official Journal no. 1219 from 17 December 2004.

[9] G. Bogasiu, *The administrative act justice. A bi-univocal approach*, Universul Juridic Publishing House, Bucharest, 2013, p. 158.

[10] Public information available on: https://legeaz.net/spete-contencios-inalta-curte-iccj-2005/decizia-1840-2005, accessed on the 2nd of February 2021, 17.30.

one hand, between the two heads of the executive and, on the other hand, with the Parliament".

In the opinion of the High Court of Cassation and Justice: "the reason of the obligation to countersign these decrees by the Prime-minister comes exactly from exercising an indirect control that arises from the principle of constitutional democracy (...). By means of the countersigning institution, the Parliament exercises an indirect control, through the mediation of the Prime minister, who is accountable to the legislative". Essentially, in this case, it was appreciated that the President's decrees countersigned by the Prime-minister are exempted from the administrative contentious control[11].

Moreover, it was recently stated that: "(...) talking about a revocation decree of an individual pardon (...), exercising control, the court had to verify if, talking about an individual administrative act, is enters or not in the category of exceptions from the revocation principle"[12]. The cited author continues: "In the absence of an Administrative Procedure Code that could list these mandatory exceptions, by reporting to the administrative doctrine, we consider that an individual pardon enters the category of irrevocable acts, as long as the pardon has been enforced, meaning that it produced effects in a different judicial regime, namely the criminal executional law"[13].

In a different opinion, it was stated that "the individual pardon, once published, is an irrevocable administrative act, and the decree through which it is revoked cannot be exempted from the control of the administrative contentious courts, so its legality can make the object of an action in administrative contentious or an illegality exception"[14].

2.2. The state of emergency decree

In Romania, the state of emergency regime is governed by G.E.O. no. 1/1999 regarding the regime of state of siege and state of emergency[15]. According to article 93 of the Constitution, named – *Exceptional measures*: para. (1): "*The President of Romania instituted, according to the law, the state of siege or the state of emergency in the entire country or in certain administrative-territorial units and requests the approval of the Parliament for the adopted measure, no later than 5 days after it has been taken"* and para. 2: "*If the Parliament is not in session, it shall lawfully convene no later than 48 hours from the institution of the state of siege or state of emergency and it functions throughout its entire duration".*

In Romania, in the spring of 2020, two decrees were issued regarding the state of emergency. Thus, on March 16th, 2020, the President of Romania, through decree no. 195 instituted the state of emergency on the territory of Romania[16], according to article 93, para. 1 of the Constitution, article 100 and article 3 and article 10 of the Government Emergency Ordinance no. 1/1999 regarding the state of siege and state of emergency regime. In addition, through decree no. 240 from April 14th, 2020, issued by the President of Romania, the state of emergency on the territory of Romania was extended[17]. From that moment through the present, a multitude of administrative acts of the public authorities regarding people's quarantine or isolation have been issued. Subsequently, and we will only mention one case, the Constitutional Court rendered its opinion, admitting the unconstitutionality exception[18] regarding the legislation on quarantine and isolation[19].

According to article 3 of Government Emergency Ordinance no. 1/1999 the state of emergency represents: "the entirety of measures with political, economic, social character that are instituted throughout the country or in certain areas, or in certain administrative-territorial units, in the following situations:

a. The existence of threats regarding national security or constitutional democracy, which makes necessary the defense of the institutions of the constitutional state and the maintaining or reestablishing of the state of legality;

b. The imminence or occurrence of disasters, which makes the prevention, limiting and the removal of their effects necessary".

The institution of the state of emergency by the President of Romania must also be analyzed according

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[11] For more information, see V. Vedinas, *op. cit.*, 2020, pp. 138-140 or C.S. Sararu, *op. cit.*, 2016, pp. 594-596.

[12] D.Apostol Tofan, *op.cit.*, 2020, pp.147-148

[13] *Ibidem*, p.148.

[14] L. Chiriac, *Despre irevocabilitatea și controlul de legalitate a decretului de grațiere- act administrativ individual*, in Studia Universitatis Babes Bolyai Jurisprudentia nr.2/2008, p.53, available online: http://studia.ubbcluj.ro/download/pdf/424.pdf, accesed on February 22nd 2021, 16.30.

[15] Government Emergency Ordinance no. 1/1999 regarding the state of siege and emergency state regime, published in the Official Journal no. 22 from January 21st 1999 and approved by Law no. 453 from November 1st 2004, published in the Official Journal no 1052 from November 12th 2004 and modified by Law no. 164/2019 (...), published in the Official Journal no 811/October 7th 2019 with the subsequent modifications and addings.

[16] Decree no. 195/March 16th, 2020 on the institution of the state of emergency on the territory of Romania, published in the Official Journal no. 212 from March 16th, 2020.

[17] Decree no. 240 from April 14th, 2020 on the extension of the state of emergency on the territory of Romania, published in the Official Journal no. 311 from April 14th, 2020.

[18] For more details on the unconstitutionality exception, see: S. G. Barbu, C. M. Florescu, *Aspects concerning the admissibility of the exception of unconstitutionality*, Bulletin of the Transilvania University Brașov, Series VII, Vol 13 (62) No.2-2020, http://webbut.unitbv.ro/Bulletin/Series%20VII/2020/BULETIN%20I/23_Barbu-Florescu.pdf, pp.293-298, accessed on February 22nd, 2021, 21.30.

[19] Decision of the Constitutional Court no. 458/2020, published in the Official Journal no. 581 from July 2nd, 2020.

to article 53 of the Constitution, which regulates the restriction of the exercise of certain rights or freedoms. From the analysis of the constitutional construction, the following judicial regime of the instituting the state of emergency is derived:

- The state of emergency is instituted by the President of Romania, through decree.
- The imposing of the state of emergency is instituted *"according to the law".*
- The Parliament must approve of the adopted measure, within 5 days at most after been taken or, if the Parliament is not in session, it will rightfully convene within 48, hours at most, from the institution of the state of siege or state of emergency and it functions throughout its duration.
- According to article 100 para. (2) of the Constitution, "the decrees issued by the President of Romania in exercising the attributions established in article 93 para. (1) *are countersigned* by the Prime-minister".
- The declaration of the state of emergency must observe the judicial regime of the restriction of certain rights or freedoms established by article 53 of the Constitution: "*only through law and only if it is necessary"* (...).
- The decree of instituting the state of emergency must be published in the Official Journal.
- Being an administrative act, issued by a public authority, the decree must be motivated.
- Recent doctrine states that "precisely because it is a normative administrative act, the Presidential decree can be subjected to a legality control from the administrative contentious courts, according to article 5 para. 3 of the Law of the administrative contentious. The court could verify if the President went beyond the competence given by the lawmaker and acted with excess of power, going beyond the purpose of the rule"[20].

3. Comparative analysis between the individual pardon and the decree instituting the state of emergency

The main resemblance between the two acts consists of the fact that they are Presidential acts with legal character, being administrative acts, expressly mentioned by the Constitution. Then, they both fall in the category of decrees that must be countersigned by the Prime-minister and published in the Official Journal, under the sanction of non-existence.

A first distinction refers to the fact that the decree of state of emergency imposition must be later on approved by the Parliament, within a mandatory deadline provided by the Constitution, two hypotheses being entertained: one in which the Parliament is in session (within 5 days from the taking of the measure) and the second one when it is not in session (within 48 hours from the institution of the state).

Unlike the individual pardon that is analyzed, and related to it, the decree revoking a individual pardon (2014), regarding the decree instituting a state of emergency and the extension of the state of emergency by 30 days, have been impacted by a series of other administrative acts, most of which have been contested because of the imposed sanctions. For example, the fines given to the citizens for disrespecting the obligation of wearing masks, a situation still not definitively resolved at institutional level, a frail jurisprudence being seen.

On the other hand, if in case of individual pardon, the President may give pardon to any individual, although regarding collective pardon Law no. 546/2002 (...) confers a more restrictive regime to this act of clemency, in the case of the instituting the state of emergency, the President enforces the legal dispositions, in this case speaking about Government Emergency Ordinance no. 1/1999 (...) as subsequently modified and completed.

4. Conclusions

The present study proposed a summary consideration of the President's administrative acts, starting from two well-known cases (from 2004 and 2020). The analysis of the administrative acts issued by the President of Romania approached both a normative administrative act – the decree of instituting the state of emergency, and an individual administrative act – the individual pardon, in order to emphasize the fact that his acts with legal character can have both a normative and an individual character.

Although the administrative act benefits of the legality presumption[21], which is relative, still, in some cases we speak about the absolute presumption of legality. In this sense, we consider the proposed objective of this study as being fulfilled and along with the doctrine we express our point of view according to which: "the presidential decrees countersigned by the Prime-minister enter the sphere of exception from the legality control mentioned by article 5 of the Law on the administrative contentious no. 554/2004 and by article 126 para. 6 of the Constitution which refers to *the acts that regard the relation with the Parliament*"[22].

[20] B. Dima, *Care este natura juridică a decretelor Președintelui României emise pentru instituirea și prelungirea stării de urgență*, available online: https://www.g4media.ro/care-este-natura-juridica-a-decretelor-presedintelui-romaniei-emise-pentru-instituirea-si-prelungirea-starii-de-urgenta-op-ed.html, accessed on February 22nd, 2021, 21.00.

[21] M. Comsa, S. G. Barbu, *Contencios administrativ și fiscal. Sinteze de jurisprudență,* Hamangiu Publishing House, Bucharest, 2013, p. 11: "It is a known fact that the administrative act enjoys the legality presumption, as well as the fact that the unilateral administrative act is in itself an executive title (...)".

[22] V. Vedinaș, *op.cit.*, 2020, p.140.

The legislation used with respect to the President[23] and on which we performed the judicial interpretation[24] comprised, mainly, the revised Constitution[25], but also other normative acts. In conclusion, by means of the two types of decrees analyzed in the present study, we appreciate the actuality and importance of the administrative act in the contemporary society.

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[23] For more information about the head of state in compared law, see: Șt. Deaconu (coord.), I. Muraru, E.S. Tănăsescu, S. G. Barbu, *Codex constituțional. Constituțiile statelor membre ale Uniunii Europene*, vol. I and II "Monitorul Oficial" Publishing House, Bucharest, 2015, p.844 and p.876.

[24] More on the judicial norms interpretation, see: M. Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2018, pp. 167-187.

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ABOUT THE THEORY OR THE OPINION ON GENDER IDENTITY IN EDUCATION. THE RELEVANT CASE-LAW OF THE ROMANIAN CONSTITUTIONAL COURT

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Abstract

A legislative change of the National Education Law No 1/2011, passed by Parliament at the middle of 2020 brought to the attention of the public the notion of "gender identity". The provisions of Article 7 (1) (e) of Law No 1/2011, introduced by the Sole Article of the Law amending Article 7 of the National Education Law No 1/2011, prohibited, inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provide extracurricular education, any activity aimed at spreading the theory or opinion of gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same.

Keywords: *theory, opinion, gender identity, Constitution, case-law, education, Constitutional Court.*

1. Introduction

The impugned legislative amendment under review concerned a text in Title I - General provisions of the National Education Law No 1/2011, which included the concept, the principles governing the pre-university and university education system, as well as lifelong learning in Romania, the main purpose of education, general aspects regarding the funding of the education system, general competencies regarding the national strategies in the field of education, the organization of specific theological education, as well as general standards regarding the prohibition of activities likely to violate morality standards and of any activities that may endanger the physical or mental health and integrity of children and young people, respectively of teaching staff, auxiliary teaching staff and non-teaching staff, of political activities and religious proselytism, of psychological violence. The newly introduced text supplemented these rules, which underlied the organization and unfolding of the education process in Romania, with a general prohibition of any activity "*aimed at spreading the theory or opinion of gender identity*", the legislator understanding by this prohibited opinion/theory that "*gender is a concept different from biological sex and that the two are not always the same".*

According to the explanatory statement accompanying the legislative proposal, the established prohibition was motivated by the statement that "*in recent years, a new gender ideology has emerged. According to this, biological sex should not label persons as 'females' or 'males'; instead, each person can choose from among the dozens of gender types that (s)he prefers. Following the emergence of the gender ideology, the phenomenon of proselytism, based on both sex and gender, has become a real danger in the education system. Consequently, the legislative proposal supplements the list of prohibitions with the prohibitions of proselytism on the basis of sex and of proselytism on the basis of gender."*

The original wording of the proposed text, which referred to the prohibition of proselytism on the basis of sex and gender, according to the explanatory statement, was kept by the Chamber of Deputies, prohibiting "*e) proselytism on the basis of sex, as defined by Article 4 (d^2) of Law No 202/2002 on equal opportunities and equal treatment for women and men, as subsequently amended and supplemented; f) proselytism on the basis of gender, as defined by Article 4 (d^3) of Law No 202/2002 on equal opportunities and equal treatment for women and men, as subsequently amended and supplemented*." Within the Senate, as the decision-making Chamber, this wording was amended, the prohibition referring to gender identity and being regulated in point (e) of Article 7 (1) of Law No 1/2011, in the wording impugned by the author of the referral.

The President of Romania brought the issue to the attention of the Constitutional Court, who, in a remarkable decision[1], upheld the referral of unconstitutionality formulated by the President of Romania and found that the provisions of Article 7 (1) e), introduced by the sole Article of the Law amending Article 7 of the Law on national education No 1/2011, were unconstitutional.

The present paper aims at bringing to the fore the above-mentioned decision of the Constitutional Court.

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[1] Constitutional Court, "Decision of the Constitutional Court of Romania No 907 of December 16, 2020" (Official Gazette of Romania, Part I, No 68, January 21, 2021).

2. The decision of the Constitutional Court

2.1. The notions of "gender" and "gender identity"

By examining the terminology used by the legislator, the Court noted that, according to the Explanatory Dictionary of the Romanian Language, the word "spreading", when referring to ideas (theories/opinions as in this case), it has the meaning of "passing from one to another; becoming known to a wide group of people". Thus, it resulted that the impugned standards prohibited - inside all teaching establishments and institutions and inside all facilities intended for vocational education and training, including inside those establishments that provided extracurricular education - any activity aimed at spreading the theory or opinion according to which gender is a concept different from biological sex and that the two are not always the same.

Taking into account the notions contained in the wording of the impugned legislative amendment, the enshrined prohibition and its rationale, contained in the explanatory statement according to which, "*in recent years, a new gender ideology has emerged*", the Court then proceeded to an analysis of the national regulatory framework so as to identify whether and how the notions of "gender"/"gender identity", used by the legislator, are reflected at regulatory level.

Thus, by examining the constitutional provisions, it was found that the notions of "gender"/"gender identity" do not appear to be regulated as such. The Romanian Constitution uses the plural masculine form in several situations, such as: (the) citizens (Articles 4, 15, 16), voters (Article 81), candidates (Articles 37), or the singular masculine form - the citizen (Article 19). The Constitution refers to "women" and "men" (see Article 16), but it also uses neutral terms such as "person" (natural person - Article 26) or "persons" (natural and legal persons - Article 35), the meaning being a generic one, without gender connotation. Official positions do not have a feminine form, phrases such as "Senators" and "Deputies" being used (for example, in Article 90). The Constitution does not contain any distinction likely to establish affiliation to the female (or male) sex based on biological or other criteria. Article 16, read in conjunction with Article 4 of the Basic Law, enshrines formal equality, regardless of sex.

Law No 287/2009 - The Civil Code, republished in the Official Gazette of Romania, Part I, No 505 of 15 July 2011, which contains the rules that represent the general law governing the patrimonial and non-patrimonial relationships between persons, as subjects of civil law, states in Article 30 - *Equality before the civil law* that "*Race, colour, nationality, ethnic origin, language, religion, age, sex or sexual orientation, opinion, personal beliefs, political affiliation, affiliation to a trade union, to a social category or to a disadvantaged category, wealth, social origin, level of education, as well as any other similar situation have no influence on civil capacity."* The Civil Code makes no reference to the situation of transgender people, but the Romanian legislation regulates the legal effects of sex change by Article 4 (2) (l) of Government Ordinance No 41/2003 regarding the acquisition and administrative change of the names of natural persons, according to which "(*2) The requests for name changes are deemed justified in the following cases: l) when a person was approved to have a sex change through a final and irrevocable court decision and requests to bear an appropriate first name by presenting a medical-legal document indicating her/his sex."*

Law No 202/2002 on equal opportunities and equal treatment for women and men, republished in the Official Gazette of Romania, Part I, No 326 of 5 June 2013, distinguishes between the notions of "sex" and "gender" through the provisions of Article 4 (d^2) and (d^3), introduced by Article I (3) of Law No 229/2015, published in the Official Gazette of Romania, Part I, No 749 of 7 October 2015, worded as follows:

„d^2) sex shall mean the set of biological andphysiological traits by which women and men are defined;

d^3) gender shall mean the set of roles, behaviours, traits and activities that society deems appropriate for women and for men, respectively. "

The definition of the notion of "*gender*" also appears in the Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted in Istanbul on 11 May 2011, ratified by Law No 30/2016, published in the Official Gazette of Romania, Part I, No 224 of 25 March 2016. Thus, according to Article 3 (c) of the Convention, "*For the purpose of this Convention: (...) c) 'gender' shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;* Article 12 of the Convention sets a series of general obligations, among which, in point 1: "*Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.*" Based on this view, States' obligations are shaped, including that of promoting the social and cultural changes and of eradicating prejudices and other practices based on discrimination between men and women and on "gender stereotypes".

Considering all the above, in the Court's view, it appeared that, since 2003, the national regulatory system has been regulating State's administrative obligations for those situations in which a person proceeds to a sex change. This equaled, implicitly, to the legal acceptance of the perception of sex not as a simple biological "given", but as an element of identity and, respectively, of social identification. Undoubtedly, for a person who chooses such a change, biological sex does not correspond to the sexual identity perceived by the respective person, as the two are not always the

same, contrary to the idea advanced by the prohibition enshrined in the impugned text of law.

This view was also reflected by the provisions of Law No 287/2009 - The Civil Code, which take into account, through the concept of "sexual orientation", elements of sexual identity, as perceived by the individual, and not only the biological features that define sex. The recognition, by law, of differences in sexual orientation and of sex changes equals, implicitly, to the acceptance, by the legislator, of the idea that biological sex is not perceived as gender by all individuals equally and that gender identity is different from biological sex.

The social component of sex/sexuality and the view/distinction between biological/psychological, contrary to socially imposed stereotypes, were clearly outlined at legislative level, in 2015, by the amendment of Law No 202/2002 on equal opportunities and equal treatment for women and men. Thus, Law No 202/2002 defines the notions of "sex" and "gender", distinction strengthened by the definition of "gender" in the Istanbul Convention, ratified a year later through Law No 30/2016.

In relation to this regulatory evolution, the Court noted that the notion of "gender" has a wider scope than that of "sex"/sexuality in the strictly biological sense, as it incorporates complex elements of a psychosocial nature. Thus, while the notion of "sex" is limited to the biological features that mark the differences between men and women, the notion of "gender" refers to a set of psychological and sociocultural traits. This latter notion includes elements of social identity of the individual, which evolve together with society and with the continuous re-evaluation of the interpretation of the principle of equality and non-discrimination on the basis of sex. Gender identity also involved customarily assigned social roles and discrimination based on sex/gender. Thus, becoming aware of one's sex appears as a component in gender identification, but biological factors are supplemented by social ones, gender identity including sexual identity and adapting it to social demands. The Romanian State has legislated this view/approach, undertaking obligations aimed, in essence, at combating gender stereotypes and at the effective realization of the principle of equality and non-discrimination.

In line with this regulatory evolution, the case-law of the Constitutional Court reflects the changes that have taken place over time regarding the social roles attached to women and men and the removal of gender stereotypes. A conclusive example in this regard is represented by the cases concerning the retirement age for women and men or those related to the regulation of parental leave.

Thus, in 1995, the Court noted that "due to the imperatives related to children upbringing and education, especially during the early years, to the increased burdens on women around the household, to the lack of widely accessible social and economic means, during the current transition period, that could ease such burdens, as well as to other aspects that hinder their professional advancement (maternity leaves, postnatal leaves, parental leaves to care for sick children, prohibitions aimed at preventing work under certain conditions, etc.), as well as due to other circumstances, women are in situations that disadvantage them compared to men", which justified, from the perspective of the principle of equality, the establishment of different retirement ages[2].

But, in 2010, on this same subject, the Constitutional Court found that "cultural traditions and social realities are still evolving towards ensuring real factual equality between the sexes, so that it cannot be concluded that, at present, the social conditions in Romania can be considered as supporting an absolute equality between men and women. However, important steps have been taken. An example in this regard is the extension of the right to parental leave for men as well, including for militaries[3]. For these reasons, raising women's retirement age to 65 was intended to take place over a period of 15 years, during which it is expected that, in Romania, the social conditions will change significantly"[4]. The Court noted, in the same context, "the normal changes that occur in society in terms of mentalities, culture, education and traditions", stating that "the provision of an equal treatment between the sexes is increasingly necessary in the context of the European trend that requires States to comply with the standards of equal, non-discriminatory treatment between men and women"[5].

Thus, were noted the recitals that address the traditional social perception, closely attached to the biological significance of sex - which seemed to overwhelmingly underlie the solution delivered in 1995, respectively the recitals that highlight the social developments in the sense of moving away from gender stereotypes, as an effect of the change/the acceptance of the change in the social roles of women and men under the influence of the factors highlighted by the Court in its reasoning.

The issue of gender/gender identity had also been the subject-matter of numerous cases before the European Court of Human Rights (*ECHR*), even if, similar to the Romanian Constitution, the Convention for the Protection of Human Rights and Fundamental

[2] Constitutional Court, "Decision of the Constitutional Court of Romania No 107 of November 1, 1995" (Official Gazette of Romania, Part I, No 85, April 26, 1996).

[3] Constitutional Court, "Decision of the Constitutional Court of Romania No 90 of February 10, 2005" (Official Gazette of Romania, Part I, No 245, March 24, 2005).

[4] Constitutional Court, "Decision of the Constitutional Court of Romania No 1237 of October 6, 2010" (Official Gazette of Romania, Part I, No 785, November 24, 2010).

[5] Constitutional Court, "Decision of the Constitutional Court of Romania No 387 of June 5, 2018" (Official Gazette of Romania, Part I, No 642, July 24, 2018).

Freedoms does not expressly regulate these notions. However, the lack of express rules to this effect did not prevent the ECHR from ruling on the above-mentioned concepts, from ascertaining social developments in this respect, resulting in the duly imposition of States' obligations, in particular with regard to the principle of equality and respect for the right to privacy (which also includes in its scope the gender identity of a person).

Thus, the ECHR stated that gender equality was a major goal in the member States of the Council of Europe, noting, for example, in its Judgment of 22 March 2012, delivered in the Case of *Konstantin Markin v. Russia*, point 127, that "the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention. (...). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. (...)."

The case-law on gender equality of the ECtHR covers a variety of legal aspects, such as cases where women are victims of violence (see, for example, the judgment of 28 May 2013 in the Case of *Eremia v. Republic of Moldova*, in which the ECtHR held that the failure by the authorities to comply with their duty to protect the applicants reflected the fact that they did not assess the seriousness of acts of violence against women, and the failure by the authorities to take into account the issue of violence against women constitutes discriminatory treatment on grounds of sex, in breach of Article 14 read in conjunction with Article 3 of the European Convention on Human Rights), employment and parental leave (see, for example, Case of *Konstantin Markin v. Russia*, cited above, where the ECtHR found that men were in a similar situation to that of women as regards parental leave), age conditions in relation to the exercise of the right to social benefits (see, for example, the judgment of 17 February 2011 in the Case of *Andrle v. Czech Republic*, where the applicant complained that, unlike the situation of women, there was no lowering of the retirement age for men who had raised children, and the Czech Government argued that this difference in treatment was due to the situation in the old communist system, where women with children had an obligation to work full-time, as well as to take care of children and care for the households, the measure being designed to compensate women for that dual burden), national provisions on the choice of first name and the transfer of the parents' surname to their children (see, for example, the judgment of 7 January 2014 in the Case of *Cusan and Fazzo v. Italy*, where the ECtHR found that a rule which does not allow a married couple to give their children the surname of their mother is discriminatory against women), homophobic violence (see, for example, the judgment of 12 April 2016 in the Case of *M.C. and A.C. v. Romania*, where the ECtHR found that the authorities had not taken into account possible discriminatory grounds when investigating a homophobic attack).

Another field of gender identity, which was very significant as regards developments both at the level of case-law and national legislation, concerned the situation of transgender people. The case-law of the ECtHR to this effect has developed from the Court's statements in the sense that it was aware "of the seriousness of the problems affecting transgender people and of their suffering" and the recommendation as to "constant consideration of appropriate measures, having regard in particular to developments in science and society" (point 47 of the judgment of 17 October 1986 in the Case of *Christine Goodwin Rees v. United Kingdom*), to finding a violation of Article 8 (right to respect for private and family life) of the Convention in a case concerning the recognition of transgender people (see judgment of 25 March 1992 in the Case of *B. v. France*) where, observing that several official acts revealed in France "a discrepancy between the legal gender and the apparent gender of a transgender person" (Article 59 of the judgment), which also appeared in the acts relating to social security contributions and in the salary slip, the ECtHR held that the refusal to amend the register of civil status in her regard had placed the applicant "in a daily situation which was inconsistent with her private life".

These considerations were reiterated in subsequent cases, such as the judgment of 30 July 1998 in the Case of *Sheffield and Horsham v. the United Kingdom*, where the Court reaffirmed that "the area must be kept under constant review by the Contracting States" (point 60 of the judgment), in the context of "extended acceptance of the phenomenon and recognition by society of the problems that transsgender people may encounter", in its judgment of 11 July 2002 in the Case of *Christine Goodwin v. the United Kingdom* (Grand Chamber), where the Court ruled that Article 8 of the Convention Convention had been violated, retaining a clear and continuous international trend towards greater social acceptance of transgender people and the legal recognition of the new sexual identity of transgender people who have undergone surgery. In its judgment of 12 June 2003 in the Sase of *Van Kuck v. Germany*, the ECtHR held, inter alia, that sexual identity is one of the most intimate aspects of aperson's private life, in its judgment of 10 March 2015 in the Case of *Y.Y. v. Turkey*, it reiterated in particular that the possibility for transgender people to fully enjoy the right to personal development and physical and moral integrity cannot be regarded as a controversial issue, and in the judgment of 11 October 2018 in the Case of *S.V. v. Italy*, the ECtHR found that there had been an infringement of Article 8 of the Convention by relying in particular on the inflexibility of the judicial process for recognising the sexual identity of transgender people then in force, which placed the applicant — whose physical and social identity had long been that of a female — for an

unreasonable period of time in an abnormal situation, leading to feelings of vulnerability, indignity and anxiety. Similarly, it is also possible to mention the judgment of 17 January 2019 in the Case of *X against the former Yugoslav Republic of Macedonia*, in which the ECtHR found that the circumstances of the case revealed legislative gaps and serious deficiencies in the recognition of his identity which, first, leave the applicant in a situation of uncertainty as to his private life and, second, have long-term negative consequences on his mental health.

Also under European Union (EU) law, the promotion of gender equality and the fight against discrimination on grounds of gender are issues developed at both legislative and case-law level. Thus, according to the EU Treaties, protection against discrimination on grounds of gender has been and remained a fundamental function of the European Union and gender equality is a "fundamental value" (Article 2 TEU) and an "aim" (Article 3 TEU) of the Union. The degree of acceptance of the social and economic importance of equal treatment was strengthened by the central position it received in the Charter of Fundamental Rights of the European Union.

To the same effect, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) establishes in the second recital that "*equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a «task» and an «aim» of the Community and impose a positive obligation to promote it in all its activities".* According to recital 3 of that directive, "*The Court of Justice has held that the scope of the principle of equal treatment for men and women cannot be confined to the prohibition of discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, it also applies to discrimination arising from the gender reassignment of a person."* Another relevant example is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, which protects lesbian, gay, bisexual, transgender and intersex (LGBTI) persons from hate crimes. This includes the criteria of sexual orientation, gender identity and gender expression in the recognition of victims' rights, helping to ensure that victims affected by a crime due to prejudice or discrimination receive adequate information, support and protection.

The Court concluded that regulatory developments at national, Council of Europe, EU level, as reflected in the case-law of the Constitutional Court, the ECtHR, the Court of Justice of the European Union (CJEU), support and highlight the fact that gender identity/gender equality is more than biological sex/differences thus combating gender stereotypes attached to the traditional approach to women's and men's roles in society. The Romanian State has, for almost two decades, undertaken that approach by express rules, Romania being connected to international developments in this area by the provisions of Article 20 of the Constitution, which set the priority for the highest standards of protection of fundamental rights.

This was essentially the national and European context in which the law containing the criticised rule has recently been adopted, a rule which establish that, in all teaching facilities, it is forbidden to spread the idea/theory that gender identity is a concept different from biological sex. In other words, gender stereotypes appear to be established by law (in the premises where the teaching process takes place), opinions to the contrary being penalised. The legislative solution with that content is considered to be contrary to the constitutional rules relied on in the statement of reasons for the referral, to be analysed in the order in which they are mentioned in the referral.

2.2. Submissions related to the infringement of Article 29 of the Constitution on freedom of conscience

According to the author of the referral, the prohibition, applicable to the teaching staff and to pupils and students, inside all teaching facilities, of activities aimed at spreading theories or opinions on gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same, was *eo ipso* a problem likely to lead to violations of the freedom of conscience, as long as those provisions generated obligations in the sense of teaching/attending courses/classes on a certain theory/opinion with a result/purpose contrary to the beliefs of each individual.

The Court found that those claims were well founded. Freedom of conscience essentially presupposes that the person has the opportunity to have and publicly express his or her views of the surrounding world. Such views are developed under the influence of a multitude of factors during the life of the individual, a framework in which the education system plays an essential role. This is also the meaning of the provisions under Article 4 of Law No 1/2011 on national education, according to which "*the main purpose of education and training of children, young people and adults is to develop competences, understood as a multifunctional and transferable set of knowledge, skills and abilities, necessary for: (a) the personal fulfilment and development, by achieving their own goals in life, in accordance with the interests and aspirations of everyone and the desire to learn throughout their lives; (b) social integration and active citizen participation in society; (c) employment and participation in the functioning and development of a*

sustainable economy; (d) forming a vision of life, based on humanistic and scientific values, national and universal culture and fostering intercultural dialogue; (e) education in a spirit of dignity, tolerance and respect for human rights and fundamental freedoms; (f) nurturing sensitivity to human issues, moral-civic values and respect for nature and the natural, social and cultural environment." These principles, which may be subsumed to the freedom of conscience, are incompatible with the imposition by law a "truncated" knowledge of reality as a prerequisite for shaping the conception of the surrounding world. These views of life cannot be "prescribed" or imposed by the State by asserting certam ideas as absolute truths and by prohibiting, de plano, any attempt to learn about any other opinion/theory existing on the same topic, especially when such opinions/theories are promoted/supported from a scientific and legal point of view, marking the societal evolutions at a certain point in time.

The drafting of Article 29 (1) of the Constitution highlights the complex area of freedom of conscience, which includes *„freedom of thought"*, *"freedom of opinion"* and *"freedom of religious beliefs"*. They *"shall not be restricted in any form whatsoever"* and no one shall be *"compelled to embrace an opinion or religion contrary to his own convictions"*. However, the contested law prohibits any activity of knowledge/expression in the organised educational environment of theories/opinions relating to gender identity other than that established by the State. This is tantamount to forcing both young people and teachers to adopt and express - on the teaching premises - only the view promoted and recognised by the State by law, according to which gender is identical to biological sex, a constraint incompatible *de plano* with the freedom of conscience as defined by that constitutional text.

Thus, with reference to Article 29 (2) of the Constitution, according to which the State guarantees freedom of conscience, and taking into account the content of that freedom, it follows that, in order to meet constitutional requirements, the education system must be open to ideas, values, opinions and encourage their free expression and criticism. In organising educational activities, the State must ensure that these freedoms are respected by ensuring that pupils/students can take part in the study of particular subjects, theories or opinions, be able to know, think to, understand, analyse certain concepts and theories and express themselves freely in relation thereto, regardless of their complexity or controversial nature. In other words, the State — through the education system, must support the formation of views of the surrounding world, rather than impose them, by preventing any possibility to learn/discuss information on a particular topic/subject.

Moreover, as stated in the referral, freedom of conscience must be examined "in particular in relation to the human dignity guaranteed by Article 1 (3) of the Basic Law, which dominates the entire system of values as its ultimate value" (the author of the referral refered to the reasoning part contained in Decision No 669 of 12 November 2014, published in the Offîcial Gazette of Romania, Part I, No 59 of 23 January 2015). The prominent position of human dignity in the constitutional system of values was reinforced by the considerations underlying the decisions by which the Constitutional Court ruled on initiatives for revision of the Constitution, such as Decision No 465 of 18 July 2019, published in the Official Gazette of Romania, Part I, No 645 of 5 August 2019, in which the Court held that "the fundamental rights and freedoms of citizens and their guarantees cannot be regarded as a diffuse set of elements unrelated one to the other, but form a coherent and uniform system of values, based on human dignity. In addition to the fact that the fundamental rights and freedoms described as such in the Constitution are based on human dignity (Decision No 1109 of 8 September 2009), human dignity being a supreme value of the Romanian State, it is not only proclamative in nature and is not deprived of legislative content, but, on the contrary, has normative value and can be classified as a fundamental right with a distinct content calling into question the human nature and condition of the individual. To that effect, the Constituțional Court itself held that disregarding the subjective principles characterising human beings is contrary to human dignity by expressly referring to the object-subject formula used by the German Federal Constitutional Court when analysing the concept of human dignity[6]. In that decision, the Court emphasised that a particular regulatory framework must not disqualify the person and place them on the second level in relation to the State's intention to keep an electronic health record and/or to centralise various medical data." (paragraph 47). The ECtHR has held in the same sense that of the very essence of the Convention for the Protection of Human Rights and Fundamental Freedoms is the respect for human dignity and human freedom (judgment of 29 April 2002, Case of *Pretty v. the United Kingdom*, paragraph 65). Any violation of human dignity affects the essence of the Convention (judgment of 2 July 2019 in the Case of *R.S. v. Hungary*, paragraph 34) (paragraph 48). Similarly, the Court noted that the Court of Justice of the European Union had also held that the EU legal order, unequivocally, endeavours to ensure respect for human dignity as a general principle of law (judgment of 14 October 2004 in Case C-36/02, Omega Spielhallen-und Automatenaufstellungs-GmbH, paragraph 34).

However, a legal constraint, in the sense of prohibiting the teaching staff and the pupils and students, inside all teaching facilities, from conducting any activity aimed at "spreading" - that is, actually, any act of communicating/learning about opinions on gender identity contrary to the one imposed by the

[6] Constitutional Court, "Decision of the Constitutional Court of Romania No 498 of July 17, 2018" (Official Gazette of Romania, Part I, No 650, July 26, 2018), par.52.

State, a theory that can contradict opinions, beliefs or maybe even the gender identity that a person perceives, is contrary to human dignity itself. Applying *mutatis mutandis* the case-law cited above, the Constitutional Court held that, by the legislative framework created with regard to the organisation of education, the State must not disregard the individual, with all the complexity inherent to that concept, and place the individual in a secondary position in relation to the possible intention of the State to impose a particular idea. In other words - with reference to the present case - the intention of the State, through its authorities, to promote at some point a conception of the concepts of "sex" and "gender", must not be transformed into an act imposing and penalising the actions for knowledge/bringing to knowledge of existing opinions on this subject, that is to say, an act which represents a constraint of the freedom of conscience, as an inherent dimension of human dignity.

2.3. Submissions as to the infringement of the constitutional provisions of Article 16 (1) relating to the principle of equality of citizens before the law, in conjunction with the provisions of Article 32 on ensuring access to education and the protection of children and young persons

The author of the referral took the view that, by imposing a condition in the sense described above, the law subject to review by the Constitutional Court is such as to exclude from the scope of beneficiaries of the right to education those who wish to study the theory/opinion of gender identity other than as it is subjectively set out by the legislator. Making access to education conditional by imposing constraints on the expression of a theory/opinion expressly provided for by law, both for beneficiaries and education providers, constitutes, according to the author of the referral, an interference which does not respect the principle of proportionality between the measures taken and the public interest safeguarded.

The Court found that those claims were also well founded. Thus, ensuring the right to education and, from that point of view, guaranteeing it at constitutional level by the provisions of Article 32 were actions aimed at the education of children, young people and people so that they can form part of society, which implies an awareness of the developments inherent in society and an informed acceptance/rejection of theories or opinions conveyed at a given time. As a result, education must be continuously linked to these developments and not *de plano* deny the knowledge of them.

The issue of gender identity with its many dimensions has long been present in the social and legal landscape - even though the initiators of that legislation use vague terms, referring to "recent years" and without indicating where and how the "theory" whose prohibition they propose has emerged and developed. The developments of legislation and case-law in Romania, of the rules adopted at the level of the Council of Europe and the EU and of the case-law developed by the ECHR and the CJEU demonstrate that the distinction between sex and gender and its much wider and more complex scope are recognised in the instruments mentioned for several decades. In this context, the prohibition in the organised educational environment of any activity aimed at knowing this issue appeared almost anachronistic, such as to suppress access to information and, thereby, access to education, aiming at a psycho-social phenomenon recognised both in legislation and case-law. This is all the more so as the prohibition is formulated in general terms and on a concept which, through the multitude of legal, sociological, psychological meanings, can emulate a variety of fields of study and research that thus become forbidden to the recipients of the educational act only because, in one way or another, they can be interpreted to question aspects of gender identity.

According to the explanatory statement, the intention of the initiators was to prohibit "proselytism", i.e. to prohibit acts of persuading young people to embrace a certain idea/theory. With regard to this wording of the text of law, considerations may have been eventually made in the light of the conditions for restricting the exercise of certain rights and freedoms. However, the final form of the law - criticised by the author of the referral - prohibits any activity of expression/knowledge of opinions different from that imposed by the legislator. Such an absolute prohibition is incompatible with the organisation of education in a democratic state and also with the protection of children and young people, as regulated by Articles 32 and 49 of the Constitution. The concealment / denial / repression of an opinion does not lead to its disappearance, nor can "protect" the individual from the alleged harmful effects that the state would like to prevent in relation to the education of children and young people.

The criticised regulation also violates the principle of equality, invoked by the author of the referral, being in conjunction with the provisions of Article 32 of the Constitution on the right to education and of Article 49 on the protection of children and young people. According to the case-law of the Constitutional Court, "the place that the principle of equality occupies in all constitutional provisions confers particular importance on it"; "the principle of equality characterises fundamental rights and freedoms, while being a guarantee of each fundamental right"; "equality is closely correlated with all fundamental rights and freedoms, so that the analysis of the suppression of fundamental rights and freedoms must be based on the principle of equality, principle which underlines fundamental rights and freedoms"; "as the principle of equality is related to the essence and function of human dignity, it follows that equality is a characterising and intrinsic element of human

dignity."[7] In the light of the principle of equality thus defined, in conjunction with the right to education and the protection of children and young people, they must have, without any discrimination, the possibility to know and to study theories, ideas, concepts in accordance with societal developments, without any constraints to censor their freedom of thought and expression. The educational ideal promoted in Romania is represented by "*the free, integral and harmonious development of human individuality", "the formation of autonomous personality", "the assumption of a system of values that are necessary for personal fulfilment and development"* [Article 3 (2) of Law No 1/2011], and the mission assumed by the legislator in terms of education is, among others, to *"train, through education, the mental infrastructure of the Romanian society, in agreement with the new requirements, derived from the status of Romania as member of the European Union and from the functioning in the context of globalization, and to sustainably generate a national highly competitive human resource, capable of efficiently operating in the current and future society".* [Article 2 (2) of Law No 1/2011]. The prohibition of the access to education and the obligation for the state to express its opinion in this regard do not serve the conscious assumption of a system of values necessary for personal fulfilment and development, being at the same time a genuine violation of equal opportunities, as long as young people in Romania, citizens of the European Union, are forbidden in their country to know/express opinions/study a certain sphere of problems and theories. The issue of gender identity is present not only in theoretical debates, but also in legislations and in a rich case-law at European level, and the prohibition on information about it appears as an unjustified violation of the equal access to education of young people in Romania.

2.4. Submissions regarding the violation of the provisions of Article 30 (1) and (2) of the Constitution on freedom of expression and prohibition of censorship

The author of the referral stated that the criticised rules equate with the establishment of a censorship of opinions/theories in theoretical research on gender identity. This is the imposition of a certain result, of a distorted knowledge regarding the matter of gender identity, and, according to Article 30 (2) of the Constitution, censorship of any kind is prohibited. Moreover, the criticised rule, by the way it will be applied, will result in the prohibition, by law, of an academic theory and will equate with the pre-establishment of the result of scientific research in the matter, with the aim of falling within the established legal limits, in contradiction with the rules of the framework law on education.

With reference to these claims, the Court recalled its statements that "the freedom of consciousness inevitably implies the freedom of expression, which makes possible to externalise, by any means, the thoughts, opinions, religious beliefs or spiritual creations of any kind."[8]. Regarding the content of the ideas, of the opinions that can be expressed at some point, the ECHR stated, referring to the interpretation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that the freedom of expression constitutes one of the foundations of a democratic society and one of the basic conditions for its progress and for the fulfilment of each individual (Judgment of 25 October 2018 in Case *E.S. vs. Austria*). "The freedom of expression enshrined in Article 10 shall be valid, subject to paragraph (2), not only for the 'information' or 'ideas' received in favour or regarded as harmless or indifferent, but also for those which catch, shock or worry" [see, inter alia, Judgment of 7 December 1976, in Case *Handyside v United Kingdom*, paragraph (49), and Judgment of 23 September 1994, in Case *Jersild v Denmark*, paragraph (37)].

Under Article 30 (1) of the Constitution, freedom of expression is inviolable, however, "according to Article 30 (6) and (7) of the Constitution, it shall not be prejudicial to the dignity, honour, privacy of a person and to the right to one's own image, being prohibited by law any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism or public violence, as well as any obscene conduct contrary to morality. The limits of the freedom of expression are entirely consistent with the concept of freedom, which is not and cannot be understood as an absolute right. The legal-philosophical conceptions promoted by democratic societies admit that one person's freedom ends where another person's freedom begins. (...) An identical limitation shall also be laid down in Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, for the protection of the reputation or rights of others (...)",* as well as in Article 19 (3) of the International Covenant on Civil and Political Rights, which establishes that the exercise of freedom of expression carries with it special duties and responsibilities and may therefore be subject to certain restrictions, but these shall only be such as provided by law, taking into account the rights or reputation of

[7] Constitutional Court, "Decision of the Constitutional Court of Romania No 464 of July 18, 2019" (Official Gazette of Romania, Part I, No 646, August 5, 2019).

[8] Constitutional Court, "Decision of the Constitutional Court of Romania No 485 of May 6, 2008" (Official Gazette of Romania, Part I, No 431, July 9, 2008).

others. Being a restrictive rule capable of circumscribing the framework within which freedom of expression can be exercised, the listing made by Article 30 (6) and (7) is a strict and limiting one"[9].

The Court observed that the prohibition of access to knowledge of an opinion and expression in this regard only because it does not agree with that of the state on an issue - in this case gender identity - arises from that perspective as a clear violation of the freedom of expression in a democratic society and cannot be classified within any of the limits enshrined in the constitutional text of reference. However, "as the limits imposed on the freedom of expression are themselves of constitutional rank, the determination of the content of this freedom is of strict interpretation, no other limit being admitted except in breach of the letter and spirit of Article 30 of the Constitution."[10].

The Court also noted that a specific expression of the freedom of expression in higher education units is, according to law, the academic freedom [Article 123 (1) of Law No 1/2011]. This involves the free expression of academic opinions, without restrictions of ideological, political or religious nature. At the same time, academic freedom requires objectivity in knowledge and appropriate scientific training, the universities having the freedom to impose certain scientific and ethical standards. In higher education institutions it is prohibited to jeopardise in any form the right to free expression of scientific opinions and the freedom of research is ensured in terms of determining the themes, choosing the methods, processes and capitalising on results, according to the law [Articles 123 (5) and (6) of Law No 1/2011]. However, the prohibition of free expression in relation to gender theory clearly determines the prohibition of any research initiative in this field, the criticised rule imposing, independently of any free debate or research, a dogmatic, truncated education, compelling for the free expression of teachers and beneficiaries of the educational act, ignoring their right to opinion.

2.5. Submissions regarding the violation of the provisions of Article 1 (3) and (5) of the Constitution on the rule of law and the respect for the Constitution and laws, as well as Article 20 (2) on the priority of international regulations in the field of fundamental human rights

It was argued, in essence, that the normative act does not comply with the legal requirements regarding its integration into the entire legislation and its correlation with the international treaties to which Romania is a party, that it contains provisions which are inconsistent with the regulations of Articles 6 and 14 of the Istanbul Convention and also contravenes the solution established by the constituent legislator in Article 20 (2) of the Fundamental Law. With regard to the existence of contradictory legislative solutions, the Constitutional Court held, by Decision No. 1 of 10 January 2014, that it breaches the principle of legal certainty, principle which constitutes a fundamental dimension of the rule of law, as expressly enshrined by the provisions of Article 1 (3) of the Fundamental Law. Taking into account the case-law of the constitutional court in the matter, binding according to Article 147 (4) of the Constitution, it was appreciated that the criticised law is contrary to the provisions of Article 1 (3) and (5) of the Constitution referring to the rule of law and the respect for the Constitution and laws.

The Court found that those criticisms were well founded. The Romanian legislation prohibits discrimination on grounds of sexual orientation, contains legislative solutions for situations aiming at sex change, the distinction between the concepts of "sex" and "gender", therefore clear provisions, in line with the obligations assumed by Romania as a signatory party to international treaties relating to the field of "gender identity". Similarly, the internal normative system is connected, through Article 20 of the Constitution, to the international regulatory framework on human rights and to the evolutionary interpretation given by international courts such as the ECHR, enshrining the priority of the highest standards on fundamental rights. Through Article 148 of the Constitution, mandatory European rules have priority if they are contrary to the domestic ones. In this context, the prohibition by law of the expression and knowledge in educational institutions of the issue of gender identity other than as identity between gender and biological sex equates to the promotion of normative solutions that are mutually exclusive, capable of creating a confusing and contradictory regulatory framework, contrary to the requirements of law quality law imposed by Article 1 (3) and (5) of the Constitution.

The establishment of different legal solutions for the same normative situation represents a contradiction of the legislator's conception, which cannot be accepted as it generates a lack of coherence, clarity and predictability of the legal rule, making the recipients of the law unable to adapt their conduct. It would be inferred from the corroboration of the incidental rules in this area that a pupil/student/teacher/a person must comply exactly with legislation that promotes gender identity distinct from sex as biologically given and does not commit any discrimination because he/she is liable to be sanctioned, but, at the same time, in educational areas to support the contrary to this legislation because - again - he/she is liable to be sanctioned, this time because he/she does not agree with gender-specificity, meaning he/she does not agree to discrimination in a

[9] Constitutional Court, "Decision of the Constitutional Court of Romania No 649 of October 24, 2018" (Official Gazette of Romania, Part I, No 1045, December 10, 2018); Constitutional Court, "Decision of the Constitutional Court of Romania No 629 of November 4, 2014" (Official Gazette of Romania, Part I, No 932, December 21, 2014).

[10] Constitutional Court, "Decision of the Constitutional Court of Romania No 629 of November 4, 2014", par.48; Constitutional Court, "Decision of the Constitutional Court of Romania No 650 of October 25, 2018" (Official Gazette of Romania, Part I, No 97, February 7, 2019).

broad sense. The obligation to comply with the law imposed by Article 1 (5) of the Constitution thus obtain a derisory nature, the person being objectively unable to comply with it. Whereas, according to other regulations in force, the State does not discriminate against persons with other sexual orientation, administratively recognises the change of sex, distinguishes between sex and gender and respects the obligations imposed by the ECHR in matters of equality and non- discrimination with its multitude of facets. Such a normative solution appears to be contrary to legal logic and lacking any reasonable reasoning.

4.Conclusions

Romania's accession to the E.U., in 2007, meant the acceptance of multiple changes. Little by little, European values were inserted in legislation and subsequently, in everyday life. The evolution of E.U. and ECtHR case-law were also reflected in the case-law of ordinary courts and of the Romanian Constitutional Court. The decision of the latter regarding the theory or the opinion on gender identity in education is another example of the adaptations undergoing in Romanian legislation.

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THE METHOD OF NORMING THE TRANSLATION CONDITIONS TO COMPETITIVE ELECTRICITY SUPPLY MARKET

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Abstract

In objectifying a desirable economic and social reality, the undistorted and efficiency regulatory mode of the conditions for the supply of electricity on a free commercial market by the national authority, a minimum legal requirement for the functioning of the electricity sector and market should be respected, in terms of efficiency, competition, transparency and consumer protection.

However, on the electricity market in Romania, marked by a successive translation of the conditions of electricity supply by suppliers and the establishment of the electricity tariff, between the method regulated by state institutions, having legal competences in the field, and the competitive market, the role of the National Energy Regulatory Authority, hereinafter referred to as ANRE, is even more important in avoiding competitive slippage and abuses against final consumers.

Contrary to its role of administrative guardianship in the field of electricity supply, ANRE stood out, by issuing administrative orders regulating the conditions for the transition of captive consumers from the regulated to the competitive market, through an administrative-normative approach not only defective, but also harmful to consumers as well as through a lack of transparency and the adoption of at least questionable administrative orders. Therefore, from this point of view, it is strictly imposed the necessity of the systematic and teleological analysis of the ANRE Order no. 188/2020(subsequently amended by Order no. 6/2021), of the ANRE Order no. 241/2020 and of the ANRE Order no. 242/2020, from the perspective of the excess of power in the issuance / adoption of the administrative act institution, regulated by disp. art.2 paragraph 1 letter n) of Law no.554 / 2004.

It is necessary to analyze the legal character of these orders issued by ANRE, including the possibility of censoring their stipulations by the court on the basis of excessive power adoption, as an indispensable requirement of compliance with the principle of legality of the administrative act, with the use of the jurisprudence of the European Court of Human Rights (ECHR) and the jurisprudence of the Court of Justice of the European Union (CJEU) relevant in the matter.

Keywords: *order, administrative guardianship, excess of power, regulation.*

1. Introduction

The specificity of the organization of modern society, characterized by globalization, but largely by placing certain types of activity under the prerogative of a few professionals, who exercise a real monopoly in those fields, involves identifying, preparing and implementing a timely, transparent legislative framework. efficient, applied, balanced, non-discriminatory, proportionate and adapted to the specifics of that activity or public service.

These regulatory needs imply the involvement of state institutions in shaping and elaborating the ways of organizing these activities of general interest or providing public services, regardless of whether they are carried out by public institutions, by legal entities with whole or majority state capital or by legal entities of private law who, according to the law, have obtained the status of public utility or are authorized to provide a public service, in public power regime, according to the stipulations of art.2 paragraph 1 (b) thesis II of Law no. 554/2004.

The public services activities, being characterized by a synoptic and complex structuring and by a regime of often monopoly, fact that puts the citizen, as recipient of the public interest, in a situation of severe inferiority to the suppliers of these services, involve state institutions control, focused on regulating the supply conditions, the rules of commercial behavior of suppliers on the economic market, the general regulatory framework for respecting the competitive environment and also the structuring, deployment and control of compliance with the rules of participation in the free market of public services.

One of the primary areas of public service provision in any state, and the Romanian society does not make a discordant note, is that of electricity supply, which is characterized as a strategic area of national interest, being thus subject to a complex and specialized regulation, aimed to maintaining a fair balance, on the one hand, between suppliers, by stimulating and preserving a competitive environment, and, on the other hand, between the actors in the electricity supply market and consumers, as final recipients in a clear position of inferiority and vulnerability on the market, determined by the poor level of information, market involvement and influencing the conditions for providing this service, including through the way of negotiating the price of electricity.

Therefore, the role of Romanian state institutions is a strong and decisive one in this fundamental field, of electricity supply, aiming to ensure balance on the free market, through the combined game of creating a proper environment for the development of this

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economic field, by stimulating investments correlated with well-structured legislative levers, designed to protect vulnerable customers.

In this regard, the concern of public institutions in regulating the electricity market and in establishing a strategy for its development is very well set out in the stipulations of Article 4 paragraph 1 of Law no. 123/2012[1], according to which: *"National Energy Strategy defines the objectives of the medium and long-term electricity field and the most efficient ways to achieve them, in the conditions of ensuring a sustainable development of the national economy and meeting the energy needs and a civilized standard of living, in quality conditions, both now and in the medium and long term, at an affordable price. The energy strategy is developed by the relevant ministry in consultation with representatives of the energy industry, non-governmental organizations, social partners and representatives of the business environment, is promoted by a draft law by the Government and approved by the Parliament. The energy strategy is periodically reviewed at the initiative of the relevant ministry, without prejudice to the stability and specific predictability of such a document, the revised form to be approved in accordance with the law. "*

This legal text has the merit of concentrating the object of a complex national strategy in the field of electricity, focusing on the legal values of state law, characterized by the need to respect a reasonable ratio of proportionality between the means of implementing the strategy and the goal and the development of this field, in order to ensure a civilized standard of living for the Romanian consumers, at a reasonable price.

The criterion of the quality of the legal norm is transposed in the national legislation, as it transpires from the jurisprudence of the European Court of Human Rights, respectively the requirement that the structure of the normative construction regulating the electricity field should be accessible and predictable, not only in order to create a climate conducive to the development of the activity of authorized suppliers, but also in order to achieve the goal of protecting final customers, who have a disadvantageous position on the energy market, being dependent on certain suppliers, often having a monopoly contribution on the electricity supply market, at least in a certain region of the country.

1.1. ANRE, Protection duties in the energy field

From this point of view, the role of the Energy Regulatory Authority (hereinafter ANRE) is a strong one and a benchmark in the field of electricity market regulation, stipulations of art.71 para. 1 of Law no. 123/2012 stating that *"ANRE monitors the implementation of the rules on the roles and responsibilities of transmission and system operators, distribution operators, suppliers, customers and other market participants in accordance with Regulation (EC) no. 714/2009. "*

This role is well structured by art.1 paragraph 1 of GEO no. 33/2007[2]*, according to which „The National Energy Regulatory Authority, hereinafter referred to as ANRE, is an independent administrative authority, with legal personality, under parliamentary control , financed entirely from own revenues, decisively independent, also organizationally and functionally, having as object of activity the elaboration, approval and monitoring of the application of the set of obligatory regulations at national level necessary for the functioning of the electricity, thermal and natural gas field and market, competition, transparency and consumer protection. "*

The legal activity carried out by ANRE aims at issuing orders, decisions and notices, whose legal regime is outlined by the stipulations of art. 5 of GEO no. 33/2007, according to which:

„(1) The orders, decisions or opinions of ANRE regarding the regulatory activity refer to:

a) granting / modifying / suspending / refusing or withdrawing licenses or authorizations;

b) approval of regulated prices and tariffs and / or their calculation methodologies;

c) approval of technical and commercial regulations for the safe and efficient operation of the electricity, heat and natural gas sector;

d) the approval / endorsement of the documents elaborated by the economic operators covered according to the legal provisions in force;

e) granting / modifying / suspending / refusing or withdrawing certificates / authorizations to economic operators and individuals carrying out specific activities in the electricity and natural gas sector;

f) approval of other regulations, norms, studies, documentation provided by the legislation for the field of electricity and heat and natural gas.

(2) The orders and decisions provided in par. (1) lt. a) -d), accompanied by the motivation instruments, drawn up in compliance with the legal provisions in force, shall be debated in the Regulatory Committee and shall be adopted by a majority vote of its members; the quorum for meetings of the Regulatory Committee shall be deemed to have been met if at least 4 members of the Committee are present.

(3) The orders and decisions provided in par. (1) are binding on the parties until a final and irrevocable court decision has been issued to the contrary, unless they have been revoked by the issuer ... "

Therefore, one of the concrete forms of exhibiting the attributions of ANRE, as a tutelary body in the field of electricity, is represented by the activity of issuing orders having as object the elaboration of technical-

[1] Of electricity and natural gas, published in the Official Gazette no. 485 of July 16, 2012

[2] Regarding the organization and functioning of the National Regulatory Authority in the Energy Field, published in the Official Gazette no. 337/2007.

legal norms aiming at the functioning of the electricity supply sector.

2. Excess of power - The issue of excess power in the exercise of duties

For a pertinent analysis of the way in which ANRE fulfills the role of administrative guardianship in the field of electricity, with particular observations on the limits of the right of appreciation in the exercise by this institution of legal attributions, it is necessary to observe a particular case of regulation by ANRE , as much as publicized, as controversial from a legal point of view.

Thus, one of the unilateral administrative acts with normative character (within the meaning of stip. Art.2 paragraph 1 letter c) of Law no.554 / 2004) issued by ANRE is the ANRE Order no. 171/2020[3], legal act aiming at determining the general legal framework for the supply of electricity by economic agents, called suppliers of last resort.

The determination of this notion has a legal origin, within the meaning of art.3 point 27 of Law no.123 / 2012, by *"provider of last resort (meaning - sn) the provider designated by the competent authority to provide the universal supply service in specific regulated conditions "*.

In the analysis of the controversial norms referred to in the above lines, the provisions of art. 4 of ANRE Order no. 171/2020 are relevant, according to which *"Starting with January 1, 2021, household customers in the portfolio of suppliers of last resort may continue to benefit from the universal service, by maintaining the contractual relationship with the provider of last resort in whose portfolio it is located or by concluding a contract with another provider of last resort, at the price of its universal service offer, or they may choose an electricity supplier with which to conclude a contract for the supply of electricity in a competitive manner ".*

Also, art. 5 of the same order states that *"Starting with January 1, 2021, as a result of the elimination of regulated tariffs, electricity consumption of household customers who have not chosen a competitive offer and have not concluded a contract on the market shall be invoiced by the suppliers of last resort with whom they had concluded a supply contract in force on 31 December 2020, at the offer price for the universal service, established in accordance with the provisions of the annex to this order ".*

In order to fully understand the significance of these two legal texts on how to set the price of electricity for consumers who have not concluded an agreement with the supplier, in a competitive market, so which are dependent on the service provided on the regulated market, the relevant provisions are of art. 3, Thesis II of the Annex to ANRE Order no. 171/2020, according to which *"... if the providers of last resort reserve the right to adjust the price of the offer for the universal service communicated to the household customer, they have the obligation to indicate in a complete and transparent manner the reasons which may lead to a variation in the supply price and explicitly describe the method by which that price varies."*

At a first analysis of these legal norms, it is noted that the situation of customers benefiting from the electricity supply service on the universal market is particularly disadvantageous compared to those on the competitive market, the supply price being left by the ANRE order mentioned , corroborated with ANRE Order no.188 / 2020, subsequently amended by Order no.6 / 2021, with ANRE Order no.241 / 2020, as well as with ANRE Order no.242 / 2020, at the simple discretion of the supplier of last resort, no reasonable criterion for determining this price has been established, obviously respecting the contractual freedom of the supplier, the principles of free competition and the free market, as they are conceived in the legislation of the European Union and in the jurisprudence of the Court of Justice of the European Union.

However, in order to establish whether these orders, as controversial as they are important, are disproportionate and whether they object to the abusive exercise, exceeding the reasonable limits of appreciation, of ANRE's attributions, it is necessary to proceed to a detailed analysis of the legal institution of the excess of power in the issuance / adoption of the administrative act, regulated by stip. art.2 paragraph 1 letter n) of Law no.554 / 2004.

Thus, for the beginning, as noted in the doctrine[4], *"We define the competence through all the attributions conferred by law to administrative persons and, sometimes, to their structures, to act for the organization of the execution and the concrete execution of the law. Using the competence, the authorities, the public institutions can act in the regime of administrative law, they can make administrative acts, administrative operations, technical-material facts. "*

From the point of view of administrative competence, it is unequivocal that the orders mentioned above are issued by an administrative institution, empowered by the provisions of art. 5 of GEO no. 33/2007 to issue normative administrative acts, through which to structure a general, abstract and conceptual framework for regulating the legal relations of an administrative nature born in the activity of providing electricity to household customers.

Therefore, ANRE issued these orders based on legal enabling norms, based on which it exercises the

[3] For the approval of the conditions of electricity supply by the suppliers of last resort, published in the OFFICIAL GAZETTE no. 876 of September 25, 2020.

[4] Emil Bălan, Administrative procedure, University Publishing House, Bucharest, 2005, p.59.

tutelary role in the field of determining the legal regime of electricity supply.

However, this simple legal authorization is not enough to reach the easy conclusion of ANRE's observance of the reasonable limits of appreciation in issuing these orders, but it is necessary to determine the legal modalities, the legal regime and especially the concrete effects that these orders produce regarding the manner of determining the price of electricity in the case of household consumers remaining on the regulated market, therefore of customers who have not concluded agreements with suppliers, on the competitive market.

From this point of view, we notice that ANRE had a certain margin of appreciation in determining the legal framework for establishing these prices, by issuing the orders in question, but this power of evaluation is not unlimited in terms of structure and especially within its limits, but, on the contrary, it is a finite one.

The answer to this matter is an important one, considering the fact that, if the court, to which the consumer, the People's Advocate or the prosecutor can address for the annulment of the mentioned orders, based on stip. art.2 paragraph 1, paragraph 3 and paragraph 5 related to those of art.8 paragraph 1 and art.11 paragraph 4 thesis II of Law no.554 / 2004, finds that by the orders issued by to ANRE the general legal framework was created, based on which the suppliers set the price of electricity and that it is disproportionate, harming household consumers, the latter can claim compensation, including ANRE, for repairing the damage suffered.

For example, regarding the issue of ANRE's margin of appreciation, the jurisprudence of the European Court of Human Rights held that *"it must take into account the state's margin of appreciation, which varies significantly depending on the circumstances, the nature of the protected right and the nature of the interference [Paradiso and Campanelli v. Italy (MC) no. 179-182; The Swiss Raelian movement against Switzerland (MC) no. 59-61]. 296.*

The same principle applies not only to the above-mentioned articles, but also to most of the other provisions of the Convention - including cases relating to implicit limitations, which are not mentioned in that article. For example, the right of access to a court, guaranteed by art. 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are implicitly allowed because the right of access, by its very nature, requires regulation at the state level. In that regard, the Contracting States have a certain margin of discretion, although the final decision on compliance with the requirements of the Convention is a matter for the Court. It must be convinced that the restrictions applied do not restrict or reduce the access allowed to the person in a way or to an extent that the right, in essence, is violated. In addition, such a limitation of the right of access to a court will not be in accordance with art. 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim pursued [Cudak v. Lithuania (MC), § 55; Al-Dulimi and Montana Management Inc. v. Switzerland (MC), § 129]. 297.

If, following the preliminary examination of the application, the Court is satisfied that all the above conditions have been met and that, in view of all the relevant circumstances of the case, there is no obvious disproportion between the aims pursued by State interference and the means employed, that claim is inadmissible as manifestly unfounded. [Mentzen v. Latvia (dec.)]"[5].

Nor has the Court of Justice of the European Union omitted such an important subject, having a fruitful jurisprudence on the right of assessment of the state, from which we note the following considerations[6], particularly relevant in the field: *"Finally, another general source of inspiration would be the case law of the European Court of Human Rights, which interprets Articles 6 and 13 of the ECHR. In accordance with the case law of the European Court of Human Rights on Article 6 of the ECHR, the adequacy of the judicial review available to the applicant is assessed in relation to the powers of the judicial body concerned and factors such as: "(a) the subject matter of the contested decision , in particular whether or not an issue requiring specialist knowledge or professional experience is concerned and whether it has involved the exercise of discretion by the administrative authorities and, if so, to what extent; (b) the manner in which that decision was reached, in particular the procedural guarantees in the proceedings before the competent body; and (c) the content of the dispute, including specific grounds of appeal and those at the level of intent* [7]....

As noted in the Decision in the Rahman case, Article 3 (2) gives the Member States a wide margin of discretion. However, the margin of appreciation is not unlimited. The Commission rightly emphasized that such a power of assessment concerns the choice of factors and conditions adopted by the Member States in accordance with their obligation to adopt national provisions in order to provide a regime to facilitate the entry and residence of extended family members. This margin of appreciation also extends to the actual assessment of the relevant facts in order to determine whether those conditions are met.

109. However, the margin of appreciation does not mean 'black box'. According to the jurisprudence of the Court, even if the competent authorities have a margin of discretion, the judicial review must verify

[5] Practical guide on admissibility conditions, https://www.echr.coe.int/documents/admissibility_guide_ron.pdf, f.70.

[6] In Case C 89/17 Secretary of State for the Home Department v Rozanne Banger.

[7] Decision of the European Court of Human Rights of 21 July 2011, Sigma Rado Television Ltd v Cyprus (EC: ECHR: 2011: 0721JUD003218104, paragraph 154 and the case law cited).

that the decision is based on a sufficiently sound factual basis and that it complies with procedural guarantees[8]. *In order to determine whether the limits on the discretion laid down by the Directive 2004/38 have been complied with, the national courts must be able to assess all the procedural aspects and the material elements of the decision, including the facts on which they are based*[9].

110. Again, the Rahman case decision has already provided strong indications in this regard: a person making an application under Article 3 (2) „has the right to have a court verify whether the national law and the manner in which it has been applied are not have exceeded the limits of the margin of appreciation laid down by that Directive "[10]. *Although the directive leaves a considerable margin of discretion, it must be possible for national courts to verify the compatibility of a national decision with the obligations laid down in Article 3 (2) of the directive „.*

As the legal wording has rightly stated[11], *„the term subsidiarity is also used by the doctrine in a second sense, in connection with the fact that in the case law of the Court a margin of quasi-discretion has been granted to the need for interference or, after some even discretionary. This discretion is a competence to classify situations which impose restrictions and / or derogations from the exercise of the rights protected by the Convention, which the Court recognizes for States. Interference is thus authorized by the Convention within the limits of the Court's discretion. This competence recognized to the States is based on reasons similar to those which led to the introduction of a principle of subsidiarity in the Maastricht Treaty"*.

But what is meant by the expression "excess of power"? The answer is given to us by art.2 paragraph 1 letter n) of Law no.554 / 2004, which states that by *"excess of power (we designate -sn) the exercise of the right of appreciation of public authorities by violating the limits of competence provided by law or by violating the rights and freedoms of citizens "*.

Therefore, we can state that the excess of power means the abusive exercise of the right of disposition of the public authority or of the public institutions subordinated to them, among which is ANRE, by the unequivocal and unjustified exceeding of the margin of appreciation of which, naturally , they dispose, or by non-compliance with the competence, material or territorial, of the issuing body or by exercising in such a manner the legal powers that, by evading the law, the rights and freedoms of the citizens are harmed.

In the analyzed case, the excess of power imply an exceeding of the external limits of ANRE's attributions, as they are established by law, transgressing, as a consequence, these assingning competence norms. Therefore, the excess involves the commission of an abuse of rights by this public institution, by issuing the orders in question with disregard for the right of household consumers to clarity and accessibility of the normative administrative act and to establish in a transparent, proportionate and balanced price of electricity supply.

A particularly relevant point of view was expressed in this regard by a renowned professor[12], who pointed out that "*The principle of avoiding abuse of power in administrative behavior implies the absence of abuse of power, in the sense that the Community official will have to - exercises its prerogatives only for the purpose for which they were conferred, and will avoid, in particular, their use without a solid legal basis or for the achievement of purposes that are not justified by a public interest. Therefore, if in the case of breach of the principle of proportionality it is a question of an excess of power in the exercise of the right of assessment by the Community official, in the case of abuse of power it is a diversion of the prerogatives conferred to them its administrative action being free of any legal basis and foreign to the realization of a public interest.* "

Also, the valences of this institution were detected by the national jurisprudence, which stated that "*it is known that the permissive norm, in administrative law, expresses the discretionary power given to the authority to act or not, the freedom to assess to act in a sense or otherwise, which does not equate to the fact that this power can be misused without legal justification of its choice. To accept the opposite means to accept the excess of power without any control of the administration activity, which is not allowed in a State law, which (...) is organized not only according to the principle of separation of powers (...), but also of that of their balance within the constitutional democracy* [13]".

Therefore, the abuse of power is the reverse of ANRE's natural right to analyze and assess the opportunity to issue the above-mentioned orders, in excess of reasonable limits of option, in relation to the circumstances and adverse effects produced by

[8] See in this regard the judgment of 4 April 2017, Fahimian (C 544/15, EU: C: 2017: 255, p. 45 and 46).

[9] See in this regard, Opinion of Advocate General Szpunar in Fahimian (C 544/15, EU: C: 2016: 908, p. 78).

[10] Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging [2004] ECR I-0000, paragraph 66, Case C-32/09-C-167/09 Stichting Natuur en Milieu and Others , EU: C: 2011: 348, paragraphs 100-103), and Case C-83/11 Rahman and Others [2012] ECR I-0000, paragraph 25, with reference to the judgment of 24 October 1996, Kraaijeveld and Others (C 72/95, EU: C: 1996: 404, paragraph 56).

[11] Valentin Constantin, On the subsidiary control of the protection of the rights guaranteed by the ECHR, https://www.juridice.ro/254226/despre-controlul-subsidiar-al-protectiei-drepturilor-garantate-de-cedo.html.

[12] Emanuel Albu, European Charter of Fundamental Rights - The right to good administration, in the Journal of Commercial Law no. 9/2007, pp. 75-90; See also Ioan Alexandru, Public administration, theories, realities, perspectives, 4th edition, Lumina Lex Publishing House, Bucharest, 2007, p.121.

[13] HCCJ, S. Cont. Adm. and Fisc., dec. no. 3359 / 30.05.2005, unpublished, cited by Gabriela Bogasiu, Law on administrative litigation. Commented and annotated., Universul Juridic publishing house, 2015, p.110.

administrative acts issued in relation to household consumers.

It was also noted in practice that "*In the analysis of excess power can not be ignored the idea that in administrative law relations the public interest prevails, which aims at the rule of law and constitutional democracy, guaranteeing the fundamental rights, freedoms and duties of citizens, meeting needs as well as achieving the competencies of public authorities*[14] ".

In another decision, the court stated that "*In exercising their powers, administrative entities have a margin of appreciation, so that, in the event that no grounds for formal illegality or elements can be identified as a result of which the issuer of the administrative act had an arbitrary conduct, deviated from the purpose of the law or violated the principle of proportionality between public and private interest, an assessment of the substance of the measures ordered, made by the administrative court itself, would constitute an unauthorized interference in public administration.*

The reasons invoked by the appellant-plaintiff do not indicate punctual violations of the law, do not concern irregularities of the administrative procedure, being disputed the score given by the experts involved in the evaluation and selection stages, score to which the party opposes its own arguments and evaluation made in the specialized technical expertise test.

But, as it was expressly and clearly mentioned in the cassation decision no. 4680 of December 5, 2014, the administrative contentious court cannot replace the public authority with attributions in establishing the total score resulting from the evaluation, and the expertise performed according to art. 201 para. (1) C. C. Proc., it includes only a specialized opinion on the issue subject to analysis, an opinion that the court must analyze in relation to all the evidentiary elements and the circumstances of the case [15] *".*

Applying all these doctrinal and jurisprudential considerations in the analysis of the stipulations of art. 4 and art. 5 of the ANRE Order no. 171/2020, we observe, as a preliminary, the fact that on the one hand, they were not properly informed by ANRE about the deadline they would benefit from in order to conclude the electricity supply contracts, according to the rules of the competitive market, and on the other hand, it established an extreme restrictive term. on the conclusion of new contracts, only a few days.

It can also be unequivocally noted that the method of pricing, determined by this order and subsequent ones, is one that creates an inadmissible discrepancy between the interest of household consumers in calculating an equidistant and predictable price, based on the principles of free supply and demand, specific to a liberalized commercial market and the right of suppliers to set, at their discretion and without any reasonable legal limitation, the supply price.

Basically, the provision according to which *the price charged to consumers will be that of the offer made by suppliers for universal service* allowed suppliers to arbitrarily set the price of electricity, taking advantage of their obvious superiority, logistics, information, functional structure, lobby, etc., to impose disproportionately high prices on customers compared to those charged by the same suppliers in the competitive market.

So, from the corroborated game of the lack of option of the domestic clients in choosing a tariff from the supplier's offer, with the very short time of concluding a contract on the competitive market and with the possibility conferred by ANRE to the suppliers to establish its own price for universal service, it is concluded that ANRE has exercised its right of option abusively, exceeding the natural limits of its right of appreciation in the field of regulation of the electricity market.

Through this behavior, ANRE destructured the contractual balance between suppliers and customers, creating the legal premises for harming the right of the latter to provide a quality service and with reasonable costs.

Moreover, ANRE determined the creation of a discriminatory situation, in the negative sense of the notion (application, without a solid justification, of differentiated treatments in objectively identical situations), between consumers who managed to conclude the contract on the competitive market and those who did not achieved this, without retaining any concrete fault on the part of the latter, since the term of choice was very short, combined with the very large number of contracts to be exchanged.

In this way, the rights of the latter are obviously affected, being put in a position to pay a price and 25% higher than customers in a position absolutely identical to them, but who have entered the competitive market, in regarding the contract for the supply of electricity.

ANRE, instead of ordering through the mentioned orders that the perceived price will be the most favorable to the customers from the universal service, among those practiced by the provider of last resort, decided that this price is the one arbitrarily established by each provider, which creates huge damage to a large number of customers.

3. Conclusions

From the analysis of the documents issued by ANRE, individualized above, it results that this public institution, having a fundamental role in the complex and flexible process of regulating the electricity market, failed miserably in creating a predictable, reasonable,

[14] HCCJ, S. Cont. Adm. and Fisc., dec. no. 3800 / 02.11.2006, unpublished, cited by Gabriela Bogasiu, Law on administrative litigation. Commented and annotated., Universul Juridic publishing house, 2015, p.111.

[15] HCCJ, S. Cont. Adm. and Fisc., dec. no. 56 / 22.01.2016.

transparent legislative framework. and in proportion to the interests of the actors engaged in the energy market, whether they are suppliers or domestic customers.

The orders issued by ANRE regarding the transition from the regulated market to the competitive one for electricity supply, being affected by a serious defect of abuse in the assessment of opportunity and lack of equidistance, are the object of a real abuse of power by the issuing institution.

This legal reality opens the premises of the appeal before the administrative contentious court, based on disp. art.1, corroborated with art 7 and art.8 of Law no.554 / 2004, of these ANRE orders, with the possibility of the court to cancel them, and the subsequent effect is that of the cancellation and of the electricity supply contracts concluded in based on those orders, based on the *accesorium sequitur principale* principle and which harms household consumers.

The latter may also obtain, based on the provisions of art. 18 paragraph 3 of Law no. 554/2004, compensations for the damages suffered, consisting in the difference in additional price paid for one kw, in relation to the price charged by each supplier for household customers in the competitive market.

This is a relevant example, in which the non-observance of the principle of proportionality between the administrative measure taken and the object in view, in this case, the liberalization of the electricity market, with the non-observance of the balance of interests of the actors engaged in this process, it is likely to produce possible harmful legal consequences for clients and costly for ANRE, on the other hand, unnecessarily burdening the courts.

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THE LEGAL NATURE OF THE RIGHT TO INFORMATION UNDER ROMANIAN REGULATIONS

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Abstract

The author aims at establishing the limits and components of the right to information in the actual Romanian legal system, departing from the provisions of art.31 of the Romanian Constitution and of Law no.544/2001 regarding the free access to information of public interest.

To this purpose, the notion of the right to information will be analyzed, alongside its components by reference to both the special legal and the Constitutional provisions. After pointing out some particularities regarding the relation of the right to information and mass media, the substantial limits of the right will be identified.

After the analysis undertaken, the author will establish a dual nature of the right to information.

Keywords: *right to information, constitutional rights, civil rights, freedom of expression, mass-media.*

1. Notion

In constitutional law literature[1], the right to information has been qualified as a fundamental right, necessary for the material and spiritual development of mankind. Other authors[2] have shown that this is an essential right, without which humans cannot exist as a social being.

Although the importance of the right to information appears to be essential for the field of public communication, we observe that legal literature avoids to offer a definition.

Considering the dynamic nature of social relations in the field of public communication, we appreciate that a definition of the concept is relatively difficult, as the right to information appears to be linked to freedom of expression, being seen as a dimension of the latter.

In order to provide a definition, we consider that the starting point must be the fundamental regulations, in this case art. 31 of the Romanian Constitution and art. 10 of the European Convention on Human Rights, which provide the content of the right to information, in the first case separate from the freedom of expression, and in the second case as a component of the freedom of expression.

In both cases, the essence of the law is the communication of information between people or between people and institutions.

Formulating our own definition, we consider that *the right to information is a human right, to receive data and information in its area of interest, either from public authorities and institutions, or from other people, under the provisions of the law, without unjustified limitations imposed by other entities.*

2. Sedes materiae

Regarding the regulation, we distinguish between the fundamental norms, which in this situation are found in the Constitution and in the European Convention on Human Rights and the special regulations, respectively Law no. 544/2001 on free access to information of public interest[3], together with its application norms, contained in the Government Decision no. 123/2002[4].

Art.31, paragraph 1 of the Constitution provides: "The right of the person to have access to any information of public interest may not be restricted".

According to art.1 of Law no.544/2001: “The free and unrestricted access of the person to any information of public interest, thus defined by this law, is one of the fundamental principles of relations between people and public authorities, in accordance with the Romanian Constitution and with the international documents ratified by the Romanian Parliament”.

The same normative act regulates the categories of information subjected to communication, the procedure for requesting that information and the remedies against the refusal to communicate.

Another normative act of reference, in this sense, is represented by Government Decision no. 123/2002 on the norms of application of Law no. 544/2001 on free access to information of public interest, which stipulates a series of clarifications in order to apply the provisions Law, along with models of documents, respectively requests, complaints in order to obtain access to information of public interest.

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[1] I. Muraru, E.S.Tănăsescu (coordinators) - *Romanian Constitution, Commentary on articles*, CH Beck Publishing house, Bucharest, 2008, pg.299.

[2] V. Dabu - *Law of Social Communication*, course support, Faculty of Communication and Public Relations „David Ogilvy” SNSPA, Bucharest, 2001, pg.38.

[3] Published in the Official Gazette, Part I, no. 663 / 23.10.2001.

[4] Published in the Official Gazette, Part I, no. 167 / 08.03.2002.

3. Content of the right to information

A. Starting from the provisions of art. 31 of the Constitution, the right to information brings together three components:

(i) *the right of access to information of public interest*

The regulation expressly refers to the information of public interest, as stipulated in art. 31, paragraph 1 of the Fundamental Law. Although the notion is not defined by the Constitution, it is found in art. 2, letter b of Law no.544/2001, adopted in order to effectively apply the constitutional provision.

Consequently, private and secret information cannot be made available to citizens on the basis of the constitutional text, but can, possibly, on the basis of national law.

(ii) *the right to be properly informed by both the authorities and the media*

Public authorities have the obligation to communicate real information at the request of citizens, both in matters of public interest and in matters of personal interest[5]. We notice a difference in terminology compared to the provisions of the previous paragraph, because the term "public affairs" is used, opposed to "information of public interest". Apparently, the distinction is superficial, the information related to public affairs being information of public interest.

We appreciate that by "issues of personal interest" the legislator did not want to designate "issues of private interest", but a problem belonging exclusively to the person making the request or his representative. Consequently, the text does not allow one person to receive information about the private interests of another person.

The mass media, regardless of the source of financing, the owner or the specifics of its activity, has the obligation to correctly inform the public opinion, respectively the recipients of the information, as it results from the provisions of art. 31, paragraph 4 of the Constitution. We consider that the reason behind the text is that of preventing the manipulation and misinformation of public opinion, given the impact that the communication of information through media has on people.

(iii) *autonomy of public radio and television services*

The regulation only applies to public radio and television services, which cannot be imposed on privately owned media. In essence, it is a guarantee of the equidistance of the main radio and television services from the spheres of public influence, both from the political environment and from outside it. We also note that the organization of the activity of public television and radio services is done by organic law[6].

We note, starting from the three dimensions, that they combine two prerogatives, namely (i) the right of the person to be informed correctly and (ii) the right to access public information directly.

We consider that these prerogatives represent the essence of the right to information, as guaranteed at constitutional level.

Some authors[7] state that the right to information also includes the right to inform, but, in our opinion, the latter is provided by the freedom of expression as regulated by art.30 of the Constitution.

B. Starting from the provisions of Law no. 544/2001, in order to determine the content of the right to information, it is necessary to start from the special terminology, found in art. 2 of the Law:

„a) by *public authority or institution* it is understood any public authority or institution that uses or manages public financial resources, any autonomous administration, a company regulated by the Companies Law no. 31/1990, republished, with subsequent amendments and completions, under the authority or, as the case may be, under the coordination or subordination of a central or local public authority and in which the Romanian state or, as the case may be, an administrative-territorial unit is sole shareholder or majority, as well as any operator or regional operator, as they are defined in the Law on community services of public utilities no. 51/2006, republished, with subsequent amendments and completions. Political parties, sports federations and non-governmental organizations of public utility are also subject to the provisions of this law,

b) *information of public interest* means any information concerning the activities or resulting from the activities of a public authority or public institution, regardless of the medium or the form or manner of expressing the information;

c) *information on personal data* means any information on an identified or identifiable natural person".

Given the terminology used by the national legislator, we can note that the information of public interest is related to the activities carried out by public authorities or institutions, being both information on how to carry out the activity within the public institution and information resulting from the activity carried out within public institution, such as financial statements, professional balance sheets, etc.

In our opinion, the definition given by art. 2, letter b of Law no. 544/2001 is inaccurate, as we cannot consider that all the information resulting from the activity of a public institution is information of public interest, some of them having an eminently professional or administrative nature, such as drawing

[5] Article 31, paragraph 2 of the Constitution provides: "Public authorities, according to their competences, are obliged to ensure the correct information of citizens on public affairs and on issues of personal interest".

[6] Gh. Iancu - *Constitutional Law and Political Institutions*, ed. IV, Ed. Lumina Lex, Bucharest, 2007, pg.168.

[7] C.A. Păiușescu, O.Duță - *The law of communication. Theoretical Considerations and Relevant Legislation*, Universitară Publishing House, Bucharest, 2011, pg.113.

up income registers obtained for each taxpayer, or conducting research on improving the main activity.

They cannot be included in the category of information exempted from the free access of citizens, but they also do not appear as information of public interest, in a legitimate sense. In reality, the text of the law provides a general classification of the designated category, which has an indirect effect on the interpretation of the constitutional text we referred to earlier, which does not define the notion of information of public interest, although it uses it.

4. Categories of information subject to communication

We note that in accordance with the provisions of art. 5, paragraph 1 of Law no. 544/2001, certain categories of information are communicated *ex officio* by any public authority or institution, respectively: "a) normative acts governing the organization and functioning of the authority or the public institution; b) the organizational structure, the attributions of the departments, the functioning program, the audience program of the public authority or institution; c) the name and surname of the persons from the management of the public authority or institution and of the official responsible for the dissemination of public information; d) the contact details of the public authority or institution, respectively: the name, the headquarters, the telephone numbers, the fax, the e-mail address and the address of the Internet page; e) financial sources, budget and balance sheet; f) own programs and strategies; g) the list containing the documents of public interest; h) the list comprising the categories of documents produced and / or managed, according to the law; i) the mean of appeal to the decision of the public authority or institution in the situation when the person considers himself / herself injured regarding the right of access to the requested information of public interest".

Considering the text of the law previously indicated, we note that the first four categories of documents[8] refer to ordinary data concerning the functioning of an institution. The information regarding the normative framework that regulates the activity, the management bodies of the institution and its contact data are made public in order to facilitate the communication with the respective institution.

With regard to information on financial sources, budget, balance sheet, own programs and strategies, we note that they are published in order to ensure the transparency of the activity in that institution.

The provisions of art. 5, paragraph 1, letters g and h of the Law generate difficulties in legal practice. Usually, the list of documents of public interest is not common to all institutions, even in the same field of activity, as its establishment depends on the interpretation of the law by the governing bodies of that institution. In addition, the list of categories of documents produced or managed is subjected to an even greater degree of relativity, as any public institution, by its nature, manages a variety of documents either from third parties or from its work.

With regard to the last category of information, concerning the manner of appealing the decision not to provide information of public interest, we note that this has a procedural nature, being, thus, irrelevant for defining the content of the law.

In accordance with the provisions of art. 5, paragraphs 2 and 3 of Law no. 544/2001, the information bulletins published by the public authorities and their periodic activity report are subject to *ex officio* communication.

We note that the law stipulates the obligation of the authority to communicate information *upon request*. This category is represented by: (i) the information of public interest as defined by art.2, letter b of Law no.544 / 2001, under the conditions of art.6, paragraph 1, of the same normative act, (ii) the privatization contracts concluded after the entry are subject to communication in force of the Law, under the conditions of art. 5, paragraph 5 of Law no. 544/2001 and (iii) the public procurement contracts concluded by the contracting authorities from among the public authorities or institutions, according to art. 11^1 of Law no. 544/2001.

We note that the legislator has expressly stipulated the obligation to communicate privatization contracts, on the basis of a procedure for transferring state participations to private property of individuals, carried out at national level, in the last three decades. The legal provision is intended to respond to an urgent social need for decisional transparency regarding large privatizations, but, in order to respect the principle of non-retroactivity of the law, the obligation to communicate contracts operates only for those concluded after December 22, 2001, the date of entry into force of the law.

For the same reasons, respectively for the transparency of the procedures, public procurement contracts concluded by contracting authorities from public authorities or institutions shall be subject to communication, upon request.

We consider that, essentially, the communication of information of public interest has as a premise the existence and possession of that information by the authority to which the request was submitted. In this regard, in accordance with judicial practice[9], we appreciate that the previously mentioned legal provisions do not oblige the public institution to compile statistics or reports that would involve a high

[8] Found in art.5, paragraph 1, letter ad of Law no.544 / 2001.

[9] Civil decision no. 2047/2010, Bucharest Court of Appeal, Administrative and Fiscal Litigation Section, cited by A.Moraru, E.Iorga, L.Lefterache - *(un)Restricted access to information of public interest 10 years after the adoption of the law*, Institute for Public Policies, Bucharest, 2011, pg.11, available online at:https://www.juridice.ro/wp-content/uploads/2012/02/Studiu-544.pdf, accessed on 24.03.2021.

degree of complexity and information processing. To this end, the institution shall provide only the data necessary for the preparation of the study, report or statistics in question.

If, in addition to the information of public interest mentioned, copies of documents issued by the public authority or institution to which the request was submitted are also requested, the cost of the copying services shall be supported by the applicant[10]. According to art.18, paragraph 5 of Government Decision no.123 / 2002, the cost of the copying service cannot exceed 0.05% of the minimum wage per economy, calculated per page.

5. Access of the media to information of public interest

The access of the press to information of public interest is a guarantee of its role in a democratic society.

The law establishes a series of special rules regarding the way in which information of public interest reaches the knowledge of the press, in addition to the common law rules on requesting information by any person, under the conditions of art. 5 and 6 of Law no. 544/2001.

In this sense, public authorities and institutions have the obligation to appoint a spokesperson, usually from the information and public relations departments[11]. Public authorities have the obligation to organize, periodically, press conferences for the communication of relevant information, on which occasion they will respond to requests for information of public interest[12]. In addition, public authorities shall, upon request, grant accreditations to journalists and media representatives[13] and inform the press in due time about the organization of press conferences or public actions, to which access of the media cannot be prohibited[14].

6. The right to reply. A guarantee of correct information according to art.31 of the Romanian Constitution

The right to reply does not benefit from a general regulation applicable to the written press, the online press and audiovisual content, as special provisions exist only for the latter. Despite this fact, it has been held in the jurisprudence of the Constitutional Court that the right to reply has a constitutional nature.

Thus, in the Constitutional Court Decision no. 8/1996 regarding the exception of unconstitutionality of the provisions of art. 74 paragraph 2 and of art. 75 paragraph 2 of the Press Law no. 3/1974[15], it was noted that "the right to reply is not expressly mentioned in the provisions of the Constitution, but, through a systematic interpretation of its provisions, the constitutional character of this right results".

In order to reach this statement, the Court took into account that under Article 15 of the Constitution, citizens enjoy the rights and freedoms provided for therein, including freedom of expression and the right to information, guaranteed by Article 30 and Article 31 of the Constitution. Thus, given that freedom of expression cannot prejudice the dignity, honor, privacy and the right to one's own image, and the media are obliged to ensure the correct information of public opinion, the Court held that the right to reply has the value of a constitutional right correlative to the right to free expression and the right to information.

Most probably, the Court's reasoning took into account the first prerogative of the right to information.

In the jurisprudence of the European Court of Human Rights, it was held that the journalist has the obligation to adopt an equidistant and professional position, ensuring the person referred to, in its material, the opportunity to express its own view of the situation, by ensuring the right to reply[16].

Equally, in the cases of Ediciones Tiempo SA v. Spain and Haider v. Austria[17], it was ruled that freedom of expression also includes the right to reply, as the latter is a guarantee of informational pluralism.

In what concerns the normative system of the European Union, the right to reply is ensured by the provisions of art. 23 of Directive 89/552/EEC, on the coordination of certain laws, regulations and administrative provisions of the Member States concerning the dissemination of television programs. However, as shown in legal literature[18], the extension of the applicability of this provision in the online press has not been formally achieved.

Specifically, we note that in the matter of written press and online press the right to reply does not benefit from an express regulation, but, given the mandatory jurisprudence of the ECHR, along with the interpretation given by the Romanian Constitutional Court in Decision no. 8/1996, we can note that the right

[10] As it results from the provisions of art. 9, paragraph 1 of Law no. 544/2001.
[11] As provided by art. 16 of Law no. 544/2001.
[12] Fact resulting from the provisions of art. 17 of Law no. 544/2001.
[13] According to art. 18 of Law no. 544/2001.
[14] As provided by art. 19 of Law no. 544/2001.
[15] Published in the Official Gazette, Part I, no. 129 / 21.06.1996.
[16] ECHR case Europapress Holding DOO v. Croatia, judgment from 22.10.2009, available online at http://www.5rb.com/wp-content/uploads/2013/10/Europapress-Holding-v-Croatia-ECHR-22-Oct-2009.pdf/, last consulted on 24.03.2021.
[17] Both quotes by S. Stoicescu - *Freedom of expression versus the right to reputation*, Hamangiu Publishing House, Bucharest, 2019, pg. 232
[18] A. Koltay - *The right to reply. A comparative approach*, Iustum Aequum Salutare, III.2007 / 4, pg. 207-208, quoted by S.Stoicescu - *op.cit*., pg. 233.

of reply is correlated with freedom of expression and the right to information, as constitutionally guaranteed, resulting from these regulations.

7. Limits of the right to information

A. From the *constitutional regulation* perspective, the right of access information of public interest cannot be restricted, a fact expressly stipulated in art. 31, paragraph 1 of the Fundamental Law. We note that the text should not be seen as absolute. Thus, the right is susceptible to limitation under the conditions of art. 53 of the Constitution, by law, for: "the defense of national security, order, health or public morals, the rights and freedoms of citizens; conducting criminal investigation; prevention of the consequences of a natural calamity, of a disaster or of a particularly serious disaster".

In addition to the general limitation mentioned above, the right to information must not prejudice measures to protect young people and national security, as provided in Article 31, paragraph 3 of the Constitution. In legal literature[19] these limitations have been designated by the terminology "value coordinates" which should not be prejudiced by the exercise of the right to information.

Although the field of national security appears to be a justified limitation and does not involve further discussion, a fact directly stated in the jurisprudence of the Romanian Constitutional Court[20], "youth protection measures" cannot be precisely determined. First of all, the terminology leads to the conclusion of the pre-existence of some measures, activities or rules adopted at national level for the protection of the age category of young people. Secondly, the classification of a person in the category of young people does not benefit from any constitutional landmark.

In these conditions, the limit imposed by art. 31, paragraph 3 of the Constitution, regarding the measures for the protection of young people, is susceptible in a high level, to arbitrary appreciation from the person interpreting the legal text.

B. From the perspective of the *special regulation*, the limitations are found in art.12, paragraph 1 of Law no.544/2001, according to which „(1) It is exempted from the free access of the citizens, provided in art. 1 and, respectively, to art. 11^1, the following information: a) information in the field of national defense, security and public order, if they are part of the categories of classified information, according to the law; b) information on the deliberations of the authorities, as well as those concerning the economic and political interests of Romania, if they are part of the category of classified information, according to the law; c) information on commercial or financial activities, if their publicity infringes the intellectual or industrial property right, as well as the principle of fair competition, according to the law; d) information on personal data, according to the law; e) information on the procedure during the criminal or disciplinary investigation, if the result of the investigation is endangered, confidential sources are disclosed or the life, bodily integrity, health of a person are endangered as a result of the investigation carried out or in progress; f) information on judicial proceedings, if their publicity impairs the assurance of a fair trial or the legitimate interest of any of the parties involved in the proceedings; g) information the publication of which prejudices the measures for the protection of young people".

Regarding the limitations of art.12, paragraph 1, letters a and b, against the decision to classify certain information, an appeal may be filed under the conditions of the special law, respectively art. 20 of Law no. 182/2002: "Any Romanian natural or legal person may appeal to the authorities that classified the information respectively, against the classification of the information, the duration for which it was classified, and against the manner in which one or another level of secrecy has been assigned".

In what concerns the limitation from art.12, paragraph 1, letter c, it is necessary that the disclosure of information leads to an effective infringement of intellectual property rights or the principle of fair competition, a simple fear in this regard being not enough. In addition, the existence of a confidentiality clause in the contract is not, *per se*, sufficient to lead to a refusal to disclose information of public interest.

Regarding the limitation from art.12, paragraph 1, letter d, we note that personal data do not fall into the category of information of public interest, but they will be provided if the data affects the person's ability to perform a public office[21].

Information on criminal or disciplinary investigation procedures, or on judicial proceedings, enjoys a special protection regime, which is not susceptible to communication if ongoing legal proceedings are affected or if a person's rights or legitimate interests are endangered.

Similar to the provisions of art. 31, paragraph 3 of the Constitution, previously analyzed, art. 12, paragraph 1 letter g of Law no. 544/2001 limits the communication of information whose publication prejudices the measures for the protection of young people. The above considerations regarding the inaccuracy of the regulation remain relevant.

8. Conclusions

As we have previously observed, the right to information in Romanian legislation benefits from both

[19] M. Năstase-Georgescu - *Communication Law*, Universitară Publishing House, Bucharest, 2009, pg. 88
[20] Romanian Constitutional Court Decision no. 37 / 29.01.2004, published in the Official Gazette no. 183 / 03.03.2004
[21] As it results from art.14, paragraph 1 of Law no. 544 / 2001

a constitutional regulation and a national regulation made by special law.

Given the field of interest of this paper, we note that the provisions of Article 31 of the Constitution determine the content of the right to information, in our opinion, as: (i) the right of the person to be properly informed and (ii) the right to access public information directly.

Although the first prerogative is slightly limited, being related only to the obligation of public authorities and the media to communicate correct information, we note that this has the nature of a fundamental right, inherent in the social dimension of the human personality.

In what concerns the second prerogative, regarding the right to access public information directly, we note that this is detailed in national legislation, for which we have analyzed the relevant provisions of Law no. 544/2001. In reality, this right is limited to information of public interest related to the activity of public authorities and institutions, having the nature of a subjective civil right, guaranteed by law in order to ensure the transparency of administrative activity.

The existence of a legal discrepancy between the two meanings of the right to information lies precisely in the nature of this right, as regulated in the Constitution. Thus, the first meaning takes the form of a dimension of freedom of expression, as defined by international instruments, such as Article 10 of the European Convention on Human Rights or Article 11 of the Charter of Fundamental Rights of the European Union, respectively the right to receive information freely, without unjustified intervention by the authorities. The second meaning takes the form of a new right, consisting in ensuring the transparency of decision-making and administrative activity for institutions financed from public funds, which cannot be elevated to the rank of a fundamental right.

For these reasons, we consider it appropriate to qualify the right to information, as regulated by art. 31 of the Romanian Constitution as a complex right, which includes both a fundamental right and a subjective civil right, in its meanings.

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THE MILITARY COMMAND ACT IN THE LIGHT OF THE CONSTITUTIONAL PROVISIONS AND OF THE LAW ON ADMINISTRATIVE LITIGATION

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Abstract

The military authorities are empowered to carry out a form of public administration, respectively to provide a public service called national defense, in exceptional circumstances, being at the same time the holders of the means of armed violence authorized by the state. At the same time, the discretion with which the military authority is legally determined to issue military command documents, exempted from forms of judicial control, must not lead to the violation of fundamental human rights, the whole activity being subordinated to the principle of legality. Not all acts of military authority concerning military relations are also acts of military command, especially those concerning military careers (promotions, promotions, secondments, appointments, transfers or retirements, etc.) or related to human resources management. (recruitment competitions, holding positions, participation in competitions, change of profile, etc.). The acts of military command are those issued for the needs of the war and justified by it, both in time of peace and in time of war. The military command is endowed with absolute state force, the non-observance of its dispositions attracting the criminal responsibility reserved for the crimes of insubordination.

Keywords: *military authorities, military command act, end of inadmissibility, military actions, troop leadership, sanctioning decisions, decisions and decisions of appointment, annual evaluations, administrative contracts concluded by military structures.*

1. Introduction

The military authorities are empowered to carry out a form of public administration, respectively to provide a public service called "national defense" in exceptional circumstances, being at the same time the holders of the means of armed violence authorized by the state. The discretion with which the military authority is legally determined to issue military command documents, exempted from forms of judicial control, must not lead to the violation of fundamental human rights, the whole activity being subordinated to the principle of legality.

Being introduced for the first time in the Romanian Constitution of 1923, the formula "*military command documents*" has kept its form until today, being found under the same structure in the Law of Administrative Litigation of 1925.

Subsequently, despite the doctrinal controversies, famous specialists[1] from the interwar period stressed the need to distinguish the documents issued by the military authorities according to the criteria of relations between different entities:

- acts of military authority of a purely administrative nature, which intervene between the military authority and civilian pollution and which can be challenged through administrative litigation;
- acts of the military authority that intervene within the military hierarchy which includes the acts aimed at commanding the troop (*in time of peace or war*) and for which control in administrative litigation was not allowed.

In order to overcome the terminological inaccuracy of the interwar period, we will note that not all acts of military authority concerning military relations are also acts of military command, especially those concerning military career (*promotions, promotions, secondments, appointments, transfers or retirement etc*.) or related to human resources management (*recruitment competitions, employment, participation in competitions, change of profile etc.*).

2. Military command act. Constitutional and legal foundations

In order to identify the place of military command acts among administrative legal acts (administrative acts - according to the school in Bucharest, having as representative Prof. Romulus Ionescu; acts of administrative law, through Prof. Tudor Dragan) we can report to the applicable administrative legal regime, which in its current version regulated in Romania is known in two forms[2]:

- The judicial administrative contentious, **the typical form**, being the common law, having in center the Law no. 554/2004 of the administrative contentious, together with other specific regulations;
- **atypical forms** that do not allow the control of the courts.

From this point of view, military command documents are administrative acts to which the atypical form is applied, meaning that the control of the courts over their legality or opportunity is not allowed.

The exception to the judicial control exercised by the administrative contentious courts and the lack of

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[1] Constantin Rarincescu, *Contenciosul administrativ român*, Ed. Universală Alcalay&Co., București, 1936, p.311.

[2] Marta Claudia Cliza, *Drept Administrativ*, Partea a II-a, Editura Pro Universitaria, București, 2011.

typicality do not allow the evasion of the obligations regarding the written requirements when issuing or adopting military command acts (internal and external structure of a content, the organization of the elements from which is composed[3]) in conjunction with those related to their motivation[4]. The mandatory nature of the requirements for motivation and written form has as a consequence the prevention of abuses, ensuring the guarantee of compliance with the law and the protection of citizens' rights.

Delimited from a historical point of view, the exemption of administrative acts finds its constitutional consecration for the first time in the Romanian Constitution of 1923, where at art. 7, last paragraph, it was specified that "the judiciary does not have the power to judge acts of government, as well as acts of command of a military nature".

The idea of exempting certain administrative acts from the control exercised by the administrative courts, which influenced the legal way of thinking in Europe, has its origins in nineteenth-century France, where the appeal for annulment for excess of public power had begun to take shape[5].

The exceptions concern two broad categories of acts, namely: administrative acts of the public authority concerning their relations with the Parliament, respectively military command documents. For the two categories of administrative acts, it is indicated to us by the legislator that we are in the presence of **absolute exceptions**, having constitutional rank[6], being resumed in the Law on Administrative Litigation[7].

For the authors of administrative law, the causes or conditions that determine the evasion of administrative acts from the control exercised by the administrative contentious courts are called **fines[8]**, which were traditionally categorized[9] as fines deducted from the nature of the act, respectively inadmissibility caused by the existence of a parallel appeal.

From the jurisprudence of the Constanța Court of Appeal (case no. 307/2015[10]) having as object of the file "Cancellation of administrative act", in the appeal, the court considered that the hypothesis according to which the military command acts cannot be challenged in administrative contentious and not to determine the jurisdiction of the court, since the solution of the admissibility / inadmissibility of the action can be pronounced only by the competent court, in this case the administrative contentious court.

The jurisprudence has held that certain administrative acts are acts of command of a military nature depending on the nature of the content. We consider case no. 2941/2014[11] pending before the Bucharest Tribunal, Administrative and Fiscal Litigation Section having as object Litigation regarding Civil Servants (Law no. 188/1999), where the plaintiff, as a military cadre, requested the annulment of the Order of the Minister of National Defense MP621 / 15.12 .2011 ordering his recall from the international mission carried out in Afghanistan, where he served as 3rd Platoon Commander in the 1st Infantry Company of the 1st Maneuver Battalion, as well as all the documents that were the basis for issuing the contested act, annul the provision no. A142 issued by the competent military unit, deletion from the personal memorandum of the mentions related to the premature cessation of its secondment, etc. The competent court, in this case the Bucharest Tribunal, correctly considered that the act challenged by the applicant was a military command act that evaded control in administrative litigation, intended to ensure and maintain the discipline and order of military units and formations over time. The applicant was seconded to the Afghanistan Operations Theater, and the reasons for its issuance were in violation of the rules on the handling of weapons, which were indispensable for the performance of military missions.

It should be noted that art. 5 of the Law on administrative litigation was amended by Law no. 212 of July 25, 2018. In **the initial form** it was specified what are the limits of control before the administrative contentious court, in aliis verbis it was specified that certain administrative acts could be challenged only for excess of public power, as follows: administrative acts issued for the application of war, the state of siege or

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[3] Verginia Vedinaș, *Drept administrativ, Ediția a X-a, revăzută și actualizată*, Editura Universul Juridic, București, 2017, p. 339.

[4] Vasilica Negruț, The Europeanization of Public Administration through the General Principles of Good Administration, nr. 2/2011 (vol. VII), Acta Universitatis Danubius. Juridica, p.8.

[5] Constantin Gheorghe Rarincescu, *Contenciosul administrativ român*, București, Editura „Alcalay&Co", 1937, p. 267.

[6] Art. 126 alin. (6) din Constituție. În Constituția României modificată și completată prin Legea de revizuire nr. 429/2003, aprobată prin referendumul național din 18-19 octombrie 2003, publicată în Monitorul Oficial al României, Partea I, nr. 758 din octombrie 2003, art. 126 consființește prin alin. (6) excepțiile de la controlul judecătoresc al actelor administrative ale autorității publice pe calea contenciosului administrativ. La nivel conceptual regăsim soluția prevăzută în Constituția din 1923, art. 107, ultimul paragraf.

[7] Art. 5 alin. (1) din Legea nr. 554/2004. Problematica actelor nesupuse controlului instanțelor specializate în contencios administrativ este prevăzută în Legea contenciosului administrativ nr. 554 din 2 decembrie 2004, publicată în Monitorul Oficial al României nr. 1154 din 7 decembrie 2004, unde art. 5 delimitează sfera actelor administrative exceptate ori nesupuse controlului și descrie limitele controlului.

[8] Finele de neprimire fac cererea adversarului inadmisibilă, fiind în fapt niște obstacole definitive pentru acțiunea în care au fost invocate, nepurtându-se asupra fondului dreptului.

[9] Julian Vincent, Serge Guinchard, Procedure Civile, 24eme edition, Dalloz, 1996, p. 134.

[10] *http://www.rolii.ro/hotarari/589a2a72e49009ac3500022e*. În cauza respectivă demersul reclamantului este justificat de luarea la cunoștință a conținutului ca urmare a declanșării procedurilor privitoare la accesul la propriul dosar întocmit în perioada comunistă de către organe ale fostei securități a statului, iar judecarea acestora este de competența instanței de contencios administrativ, actele administrative invocate nefiind acte de comandement cu caracter militar (*actele și mapele conținute de propriul dosar, notele ulterioare, etc*.). De asemenea, chiar dacă actele respective anterior menționate au fost emise de o autoritate publică militară, nu îndeplinesc condițiile aprecierii lor ca acte de comandament cu caracter militar.

[11] *http://www.rolii.ro/hotarari/587c051de49009940b001a4f*.

the state of emergency, those concerning defense and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and epizootics.

The legislator thus opted for the elimination of the limited control situations previously provided in the law and extended the rules established by the Decision of the Constitutional Court no. 302 of March 1, 2011 on all categories of documents listed in art. 5 para. (3) of the Law on Administrative Litigation.

The constitutional exceptions from the judicial control of administrative acts are also mentioned in the Decision of the Constitutional Court no. 302 of 2011[12], previously stated, by which it was noted that absolutely the exceptions refer only to the acts of military command and to the administrative acts of the public authorities regarding their relations with the Parliament. By their nature, these acts are not subject to any form of judicial control. However, this does not preclude the fact that military command documents may be subject to higher hierarchical control as provided for in the internal military regulations.

From the findings of the Constitutional Court it appears that the previously mentioned provisions, respectively art. 126 para. (6) of the Constitution and art. 5 para. 2 of Law no. 554/2004 are exceptions of strict interpretation, no other situations being allowed[13].

Under functional aspect, based on the new provisions of art. 5 para. (3) of Law no. 554/2004, it can be concluded that the administrative acts issued for the application of the state of war, state of siege or emergency, those concerning defense and national security or those issued for the restoration of public order, as well as for removing the consequences of natural disasters, epidemics and episodes are subject to judicial control under the same conditions as for administrative acts, general conditions regulated by the relevant law. The only applicable derogation refers to the inapplicability of art. 14 regarding the suspension of the execution of the act in the phase of the preliminary administrative procedure.

The current amendment that we mentioned earlier in the form of a change brought by an organic law, portrays the same picture of administrative acts, but for which the regime of suspension of the execution of the act no longer applies, regime provided in art. 14 of the Law on administrative litigation in its consolidated form. In other words, this restrictive table of administrative acts is not liable to suspend enforcement for reasons which are easy to understand, which are related to the consequences which would result from the temporary cessation of the effects of these categories of acts and which are seriously disturbed. the functioning of public administrative services essential for the proper functioning of the company, in exceptional conditions.

The late Professor Antonie Iorgovan, referring to Anibal Teodorescu's assessments[14] of the needs generated by the First World War, explains the reasons behind the concerns of the legislator to create the premises for censorship of such administrative acts by the judiciary, invoking historical conditions and the effects that the First World War had on Romania.

In post-war legal doctrine[15], the commander is described as a holder of relatively limited power by the state and the relevant minister, and of all the civil, political and military powers conferred, only the latter are outside the administrative contentious. The legitimacy of the military command derives from its feature of state command and from its recognition as obligatory for society and those to whom it is addressed, without which social efficiency would not be achieved.

The interwar specialty doctrine made the distinction between military command acts that emerge within the military hierarchy and military command acts that intervene between the military and the civilian population. Those who intervene between the military authority and the civilian population are subject to judicial control exercised in administrative litigation[16].

Consequently, under the scope of the notion of military command, the doctrine retained those administrative acts whose purpose was to respond to a military command, understood as the prerogative to command or issue orders from a strictly military point of view[17].

The reference for the mentioned period, as examples of military command documents **issued during the war**, we find: the modification of the composition of the troops in the sense of diminishing, dividing, completing etc.; concentrating the troops on the lines of attack or defense, advancing or withdrawing the troops.

From the period of the First World War we can mention some military command documents, as follows: Operation Order no. 214 for the day of 23.11.1916 of Division IV of the III Army Corps of the Second Army, which describes the mission of the Division to occupy a defensive position meant to stop the advance of the enemy[18]; Operation order no. 212 for the night of 21/22 November 1916 of Division IV of the 3rd Army Corps of the Second Army, ordering the

[12] Publicată în M.O. nr. 316 din 09 mai 2011.
[13] Gabriela Bogasiu, *Legea contenciosului administrativ comentată și adnotată*, Editura Universul Juridic, București, 2018, p. 181.
[14] Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, Editura All Beck, București, 2005, p. 651.
[15] Antonie Iorgovan, op.cit. 652.
[16] Constantin Rarincescu, *Contenciosul administrativ român*, Ed. Universală Alcalay&Co., București, 1936, p.314.
[17] Antonie Iorgovan, *Tratat de drept administrativ*, Vol. II, Editura All Beck, București, 2005, p. 617.
[18] http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301457.xml&dvs=1606738461999~69&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true.

withdrawal to a new position of resistance[19]; Ordinance no. 468 of August 26, 1916 of the commander of the Northern Army regarding the exclusive spoken and written use of the Romanian language, in public and in private[20]; The high agenda of King Ferdinand no. 3, p. 51 of October 7, 1916, ordering the maintenance of positions and the resumption of the attack in case of territorial losses[21]; Order of the General Headquarters no. 2420 in conjunction with the Order of the General Inspectorate of the Army no. 32 of 1916 regarding the obligations of the officers to transit or remain in the Bucharest garrison, under the sanction of immediate sending to the front[22].

In peacetime examples include: setting up, reorganizing, dismantling and relocating units; maneuvers and exercises performed with troops and other components, etc.

By jurisprudence (case no. 349 of 2010 pending before the Timișoara Court of Appeal, the object brought to trial being the exception of illegality of an administrative act) it was ruled that **we are not in the presence of military command acts in the following situations**: acts concerning the status military personnel; acts concerning the organization and functioning of public authorities in the field of defense; acts concluded by the armed structures in the exercise of their activities[23].

We agree with other authors[24] that not all administrative acts issued during the war are exempted from the control indicated by the Law on Administrative Litigation, because placing an administrative body above the law, even in exceptional situations, would lead to freedom to violate , non-restrictive, the fundamental rights and freedoms of citizens.

As a main idea it can be noted that any acts issued by military authorities, foreign to the necessities of war, including orders to enter the reserve, advancement orders, sanctioning decisions, etc., are not acts of military command within the meaning of the law, but true administrative acts and are subject to censorship or control by way of administrative contentious, in this sense the supreme court ruling by the decision of the ICCJ, the administrative and fiscal contentious section, no. 532 of February 15, 2006. In the jurisprudence of the Sibiu Tribunal, it was retained on the merits, in case no. 307/2018[25] having as object the refusal to solve the request, that the sanctioning act with Warning of a military cadre, provided in art. 60 para. (2) of Order M64 / 2013 does not represent a military command act, the disciplinary procedure being foreign to the needs of the war.

In another case, respectively no. 169/2020[26] pending before the Bucharest Court of Appeal, having as object of the file the annulment of the administrative act, the defendant active military cadre in the corps of non-commissioned officers erroneously motivated his action claiming that the Order of the Ministry of National Defense no. MP53 / 2009 promotion to the rank of major lieutenant is an act of military command, which led to the inadmissibility of the lawsuit.

From a literary point of view, the command is an order that is imposed in front of certain categories of persons obliged in the indicated sense. By extrapolation, the military command, contained in a norm of positive law, emanates directly from a state body, in our case the military bodies, by which the observance of its content is ordered. The military command is endowed with absolute state force, the non-observance of its provisions attracting, in certain situations, the criminal liability indicated by art. 417 of the New Criminal Code reserved for the crime of insubordination.

We are in the presence of a military command whenever we are dealing with a legal relationship of public law between the military that meets the condition to oblige regarding purely military matters and that are related to the organization and leadership of the forces. The imperative of the rules of military command is always manifested in the form of an order, thereby understanding an obligation that can be executed relatively unconditionally.

Moreover, R.G.-1 Regulation of internal order in the unit approved by the Order of the Minister of National Defense no. M 38 of 15.03.2016[27] defines at art. 10 the order as an "imperative requirement transmitted by the commander in accordance with the normative acts in force, the customs of the war, the conventions and treaties to which Romania is a party and is the basis of any military action / activity". Ensuring the command of a military structure is carried out through this military command, called an order, which systematizes the legal relations between the military through coordination and subordination. The

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[19] http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1301536.xml&dvs=1606739403113945&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true.

[20] http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1380225.xml&dvs=1606740339759~279&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true.

[21] http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1319363.xml&dvs=1606740645030~630&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true.

[22] http://digitool.bibnat.ro/view/action/nmets.do?DOCCHOICE=1318693.xml&dvs=1606741223559~224&locale=ro_RO&search_terms=&adjacency=&VIEWER_URL=/view/action/nmets.do?&DELIVERY_RULE_ID=4&usePid1=true&usePid2=true.

[23] *http://www.rolii.ro/hotarari/5894c96be49009c0330025db*. Hotărârea atacată, respectiv H.G. nr. 576/1998, privind vânzarea unor imobile din patrimoniul Ministerului Apărării Naționale, cu destinația de locuință, nu are caracter militar, iar reglementările cuprinse în hotărâre au legătură cu modul de administrare a locuințelor de serviciu de către MApN în calitate de autoritate publică.

[24] Verginia Vedinaș, Drept Administrativ, Ed. a XII-a, revăzută și actualizată.

[25] *http://www.rolii.ro/hotarari/5af79f8ae490091c0f000033*.

[26] *http://www.rolii.ro/hotarari/5f0d0bd7e49009bc00000032*.

[27] publicat în Monitorul Oficial nr. 214 din 23 martie 2016.

desideratum of the imperative requirements imposed by the military command is limited to ensuring victory in battle, the key element of the success of military actions being discipline, recognized by legal doctrine as a defining feature of military forces.

The military commands, both from an organizational-functional point of view and stricto sensu, regardless of the level at which they are (battalion, brigade, division, staff, etc.) are meant to lead the armed troops, along with the other components of the force. to ensure victory in time of war, and in time of peace to prepare / train military forces in order to maintain or increase combat capability (combat capability of the troop, improve combat techniques and tactics, improve methods used, etc.). At the base of the idea of command we have the organizational, coordination and command foundation of the troops, which leads to the idea that not all acts issued by a military authority are also acts of command of a military nature.

The Supreme Court, by Decision no. 1937 of 2019 of the High Court of Cassation and Justice, Administrative and Fiscal Litigation Section[28], pronounced on appeal, having as object of the action the suspension of the execution of Decree no. 1131 of December 28, 2018 on the extension of the term of office of the Chief of Defense Staff issued by the President of Romania and the Presidential Administration, invoking its own jurisprudence on the complex nature of presidential decrees, not being competent to rule, resumes the reasoning of the Bucharest Court of Appeal. 79 of March 29, 2019 regarding the qualification of the decree as an act of military command, subscribed to the consecrated fines of non-receipt found in art. 126 para. (6) of the Romanian Constitution. According to our assessments, Decree no. 1131/2018 cannot be a substitute for a military command act, being foreign to the objective needs of war, missions or armed operations, essentially representing a complex administrative act with autonomous existence, not being able, according to some authors, to be assimilated to administrative acts normative or individual[29]. The decree regulates the situation of the highest military civil servant with regard to his own career, without any causal link with the war.

Among the acts of military authorities that may be the subject of an action in administrative litigation, we list, non-exhaustively:

- sanctioning decisions issued by the unit commander on the basis of proposals in the minutes drawn up by the disciplinary investigation commission or the honorary council;
- failure to resolve within the legal time limit or unjustified refusal of a military authority to resolve a request regarding a right or a legitimate interest, issued by the military;
- decisions and decisions of appointment, transfer to reserve or retirement, transfer to another garrison etc.;
- imputation decisions in case of recovery of material damages;
- the decisions of the commission of jurisdiction of the accused
- annual, stage and final evaluations;
- *administrative contracts concluded by military structures*[30].

The right of commanders to give order in the leadership of troops does not lie only in aspects related to the necessities of war in the classical sense, as the legislator uses in the regulations in the field formulas such as *military actions*, *operations*, *missions*, etc. As is well known, with Romania's entry into NATO, our country has assumed, according to Article 118 of the Romanian Constitution, the obligation of collective defense, being stated to participate in actions on maintaining or restoring peace in military alliance systems. By reference to Law no. 121 of 15 June 2011 on the participation of the armed forces in missions and operations outside the territory of the Romanian state[31], Article 2 describes the types of military actions in which Romania participates under the mandate of the UN - United Nations, OSCE - Organization for Security and Cooperation in Europe, under NATO leadership - the North Atlantic Treaty Organization or the European Union, respectively in coalitions or at the request of an affected state.

Pursuant to art. 118 in the Constitution, the prerogative of the participation of the armed forces in military actions in theaters of war lies in the international commitments assumed by the Romanian state, which together with the actions of maintaining or restoring peace must be compatible and compliant with the fundamental principles of the rule of law[32].

Military doctrine and literature argue that war is governed by a series of specific principles, its conduct and execution related to military science proper, military normative acts in force, objective realities and ways of action specific to the art of war[33]. Specialized military works also use the formula of *actions other than war*[34], defined as post-war actions, adjacent to or complementary to the war, whose characteristics aim to protect the heritage in general and reduce the impact on social, economic and cultural life, during which issue military command documents.

[28] http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=155709.
[29] Radu Carp, *Reflecții pe marginea statutului juridic al decretelor emise de Președintele României*, în RDP nr. 4/2004, pp.13-24.
[30] Oliviu Puie, *Tratat teoretic și practic de contencios administrativ*, Volumul I, Editura Universul Juridic, București, 2015, p. 607.
[31] Publicată în Monitoriul Oficial nr. 427 din 17 iunie 2011.
[32] Cristian Ionescu, Corina Adriana Dumitrescu, *Constituția României*, Comentarii și explicații, Editura C.H. Beck, București, 2017, p. 1267.
[33] Ferdinand Foch, *Principiile războiului. Conducerea războiului*. Editura Militară, București, 1975, p. 35.
[34] Gheorghe Văduva, *Principii ale războiului și luptei armate, realități și tendințe*, Curs, Universitatea Națională de Apărare, București, 2003, p. 23.

While the war is declared based on Law no. 355 of November 20, 2009 regarding the regime of the state of partial or total mobilization of the armed forces and of the state of war, where at art. 6 describes the procedure for declaring by decision of the Parliament, the armed struggle, which is the core of any war, takes place on the basis of a military decision, so an atypical administrative act, unanimously called by law and jurisprudence as a military command.

3. Conclusions

The military command act, provided for the first time in the Romanian Constitution of 1923, which maintained its exceptional status from the control exercised by the administrative contentious courts, arising from the objective needs and consequences of the First World War, still exists today. the conditions for the fulfillment by the Romanian state of the constitutional obligations of collective defense provided in article 118 of the Romanian Constitution, respectively art. 2 of Law no. 121 of June 15, 2011 on the participation of the armed forces in missions and operations outside the territory of the Romanian state.

Although we are in the presence of an absolute exception, the legislator did not allow that by establishing the fines of non-receipt to be violated at their issuance, the conditions related to form, content or motivation.

The legal doctrine has distinguished between military acts of command that arise within the military hierarchy and military acts of command that intervene between the military and the civilian population. Those who intervene between the military authority and the civilian population are subject to judicial control exercised in administrative litigation.

Consequently, in the sphere of the notion of a military command act, those administrative acts were retained in the doctrine whose purpose is to respond to a military command, understood as the prerogative to command or issue orders from the point of view. strictly military.

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SUSPENSION OF THE ENFORCEMENT OF THE REGULATORY ADMINISTRATIVE DEED - A FATA MORGANA OF CASE-LAW AND DOCTRINE

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Abstract

The article aims to be an analysis of the effects of suspending the enforcement of the regulatory administrative deed in the context in which, as we shall see, opinions are divided both in the specialized literature and in the case-law of administrative contentious courts. Starting from the provisions of Law no. 554/2004 of the administrative contentious, the study shall go through a comparative analysis in regard to the institution of annulment of the administrative deed, as there are authors but also courts of law considering the two concepts as equal ones.

We have also shown why we do not adhere to the latter current, inclusively by reference to a series of decisions of the Constitutional Court from which clearly results the individuality of the effects that the two institutions produce on regulatory administrative deeds.

We concurrently exemplified this, in the content of the study, with a recent case of the Bucharest Court of Appeal having as a subject matter the suspension of enforcing a regulatory administrative deed.

We express our belief, or perhaps at least hope, that in the end, both the specialized literature and especially the practice of the courts of law shall be uniform in the sense of recognizing the independence of the institution to suspend the enforcement of the regulatory administrative deed and its own effects that each case separately has.

Keywords: *regulatory administrative deed, annulment of the administrative deed, suspension of enforcement, Constitutional Court, decisions, case, Court of Appeal, independent, own effects.*

1. Introduction

The present study aims to analyze the effects of suspending the regulatory administrative deed, in the context in which at doctrinal level there are differences of opinions, an issue that we shall also develop during this material.

On the other hand, such an analysis is also necessary in view of a comparison in regard to the annulment of the regulatory administrative deed, a situation clearly regulated by Law no. 554/2004 of the administrative contentious in view of the effects of such a solution by the court of law. For the rigor of research, we appreciate that it is necessary to emphasize the differences between the two institutions, from the perspective of the effects produced by the solution of suspending the enforcement/annulment of the regulatory administrative deed.

If the situation of regulatory administrative deeds does not involve discussions, Law no. 554/2004 expressly providing the effects produced by a final decision annulling such a deed, the issues mainly occur in case of ruling a decision suspending the enforcement thereof where there is no clearly outlined regulation.

Taking advantage of this legislative void, let's say, some of the authors went so far as to equate the effects produced by the two institutions (cancellation vs. suspension of enforcement), strictly by reference to the fact that a regulatory administrative deed produces erga omnes effects, completely ignoring the specific conditions and characteristics of the two concerned institutions.

On the other hand, we do not consider it necessary to concretely regulate the effects of a decision admitting the suspension of the enforcement of a regulatory administrative deed, in the context in which, from our point of view, besides other authors, we consider that they clearly result from the conditions expressly provided by art. 14 and art. 15 of Law no. 554/2004.

Last but not least, the present analysis would not be complete, if it did not include a case study, starting from a solution ruled by the Bucharest Court of Appeal in a case[1] in which it was requested to suspend the enforcement of a regulatory administrative deed, a solution favourable to the plaintiff. Why did I feel the need for a reference to the Fata Morgana concept in the title of the article? Precisely in the light of the mirage that a favourable solution in an application to suspend the enforcement of an regulatory administrative deed can create versus all the other recipients of the concerned deed. And the proof lies precisely in the case study that we analyzed at the end of this material.

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[1] Civil Judgement no. 132/02.03.2020, ruled by the Bucharest Court of Appeal in file no. 7222/2/2019, having as a subject matter the suspension of enforcing the Order of the President of ANRE no. 216/2019, a regulatory administrative deed, published in the Official Gazette of Romania Part I , no. 1001/12.12.2019.

2. Content

2.1. Annulment of the regulatory administrative deed vs. suspension of its effects

2.1.1. Regulation from Law no. 554/2004 - legislative issues

The relevant provisions in this analysis are those of art. 14 and 15 of Law no. 554/2004 which refers to the suspension requested by the "*injured person*", the request for suspension of the enforcement of the administrative deed having a subjective component. Therefore, we deal with an injured person, who considers that by a regulatory administrative deed there is the possibility of inflicting an "*imminent*" prejudice. Therefore, if the imperative requirements of the contentious law impose the existence of an injured person who, "*for the prevention of imminent prejudice*" can resort to the court with a request to suspend the enforcement of the administrative deed, it is more than obvious that we cannot talk about an objective contentious, but a subjective one, with the specificity of the person formulating the request. Such claim is based on the existence of an own "imminent prejudice" of the applicant and is not a claim concerning the "*general interest*". It can be rightfully concluded that in view of ordering the suspension of enforcing an administrative deed, the lawmaker imposed a subjective condition, specific to the plaintiff - the imminent prejudice, which has to be proven in his patrimony. It is true that the second condition should be also cumulatively fulfilled - the well-justified case which presupposes a proven illegality of the administrative deed (which is obvious and supposes a superficial investigation of the merits), but this second condition obviously pertains to the objective side of contentious, the illegality being the same regardless of the plaintiff in the suspension request**.**

On the other hand, Law no. 554/2004 expressly provides the effects, which the admittance of a request for annulment of the regulatory administrative deed produces in case of annulling a regulatory administrative deed, by non-appealable decision. Thus, according to the provisions of art. 23 "*Final and irrevocable court decisions by which a regulatory administrative deed was fully or partially annulled in are generally binding and have power only for the future*". From the mentioned text it can be noticed that we are talking about an expressly regulated situation, so that, *per a contrario*, in all other situations, inclusively in case of suspending a regulatory administrative deed, we deal with effects exclusively produced against the person who proved the cumulative fulfilment of the two conditions provided above, and against which the effects of a possible decision by which the suspension of the enforcement of the deed was ordered shall take place. In such a context, it is obvious that we cannot speak of *erga omnes* effects in case of court decisions suspending the enforcement of regulatory administrative deeds, as on the one hand, the lawmaker did not provide for any subsequent measures to rule such a solution, as no reference is made either to the general effects or to the obligation to publish the decision in the Official Gazette, as art. 23 thesis II of Law no. 554/2004.

Anyway, such a solution is consistent with the fact that, unlike the annulment of a regulatory administrative deed, the suspension of enforcement is a provisional and extraordinary measure. Moreover, the suspension of enforcement is always and regardless of the nature of the administrative deed a provisional measure, "*is exceptional and is ordered only in well-grounded cases*"[2].

It is important to remember, in support of our statements there is also a series of decisions of the Constitutional Court, which had as a subject matter the exception of unconstitutionality of the provisions of art. 23 and 24 from Law no. 554/2004. We consider that such decisions are relevant, even if they did not have as a subject matter the analysis of the constitutionality of the provisions of art. 14 or 15 of the mentioned regulatory deed, in view of the effects of suspending an regulatory administrative deed. Thus, by Decision no. 914 of 23 June 2009[3], the Constitutional Court held that „*the provisions of art. 23 of the Law on administrative contentious no. 554/2004 consecrates, at the level of the substantive law, the erga omnes effects of the non-appealable and irrevocable court decisions by which a regulatory administrative deed was fully or partially annulled. The binding nature of this type of decisions towards all legal subjects is concretely ensured by publishing in the Official Gazette of Romania the court decisions regarding the regulatory administrative deeds issued by the Government and the other central bodies of public administration, in the official monitors of counties respectively of those decisions regarding the annulment of certain deeds of the local public administration bodies, corresponding to the counties, municipalities, towns and communes. The usefulness of this publication is indisputable, considering the fact that, by their nature, regulatory administrative deeds approach an indeterminate number of legal subjects."* Also, by Decision no. 126 of 10 March 2015[4], the court of constitutional contentious ruled that "*for persons who had the capacity of a party to the dispute in which the court ordered the full or partial annulment of a unilateral regulatory administrative deed, insofar as they also request the recognition of the claimed right, together with reparations, the effects of annulment of the deed occur by virtue of the principle of the relative*

[2]Alexandru-Sorin Ciobanu, *Administrative Law. Public Administration Activity. Public Field,* Universul Juridic, Bucharest 2015, p. 84 et seq.

[3] Published in the Official Gazette of Romania, Part I, no. 544 of 5 August 2009.

[4] Published in the Official Gazette of Romania, Part I, no. 346 of 20 May 2015.

effect of court decisions " also occur for the past, meaning that, for the parties to the dispute, the annulment of the unilateral regulatory administrative deed produces legal effects also for the past. Therefore, "*the annulment of a unilateral regulatory administrative deed, considering the provisions of art. 23, produces erga omnes effects also only for the future for third parties who did not have the capacity of party in the dispute in which the annulment decision was ruled, after the publication of this decision".* I n conclusion, as it results from the practice of the Constitutional Court, the lawmaker conditioned the production of *erga omnes* effects, inclusively by the publication of the final annulment decision in the Official Gazette.

Finally, it is important to also mention an attempt by the courts to obtain a settlement of the issue from the High Court of Cassation and Justice, which was asked to rule by a second appeal in the interest of the law on "*the interpretation and application of the provisions of art. 14 and 15 of Law no. 554/2004 on administrative contentious, with subsequent amendments and supplementations and of art. 435 of the Civil Procedure Code, regarding the hypothesis of admitting the request for suspension of the enforcement of an regulatory administrative deed and the effects of this solution towards the parties to the dispute as well as towards third parties*". In the notification filed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, "*Starting from the fact that the suspension of the enforcement of the administrative deed is a means to ensure compliance with the principle of legality, which governs the entire activity of public administration, the author of the notification believes that the suspension of a regulatory administrative deed produces erga omnes effects, and it is fair that, as long as the public authority or the court, as a result of challenging the administrative deed, is pending the verification of its legality, it should not produce its effects on the targeted persons".* The author of the notification also believes that "*due to reasons of legal logic*"[5] "the fact that "*the decision aiming at the suspension of such a deed, legally enforceable under the conditions of art. 14 par. (4) of Law no. 554/2004, in turn produces also effects erga omnes, whereas a possible application having a similar subject matter is irrelevant"* and considers that *"It would be discriminatory for an regulatory administrative deed to produce the legal effects for which it was adopted towards all concerned persons, except those who were parties to the dispute of administrative law, in which the court ordered the suspension of enforcing the administrative deed*."

Unfortunately, the High Court dismissed by Decision no. 18/02.10.2017[6] the notification as inadmissible, motivated by the fact that "*in this case, there was no evidence of divergent case-law regarding the invoked legal issue, an issue which, moreover, is neither contemporaneous versus the period of ruling the concerned decision, and the alleged non-unitary practice, invoked in the notification, concerns only decisions ruled by the supreme court*".

2.1.2. Views expressed in doctrine

As noted in the doctrine, the suspension is "a temporary measure of temporary protection of the rights and legitimate interests of the recipient of the deed or other injured persons."[7] Starting from these issues, corroborated with the fact that, as previously shown, in order to rule a decision of suspending the enforcement of an (individual or regulatory) administrative deed is necessary the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004.

Returning to Decision no. 18/02.10.2017 of the High Court of Cassation and Justice, in order to resolve the appeal in the interest of the law, the court requested even the views of specialists from the Faculty of Law of the "Babeș-Bolyai" University from Cluj-Napoca and the Faculty of Law of the Bucharest University (from here probably comes the surprise that, although it seems that it rigorously analyzed the case, the solution was to dismiss the complaint as inadmissible).

As mentioned at point V. 20 of the said Decision, the Faculty of Law of the "Babeș-Bolyai" University of Cluj-Napoca, by the point of view expressed by Univ. Reader PhD Ovidiu Podaru, appreciated that, in the spirit of the systematic interpretation of the provisions of art. 7, 14 and 1 of Law no. 554/2004, the suspension of a regulatory administrative deed, as well as its issuance, revocation, abrogation and annulment, by symmetry, produces *erga omnes* effects; the applicable legal reasoning is, *mutatis mutandis*, the one provided by art. 60 par. (2) of the Civil Procedure Code, according to which, since, by the nature of the legal relationship, the effects of the regulatory administrative deed are extended to an indeterminate number of persons, the effects of the decision to suspend such is beneficial to everyone. On the other hand, the Faculty of Law of the Bucharest University - through the point of view expressed by Univ. Prof. PhD Dana Tofan and Verginia Vedinaș and Univ. Readers PhD Alexandru-Sorin Ciobanu and Univ. Lecturer PhD Bogdan Ionuț Dima - appreciated that the court decisions by which, pursuant to art. 14-15 of Law no. 554/2004, the enforcement of regulatory administrative deeds is suspended (except for a few situations related to the actions in objective administrative contentious and to the damage of a legitimate public interest by the concerned deeds) do not produce, *de lege lata*, *erga omnes* effects.

[5] We do not understand what they are, in the context in which the solutions of the courts have to comply with the legal provisions, in the letter and spirit of the law, there are no norms of legal logic expressly regulated, which would represent a possible source of law (our note).

[6] Published in the Official Gazette of Romania, Part I, no. 970 from 07 December 2017.

[7] Gabriela Bogasiu, *Justice of the Administrative Deed. A Bi-univocal Approach*, Universul Juridic, Bucharest, 2013, p. 247.

In the specialized literature were outlined two currents of opinion in regard to the effects of the suspension of the regulatory administrative deed.

Thus, in a first opinion, it was noted that "the effects of the suspension occur inter partes litigantes, irrespective whether they concern individual deeds or regulatory deeds" even if "it is true that maintaining the applicability of a regulatory administrative deed, for persons who did not request and obtain the judicial suspension, may seem unfair, but we have to also consider the fact that the plaintiff had to prove the two conditions imposed by law, including the threat of concrete material prejudices in their regard"[8]. Since we fully agree with this opinion, we shall not insist upon it, but shall try to debate more the theories comprised in the second opinion formed in regard to the legal effects and their erga omes extent in case of suspending the enforcement of a regulatory administrative deed.

Another current of opinion (as it also results from the considerations of the HCJC Decision no. 18/2017), is the one according to which "the issue of the effects of extending the suspension of a regulatory administrative deed can be analyzed only by relating to the provisions of art. 14 and art. 15 of Law no. 554/2004 to the provisions of art. 23 of Law no. 554/2004 which, regulating the effects of annulment of a regulatory deed by a final decision of the administrative contentious court, states that the effects of annulment, by publishing the final court decision in the manner provided by law, occur for the future and have erga omnes effects. As a consequence, by applying the principle of symmetry, if the annulment of the regulatory administrative deed produces effects for the future and erga omnes, the suspension of enforcing the regulatory administrative deed has to produce the same legal effects"[9]. Although the author invokes the principle of symmetry, but which to our knowledge represents something completely different (i.e. we do not understand how the annulment can be symmetrical with the suspension of enforcing the regulatory administrative deed), he does not bring any argument to support his statements, whereas his entire theory remains in the stage of pure claim.

Moreover, in supporting this opinion, the author states that "such a conclusion is highlighted also in the judicial practice"[10] invoking a solution ruled (how else) by the Court of Appeal Cluj, in the merits, without notifying us whether the solution was maintained or not in a possible second appeal at the High Court.

A theory, which we could say is at least curious, is outlined at another author [11] who believed that "Since it is a party in the lawsuit in which the suspension of enforcing the regulatory administrative deed was ordered, for the public authority the court decision ordering the suspension is mandatory in terms of the power of res judicata. As the authority is bound not to enforce the deed in respect of the plaintiff, implicitly it will not be able to perform enforcements deeds against other legal subjects (...) and the suspension should concern all subjects for whom the act is intended, regardless of whether they had or not the capacity of a party to the dispute in which the deed was suspended."

If we admit such a theory, we could reach the absolutely bizarre situation from a legal point of view, when a decision to suspend the enforcement of a regulatory administrative deed ruled by the court further to verifying the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004, would it end up producing erga omnes effects, but in fact only partially, towards the authority issuing the deed?! We do not understand how the said author reached such a theory, but obviously it exceeds any legal norm applicable to administrative law and not only.

2.2. Case study - a solution of the Bucharest Court of Appeal, from ecstasy to agony for the other recipients of the concerned challenged regulatory administrative deed

We shall analyze at this point, the solution ruled in the case that was the subject matter of file no. 7222/2/2019 ordering the suspension of enforcing *Order no. 216/2019* - regulatory administrative deed, in which the plaintiff was the National Company Nuclearelectrica. The solution, a lucky one for the plaintiff in the case, generated numerous discussions in view of its invocation by another operator (Hidroelectrica[12]) in its own dispute having the same subject matter, but also by a company having the capacity of a shareholder of the two operators (Fondul Proprietatea - the Ownership Fund[13]). In both cases, the applicant relied on the solution in File no. 7222/2/2019, strongly claiming that it is a regulatory administrative deed e, the solution produces *erga omnes* effects, the suspension of enforcing Order no. 216/2019 operating against all those involved. Obviously, by reference to both the legal and doctrinaire issues invoked in the antecedence, our opinion is to the contrary, so that the solution is not binding to all operators, as such a situation is not regulated in the law of administrative contentious, *i.e.* that the suspension of a regulatory administrative deed produces general effects, *erga omnes.*

In accordance with this opinion, in the two subsequent cases, the same court - the Bucharest Court of Appeal, ruled in favour of dismissing the suspension

[8] Alexandru-Sorin Ciobanu, *op.cit.*, p.88-89.

[9] Oliviu Puie, *Administrative and Tax Litigation. Law no. 554/2004. Law no. 212/2018. EOG no. 57/2019 on the Administrative Code. Legislative Correlations. Comments. Explanations. Doctrine. Case-law,* Universul Juridic, Bucharest 2019, p. 299.

[10] Idem, p. 299.

[11] Claudiu-Angelo Gherghină – *The Legality of the Regulatory Administrative Deed in the Rule of Law*, Universul Juridic, Bucharest 2019, p. 206 et seq.

[12] In File no. 1267/2/2020; the request for suspension was dismissed on the merits.

[13] In File no. 426/2/2020; the request for suspension was dismissed on the merits.

requests filed by both Hidroelectrica and Fondul Proprietatea.

In view of the topic submitted to the analysis of this study, not so much the solution is relevant, but the considerations of the two ruled judgements. Thus, by the civil judgement no. 258/23 April 2020[14] ruled by the Bucharest Court of Appeal, the court ruled that "the reference to the solution ruled by the Bucharest Court of Appeal in file no. 7222/2/2019 has no implications on this action, one posing its own individuality related to the holder of the summons and the invoked reasons, not in view of the standing of the company Nuclearelectrica SA that obtained the suspension solution in the concerned case, but of a company in which Fondul Proprietatea is a shareholder, namely Hidroelectrica SA." Moreover, the court goes further and notes in a detailed analysis that "starting from the premise that the suspension of enforcing a unilateral administrative deed at the request of a plaintiff determines the lack of interest or the lack of interest of a similar request filed by another plaintiff, it omits the fact that the standing of the latter person no longer depends in such a circumstance in view of suspending the enforcement of the solution to be ruled in its own merits action in annulment of that administrative deed, but on the court decision by which it analyzes the action of the first plaintiff, who obtained the concerned suspension, respectively the extent to which it assumes the continuation of the procedural steps". The approach of the court in this case is interesting, but beyond this issue, even indirectly perhaps, the Bucharest Court of Appeal ruled that a solution to suspend the enforcement of a regulatory administrative deed does not produce effects against another person, a third party to the dispute in the case.

On the other hand, in the second case that I mentioned, the same court noted by the civil judgement no. 350/03.06.2020[15] that "on the first argument of the plaintiff regarding the existence of the well-justified case, namely the fact that by the civil judgement no. 132/02.30.2020 (...) it was already ordered to suspend the enforcement of Order no. 216/2019 (...) until the ruling of the court of first instance, the Court shows that the plaintiff who promoted this request for suspension is Nuclearelectrica" so that "the court does not consider that the order to suspend the enforcement of Order no. 216/2019 at the request of Nuclearelectrica would automatically lead to the adoption of the same solution in this case". In the conclusion of these considerations, and also in agreement with our opinion, the Bucharest Court of Appeal ruled that "as it obviously results from the regulation of art. 15, art. 14 of Law no. 554/2004, the suspension of enforcing the administrative deed, as an extraordinary measure that can be ordered by the administrative contentious court in the hypothesis that an injured person proves the fulfilment of the legal conditions, does not produce erga omnes effects".

3. Conclusions

We consider that the institution of suspending the enforcement of the regulatory administrative deed deserves more attention, both from the doctrine, but especially from the courts of law.

We make this statement, in the context in which, in view of the effects that a decision of the court of first instance confirming such a solution, is legally enforceable and a possible second appeal does not suspend its enforcement. Therefore, we believe that the administrative contentious judge should more rigorously analyze the cumulative fulfilment of the two conditions expressly provided by Law no. 554/2004 and order the suspension of enforcing the regulatory deed only if they are cumulatively fulfilled. We cannot agree, in any form, with the theory according to which such a decision has to produce *erga omnes* effects, as such an interpretation would deprive of content the very institution of suspending the enforcement of the administrative deed. None of the supporters of this opinion convinced us (nor did they explain in any way) how the threat that a prejudice occurred proven in a dispute can (or is) the same for all recipients of that deed!

On the other hand, in the absence of a careful analysis of the well-justified case and the existence of threatened prejudice upon the property of the person considering itself injured, serious consequences may arise in the disruption of the issuing authority, which practically undergoes the impossibility of applying any legal norm throughout the period of suspending the concerned deed.

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- Oliviu Puie, Administrative and Tax Litigation. Law no. 554/2004. Law no. 212/2018. EOG no. 57/2019 on the Administrative Code. Legislative Correlations. Comments. Explanations. Doctrine. Case-law, Universul Juridic, Bucharest 2019;
- Alexandru-Sorin Ciobanu, Administrative Law. Public Administration Activity. Public Field, Universul Juridic, Bucharest 2015;
- Claudiu-Angelo Gherghină – The Legality of the Regulatory Administrative Deed in the Rule of Law, Universul Juridic, Bucharest 2019.

[14] The applicant filed a second appeal. But it gave up his trial, considering the lack of interest generated by the repealing of Order no. 216/2019.

[15] In this case, too, the plaintiff filed a second appeal but filed a waiver of the lawsuit, as there was no longer any interest in filing an action.

INTELLECTUAL PROPERTY IN TIMES OF COVID-19

Cristiana BUDILEANU[*]

Abstract

Since the beginning of year 2020, we are facing a pandemic of a coronavirus disease discovered in 2019 in China and rapidly spread worldwide. This pandemic affected many sectors of economic activities, such as the medical system, tourism, culture, education, work life.

The life we knew before the pandemic may never return to us or it would be possible to have a better life after the pandemic is over because since the beginning of times, the human being tried to overcome his condition by creating all sort of things to have an easier and more comfortable life. All such creations were made due to his intellectual activity which later, with the development of the societies, it began to be recognized and protected by laws. Nowadays, the intellectual property is present in all economic sectors and we protect it through patents, designs, copyright, trademarks.

Therefore, the intellectual property is nowadays more important than ever in order to try to end the pandemic because only the creative mind of human beings may find a way to eradicate this disease.

The purpose of this article is to analyse the consequences of the pandemic into the intellectual property. We would try, among others, to see if the human being remained as creative as before the pandemic or if he taken the opportunity to become even more creative, to invest more in research and development and if the laws protecting the intellectual property would stay in front of the needed progress to overcome this pandemic.

Keywords: *vaccine, counterfeit, pharmaceuticals, fashion, free use.*

1. Introduction

Intellectual Property ("**IP**"), as any other law discipline, is alive one or even more alive than others, even if like in other disciplines, the IP regulations are sometimes behind our times. Examples of such situations are the regulations of Artificial Intelligence ("**AI**"), of 3D printing in relation to which the specialists arise many questions.

In the present, we are in the middle of a pandemic, a Coronavirus disease pandemic ("**Covid-19**") which affected and changed our lives since its beginning in 2020, but which it is, as we will see below, manageable due to the creators, researchers, in other words due to the IP which "even in a period of such challenge and adversity (…) IP can provide opportunities for innovation, and the regulatory framework can evolve and be responsive to facilitate the adoption of new technology models."[1]

When arrived in Europe, Covid-19 put the biggest states (such as Italy, France, Spain) in distress from medical point of view, because of the large number of sick people who needed very attentive medical care and also because of the lack of sufficient medical supplies, medical staff, rooms in hospitals, etc.

However, ignoring these shortcomings, if we look back in time a year ago, we may see that unlike the situation in prehistoric and even more recent epidemics or pandemics, the Covid-19 pandemic caught the humankind and the technology more advanced than ever, which despite the restrictions of freedom, lot of industries have managed to continue their activity through remote work (e.g. IT, legal sector) or through reinvention of the business approach (e.g. by being present more in online system. There were some restaurants who started making deliveries, supermarkets started to offer to clients the possibility of home delivery).

It is also true that other industries were negatively impacted (e.g. culture, tourism, hotels, publicity). If we look at the publicity sector in Romania, we remember that during the emergency state, the number of radio and TV commercials has decreased, not being presented anymore commercials with discounts at products sold by supermarkets or by fashion stores. Also, the street advertising (e.g. the posters placed on billboards) decreased, having in view that the freedom of movement was restricted, the shopping centres, restaurants, theatres and other places where the people could gather were closed.

However, in time, with the help of technology and people who put at free their research and who created devices to protect people from the virus, solutions were found for those industries to retake their activity. For example, the fashion industry moved more in online, TV commercials to online shops beginning to appear

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[1] Intellectual Property Office of Singapore, *Digitalisation and Intellectual Property in the time of COVID-19*, September 2020, https://www.reuters.com/article/sponsored/digitalisation-and-intellectual-property-in-the-time-of-COVID-19 (accessed on 19.03.2021).

more, the culture also moved in online, being possible to find lots of theatre plays or performances.

All of this was possible due to the creative mind of human beings which helped prior and during the pandemic with the development of our life standards.

1.1. Other pandemics that affected the humanity

It is not the first time when the humanity is facing a disease with rapid spread and with lots of victims who transforms into an epidemic or a pandemic. Along the history, „plagues and epidemics have ravaged humanity throughout its existence, often changing the course of history" and „at times, signalling the end of entire civilizations"[2]. However, people associate plagues, epidemics or pandemics with times long gone, considering that in the time they live in, it is not possible to happen something like that, just like the people from Albert Camus's novel "The Plague" because they are modern people with phones, trams, airplanes, internet, and "they are surely not going to die like the wretches of 17th century London or 18th century Canton"[3]. If we analyse the current times during Covid-19 pandemic and the times from Albert Camus's novel "The Plague", we realise that even if between the two events it is a great period of time, the Covid-19 pandemic also caught people unprepared, some of them do not believe that this virus exists or they believe that the virus is a normal cold and they continue with business, with making arrangements for travel, not observing the rules imposed by states, considering themselves free. This tells us that people forget history or that they did not learn anything from it.

The worst epidemics and pandemics in history are considered to be:

a) The prehistoric epidemic in China (approx. 3000 B.C.) which took place in a prehistoric village now called „Hamin Mangha" and which „ happened quickly enough that there was no time for proper burials"[4];

b) The plague of Athens (430 B.C.) which took place during the Peloponnesian War during which it is estimated that between 75,000 and 100,000 people (i.e. 25% of the population) died[5];

c) Antonine Plague (A.D. 165 - 180) which is believed to have appeared in Babylon, spread in Parthia and then in entire world, even in China, where it is attested in 173, 179 and 182 A.D.[6];

d) Plague of Cyprian (A.D. 250 - 270) which originated in Ethiopia, spread in Rome where it killed approx. 5,000 people per day, in Greece and Syria[7];

e) Plague of Justinian (A.D. 541 - 542) named after the Byzantine emperor Justinian I, arrived in Constantinople almost a year after the disease first made its appearance in the outer provinces of the Byzantine empire. It killed between a quarter and a half of the Mediterranean population and played a key role in the fall of the eastern Roman Empire[8];

f) The Black Death (1346 – 1353) which devastated Europe, killing approx. 25-30 million people. The disease originated in central Asia and entered Europe carried by rats on Genoese trading ships sailing from the Black Sea[9];

g) Cocoliztly epidemic (1545 – 1548) first appeared in Mexico and killed an estimated 45% of the entire Aztec population. Historical records suggest it was some type of haemorrhagic fever, but recent DNA evidence suggests the culprit might have been salmonella brought by European colonizers[10];

h) Great Plague of London (1665 – 1666) ravaged London, around 68,596 people dying during the epidemic, though the actual number of deaths is suspected to have exceeded 100,000 out of a total population estimated at 460,000. From London, the plague spread to many parts of England[11];

i) Great Plague of Marseille (1720 – 1723) was the last wave of plague that hit western Europe and affected the French region of Provence. Arrived from the Levant, the plague killed between 76,000 and

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[2] Owen Jarus, *20 of the worst epidemics and pandemics in history*, Live Science, All About History, 2020, https://www.livescience.com/worst-epidemics-and-pandemics-in-history.html (accessed on 19.03.2021).

[3] The School of Life, *Camus and the Plague*, https://www.theschooloflife.com/thebookoflife/camus-and-the-plague/ (accessed on 19.03.2021).

[4] Owen Jarus, *op. cit.*.

[5] Robert J. Littman, *The plague of Athens: epidemiology and paleopathology*, Mt Sinai J Med. 2009, https://pubmed.ncbi.nlm.nih.gov/19787658/ (accessed on 19.03.2021).

[6] For more details, Florian Matei-Popescu, *Ciuma Antonină – o pandemie devastatoare la apogeul Imperiului Roman*, 2020, https://www.upit.ro/ro/upit-pentru-comunitate/ciuma-antonina-o-pandemie-devastatoare-la-apogeul-imperiului-roman (accessed on 19.03.2021).

[7] John Horgan, *Plague of Cyprian, 250-270 CE*, 2016, https://www.ancient.eu/article/992/plague-of-cyprian-250-270-ce/ (accessed on 19.03.2021).

[8] John Horgan, *Justinian's Plague (541 – 542 CE)*, 2014, https://www.ancient.eu/article/782/justinians-plague-541-542-ce/ (accessed on 19.03.2021).

[9] Mark Cartwright, *Black Death*, 2020, https://www.ancient.eu/Black_Death/ (accessed on 19.03.2021).

[10] Angus Chen, *One of the history's worst epidemics may have been caused by a common microbe*, 2018 https://www.sciencemag.org/news/2018/01/one-history-s-worst-epidemics-may-have-been-caused-common-microbe (accessed on 19.03.2021).

[11] John S. Morrill, *Great Plague of London*, https://www.britannica.com/event/Great-Plague-of-London (accessed on 19.03.2021).

126,000 people in south-eastern France, taking as many as 45,000 lives in Marseille alone[12];

j) Russian Plague (1770 – 1772) was the last wave of plague that hit Europe, started when Russian troops that fought in Russo-Turkish war developed a feverish illness and swollen lymph nodes. The plague spread all the way to Moscow, and killing between 52,000 and 100,000 people in Moscow alone[13];

k) Philadelphia yellow fever epidemic (1793) was worst outbreak of Yellow Fever ever recorded in North America, approximately 11,000 people contracted it out of which 5,000 people, (i.e. 10 % of the city's population), died[14];

l) Flu pandemic (1889 – 1890) also known as the "Russian flu", appeared in November 1889 in St. Petersburg, Russia. Within four months, it had spread throughout the northern hemisphere, killing about 1 million people worldwide[15];

m) American polio epidemic (1916) started in June 1916 in a densely populated area of Brooklyn, New York, and soon spread to other communities across Northeast America. It lasted through October 1916 and claimed 6,000 lives and left 27,000 people paralyzed, 80% of the fatalities being children under 5[16];

n) Spanish flu (1918 – 1919) was first observed in Kansas, United States, and it was the most severe influenza outbreak of the 20th century. It affected 1/3 of the world population and killed between 25 and 50 million people worldwide. Just like Covid-19, it was transmitted from person to person through airborne respiratory secretions[17];

o) Asian flu (1957 – 1958) was caused by a virus known as influenza A subtype H2N2. It was first identified in February 1957 in East Asia and subsequently spread to countries worldwide. The estimated number of deaths was 1.1 million worldwide[18];

p) AIDS pandemic and epidemic (1981 – present) is caused by the human immunodeficiency virus (HIV) which targets the immune system and weakens people's defense against many infections and some types of cancer. First identified in 1981, AIDS continues to be a major global public health issue, having claimed almost 33 million lives so far and infected over 70 million worldwide[19];

q) H1N1 Swine flu pandemic (2009 – 2010) was first detected in spring of 2009 in the United States of America and spread quickly across the world. The disease was caused by a novel influenza A virus which contained a unique combination of influenza genes not previously identified in animals or people. It is estimated that 151,700 - 575,400 people worldwide died from A H1N1 virus infection during the first year the virus circulated[20];

r) West African Ebola epidemic (2014 – 2016) was the "largest, most severe and most complex Ebola epidemic" in history, according to the World Health Organization. More than 28,000 people were infected, and over 11,000 people died before the international public health emergency ended in June 2016. Most of the cases occurred in three countries: Guinea, Sierra Leone, and Liberia[21].

2. The impact of Covid-19 on Intellectual Property

If we analyse the goods that we use, eat, drink, dress in our daily life, we notice that all of them are the product of the IP. The IP started its life when people started to exist and to find ways to improve their life. The drawings in the caves, the tools for hunting, for agriculture, the wheel, the earliest examples of written literature are also part of the human creation and therefore of the IP.

Not only in normal times, but also in times of crisis, such as a pandemic, IP is more important than

[12] Cindy Ermus, *The Plague of Provence: Early Advances in the Centralization of Crisis Management*, Arcadia, 2015, no. 9, http://www.environmentandsociety.org/arcadia/plague-provence-early-advances-centralization-crisis-management (accessed on 19.03.2021).

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[17] Editors of the Encyclopedia Britannica, *Influenza pandemic of 1918-1919*, https://www.britannica.com/event/influenza-pandemic-of-1918-1919 (accessed on 19.03.2021).

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[21] World Vision, *2014 Ebola virus outbreak: Facts, symptoms, and how to help*, https://www.worldvision.org/health-news-stories/2014-ebola-virus-outbreak-facts (accessed on 19.03.2021).

ever, and its benefits are even greater[22] because it helps to progress and innovate to eradicate the pandemic. In addition, "the IP system recognizes at both the national and the international levels that emergencies and catastrophes may call for measures that may disrupt the normal functioning of the incentive framework upon which the IP system is based during the period of the emergency or catastrophe."[23] Such measures include compulsory licenses, licenses of right of patented technology embodied in vital medical supplies and medicines, the use of exceptions in relation to cultural and educational works to ensure the availability of vital data, information and knowledge for the purposes of combatting and containing the virus.

At the beginning of the crisis, starting with Italy and continuing with other states where the disease spread, the biggest problem encountered by states was the „scarcity of resources to fight and contain the virus", by resources meaning in principle the medical staff and including but not limited to „personal protective equipment, testing kits, ventilators, pharmaceuticals and healthcare products as well as other laboratory and medical equipment"[24]. In time, solutions were found, most of them coming from private sector which made available to the medical sector the missing equipment either on a voluntary basis, either obliged by governments.

There were many voices saying that the IP stands against the progress to eradicate the Covid-19 pandemic mischaracterising the IP rights as a "monopoly", claiming that "IP rights will thwart research and development and make vaccines and treatments unaffordable" and calling "for the suspension of IP rights to keep prices low and to address supply shortages, particularly in low and middle-income countries"[25]. But is this the case? Is IP standing against the needed innovation to fight the Covid-19? In our opinion "no" because there are multiple ways to use the IP such as:

a) free licenses granted online by the IP right holders to the general public, for example under Creative Commons;

b) free licenses granted by the IP right holders to specific persons under written agreements;

c) waiver by the IP right holders to act against the persons who infringe their rights;

d) compulsory licenses granted by competent authorities in the state where the IP right exist;

e) technology pools (i.e. agreements between at least two IP right owners to group their rights relating to a specific technology and to license the rights to use these rights to each other and to third parties, subject to certain conditions, such as the payment of royalties[26];

f) under emergency legislation adopted by the affected states which in most countries have the right to requisition goods and/or services necessary to fight against the crisis.

Also, in times of crisis, the IP is better valued and the businesses whose activity is based on IP have greater revenues.

It may be thought that from the IP systems, only the patent system is a key element of the system for innovation and dissemination of medical technologies since most of the drugs, medical devices, vaccines, and other health technologies are protected by patents. However, the copyright, trademarks, designs, and trade secrets are also key elements of the IP system which may help or already helped during the Covid-19 pandemic not only the medical system, but other industries also[27]. In addition, it is worth mentioning that drugs, medical devices, vaccines, and other health technologies may be protected by multiple IP systems at the same time. For example, a vaccine may be protected under the patent laws, but also under the trademark law. A medical device may be protected under the design law, but also under the trademark law and copyright law.

2.1. Copyright during Covid-19

As we know, for the copyright there is no need for any registration, the author having the right over his/her work since the moment of its creation, even if it is unfinished, under the condition that the work is original.

The Berne Convention for the protection of literary and artistic works as amended in September 1979 („**Berne Convention**") presents the object of „literary and artistic works" which is represented by „every production in the literary, scientific and artistic

[22] Thomas J. Donohue, *Why Intellectual Property Protection matters in the time of Coronavirus*, Global Innovation Policy Center, https://www.theglobalipcenter.com/why-intellectual-property-protection-matters-in-the-time-of-coronavirus/ (accessed on 19.03.2021).

[23] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 3, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[24] Ma. Sophia Editha Cruz – Abrenica, Renson Louise Yu, *IP in the Time of Covid-19: Limiting IP rights for Covid-19 Solutions*, 2020, https://www.lexology.com/library/detail.aspx?g=f681793e-f830-40a7-988c-13d7b689d792 (accessed on 19.03.2021).

[25] For more details, Philip Stevens, Mark Schultz, *Why Intellectual Property rights matter for Covid-19*, Geneva Network, 2021, https://geneva-network.com/research/why-intellectual-property-rights-matter-for-covid-19/ (accessed on 19.03.2021).

[26] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 5, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

[27] This aspect was also recognised by WTO. For more details, see World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 2, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".

The World Trade Organization („**WTO**") Agreement on Trade-Related Aspects of Intellectual Property Rights (the „**TRIPS Agreement**") represents the most comprehensive multilateral agreement on IP and it makes the connection with the Berne Convention stipulating that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.

The computer programs have a key role in making our life easier. It is said that prior to the Covid-19 pandemic, „the speed of technological change had already expected to be significant" taking into consideration the rollout of 5G, development of AI and big data[28], but after the pandemic started, we have „vaulted five years forward in consumer and business digital adoption in a matter of around eight weeks".[29] And if we think at all that changed around us we realise that this is true because many entities from many industries shifted in online using digital platforms for their activity (e.g. the courts, the grocery stores, the schools, the doctors who started delivering telemedicine, the theatres, the show organisers, etc.) or other industries, such as financial ones, increased their use of digital services (e.g. banks).

Also, in the cultural sector, "many right holders have taken steps to make their works easily available to schools, universities, libraries, research institutions and the general public. These steps include innovative licensing arrangements, free access to research related to SARS-CoV-2, the virus strain that causes Covid-19, free access to newspaper and media articles about Covid-19, free access to many educational texts, online learning platforms and e-books and the free transmission of concerts, operas, and other cultural works."[30]

Therefore, many right holders of copyright tried to help either with free licenses, either with better prices for their works. For example, at the beginning of the crisis, having in view the shortage of masks and other protective equipment Romanian and French Association of Standardization have made available for free:

a) in Romania, kit of free standards during the emergency state (i.e. March-Mai 2020);

b) in France, guides to produce masques for the population that there are still available for free and continuously updated and improved[31].

Other entities which made available their works protected by copyright are from different sectors, such as academic, corporative, intergovernmental organizations, non-governmental organizations, governmental organizations, and among them we mention:

a) Technology companies such as Microsoft, Amazon, IBM, Intel, Hewlett Packard, Facebook have committed to grant time-limited licenses for some of or all their IP for the purposes of ending and mitigating the Covid-19 pandemic32;

b) College de France, which offers more than 1000 online documents (courses, conferences, colloquium);

c) Harvard University, which offers some content freely available such as e-books, streaming video and music, images, theatre and Covid-19 resources;

d) Copyright Clearance Center, which has a list of publishers who have authorised the use of their materials in distance learning models and other uses;

e) Egypt Today, which lists governmental initiatives where cultural sectors began broadcasting and uploading their content on the internet;

f) Pearson, which is providing access to expert faculty, best practices and other online learning resources for people who are studying, teaching or working remotely;

g) European Committee for Standardization and the European Committee for Electrotechnical Standardization, which in collaboration with their members made freely available certain copyrighted European standards for certain medical devices and personal protective equipment.

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[28] Intellectual Property Office of Singapore, *op.cit.*.

[29] Aamer Baig, Bryce Hall, Paul Jenkins, Eric Lamarre, and Brian McCarthy, *The Covid-19 recovery will be digital: A plan for the first 90 days*, 2020, https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/the-covid-19-recovery-will-be-digital-a-plan-for-the-first-90-days (accessed on 19.03.2021).

[30] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 3, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[31] https://www.afnor.org/actualites/masque-barriere-france-international/ (accessed on 19.03.2021).

[32] Open Covid Pledge, *Make the pledge to share your intellectual property in the fight against Covid-19*, https://opencovidpledge.org/ (accessed on 19.03.2021).

Regarding the procedures for isolation, testing and treatment of every case of Covid-19[33], there were also developed and used contact tracing applications[34] and body temperature devices, which have played a major role in the prevention of the spread of the virus among the citizen of China, Singapore, and South Korea[3536]. Such applications and devices also started to be developed and used in other states, even in European Union, Canada, United States of America.

As previously mentioned, many businesses from many industries started to develop their activity remotely, through digital means in order to survive, the pandemic being therefore a wake-up call to businesses that have been slow to embrace digitalisation and to commercialise their intangible assets. In these times, the declaration of Margaret Vestager, EU Competition Commissioner, that "there are only two types of business: those that are digital and those that soon will be", is more applicable than ever that.[37]

Nowadays, "digitalisation and IP come hand in hand" taking into consideration that the technologies developed and used for remote activities are protected by copyright. Also, it is said that "governments should encourage businesses to embark on digitalisation, and should not only offer funding, but also make it easier for businesses to protect the IP rights created in the process of digitalisation."[38]

Even if the digitalisation has its positive aspects such as amplifying brand value, it also has negative aspects, such as making IP "more vulnerable to theft through greater ease of counterfeit and copying". Therefore, "understanding the value of IP assets and ensuring they are adequately protected will be essential for businesses going digital."[39]

2.2. Patents during Covid-19

According to art. 27 of the TRIPS Agreement, patents are available for any inventions, in all fields of technology under three conditions: (a) to be new, (b) to involve an inventive step and (c) to be capable of industrial application.

The first recorded patent in the world for an industrial invention was granted in 1421 in Florence to the architect and engineer Filippo Brunelleschi[40]. The patent gave him a three-year monopoly on the manufacture of a barge with hoisting gear used to transport marble. It appears that such privileged grants to inventors spread from Italy to other European countries during the next two centuries[41].

Patents are granted to incentivize innovation and "that incentive requires trust that those rights will be respected."[42]

Patents provide the IP right holder with a legal right to prevent other to making, using, selling, and importing that invention for a period of time and they are granted for inventions in any field of industry, but having in view the crisis we are facing, the patents in the medical field for devices, drugs, vaccines, and other health technologies are of most interest nowadays.

As we know, patent rights require public disclosure, and in the medical sector, they enable drug developers to identify partners with the right intellectual assets such as knowhow, platforms, compounds, and technical expertise. Without patents most of this valuable proprietary knowledge would be kept hidden as trade secrets, making it impossible for researchers to know what is out there.[43]

To support the inventors, many states have implemented accelerated patents examination

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[33] Dr Tedros Adhanom Ghebreyesus, Director - General of World Health Organisation - speech opening remarks at the Media Briefing on COVID-19, 13 March 2020 said "You can't fight a virus if you don't know where it is. Find, isolate, test and treat every case, to break the chains of transmission. Every case we find and treat limits the expansion of the disease.".

[34] World Health Organisation defined the contact tracing as "the process of identifying, assessing, and managing people who have been exposed to a disease to prevent onward transmission. When systematically applied, contact tracing will break the chains of transmission of an infectious disease and is thus an essential public health tool for controlling infectious disease outbreaks. For contact tracing to be effective, countries need adequate capacity, including human resources, to test suspect cases in a timely manner." For more details, please see *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing*, Interim Guidance, 28 May 2020, https://www.who.int/publications/i/item/WHO-2019-nCoV-Ethics_Contact_tracing_apps-2020.1 (accessed on 19.03.2021).

[35] Euronews, *Coronavirus Conundrum: COVID-19 Tracking Apps That Do Not Breach Privacy*, (television broadcast, dated 9 April 2020), https://www.youtube.com/watch?v=_goD-J96br0 (accessed on 19.03.2021).

[36] Jennifer Valentino-DeVries, *Translating a Surveillance Tool into a Virus Tracker for Democracies*, New York Times, 19 March 2020, https://www.nytimes.com/2020/03/19/us/coronavirus-location-tracking.html (accessed on 19.03.2021).

[37] Intellectual Property Office of Singapore, *op.cit.*.

[38] Intellectual Property Office of Singapore, *op.cit.*.

[39] Intellectual Property Office of Singapore, *op.cit.*.

[40] Isabelle Hyman, *Filippo Brunelleschi*, Encyclopedia Britannica, January 1, 2021. https://www.britannica.com/biography/Filippo-Brunelleschi (accessed on 19.03.2021).

[41] William Weston Fisher, *Patent*, Encyclopedia Britannica, May 27, 2019. https://www.britannica.com/topic/patent (accessed on 19.03.2021).

[42] Christopher Stothers, Alexandra Morgan, *IP and the supply of Covid-19-related drugs*, Journal of Intellectual Property Law & Practice, Volume 15, Issue 8, August 2020, p. 590, https://doi.org/10.1093/jiplp/jpaa114 (accessed on 19.03.2021).

[43] Philip Stevens, Mark Schultz, *op. cit.*.

procedures, known also as „fast-track" procedures, among such states being[44]:

a) Brazil – for patent applications related to innovations that can be used to fight Covid-19 from 7 April 2020 to 30 June 2021;

b) United States - for applicants which qualify for small and micro-entity status with respect to applications that cover a product or process that is subject to US Food and Drug Administration approval for use in the prevention and/or treatment of COVID-19;

c) Russia - applications for inventions and utility models in the field of technologies for combating viruses and associated diseases (such as pneumonia) without charging an additional fee.

2.2.1. History of the vaccine

Most of the pharmaceutical companies, when making development, research and releasing new drugs, medical equipment or vaccines on the market want to protect their IP rights taking into consideration the high costs involved by those activities.

From a legal point of view, the vaccines are protected by IP through the patents system.

At this moment, there exists in the market multiple vaccines approved by the competent authorities against the Covid-19. However, like always, people are divided in two groups: one group entrusting the vaccines and agreeing to be vaccinated in order to acquire the immunisation to Covid-19, the other one not entrusting them and refusing the vaccination, even if according to World Health Organization, the vaccines in general (i.e. which protect against at least 20 diseases, such as diphtheria, tetanus, pertussis, influenza and measles) save the lives of up to 3 million people every year[45].

According to the Cambridge Dictionary, the term "vaccine" is defined as "a substance containing a virus or bacterium in a form that is not harmful, given to a person or animal to prevent them from getting the disease that the virus or bacterium causes"[46]. Most of the vaccines are given by an injection, but some are given orally (by mouth) or sprayed into the nose[47].

The word "vaccine" comes from the name for a pox virus—the cowpox virus, *vaccinia*[48].

Edward Jenner is considered the founder of vaccinology in the West in 1796, after he inoculated a 13-year-old-boy with vaccinia virus (cowpox), and demonstrated immunity to smallpox, after he noticed that milkmaids infected with cowpox, which manifested itself as a series of pustules on the hand and forearms, were immune to the smallpox epidemics that regularly attacked the residents of his parish[4950]. In 1798, the first smallpox vaccine was developed. Over the 18th and 19th centuries, systematic implementation of mass smallpox immunisation culminated in its global eradication in 1979[51].

However, it is said that "the story of vaccines did not begin with the first vaccine of Edward Jenner, but that it begun with the long history of infectious disease in humans, and in particular, with early uses of smallpox material to provide immunity to that disease", the evidence showing that the Chinese employed smallpox inoculation as early as 1000 AD, being practices also in Africa and Turkey.[52]

After the first vaccine of Edward Jenner in 1798, the following vaccines have been developed[53]:

a) 1885 – the vaccine of Louis Pasteur against rabies, who appropriated the word "vaccine", permanently stretching its meaning beyond its Latin word associations with cows and cowpox virus[54];

b) 1923 – the method of Alexander Glenn to inactivate tetanus toxin with formaldehyde;

c) 1926 - the method of Alexander Glenn was used to develop the vaccine against diphtheria;

d) 1938 – the vaccine against tetanus;

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[44] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 6. https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

[45] World Health Organization, *Vaccines and immunisation: What is vaccination?*, December 2020, https://www.who.int/news-room/q-a-detail/vaccines-and-immunization-what-is-vaccination (accessed on 19.03.2021).

[46] Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/vaccine (accessed on 19.03.2021).

[47] World Health Organization, *Vaccines and immunisation: What is vaccination?*, December 2020, https://www.who.int/news-room/q-a-detail/vaccines-and-immunization-what-is-vaccination (accessed on 19.03.2021).

[48] Howard Markel, *The origin of the word „vaccine"*, Science Friday, 2015, https://www.sciencefriday.com/articles/the-origin-of-the-word-vaccine/ (accessed on 19.03.2021).

[49] Howard Markel, *op. cit.*

[50] For more details on the observations of Edward Jenner prior to creating the vaccine, please see Edward Jenner, *An Inquiry into the Causes and Effects of the Variolae Vaccinae. A Disease Discovered in Some of the Western Counties of England, Particularly Gloucestershire, and Known by the Name of the Cow Pox*, The Project Gutenberg eBook, 2009, http://www.gutenberg.org/files/29414/29414-h/29414-h.htm (accessed on 19.03.2021).

[51] The Immunisation Advisory Centre, *A brief history of vaccination*, https://www.immune.org.nz/vaccines/vaccine-development/brief-history-vaccination (accessed on 19.03.2021).

[52] The College of Physicians of Philadelphia, *The History of Vaccines*, https://www.historyofvaccines.org/timeline#EVT_101044 (accessed on 19.03.2021).

[53] For more information, please see Children's Hospital of Philadelphia, *Vaccine History: Developments by year*, 2019, https://www.chop.edu/centers-programs/vaccine-education-center/vaccine-history/developments-by-year# (accessed on 19.03.2021).

[54] Howard Markel, *op. cit.*.

e) 1948 – the vaccine against Pertussis;

f) 1955 – the vaccine of Jonas Salk against polio;

g) 1963 – the vaccine against measles;

h) 1967 - the vaccine against mumps;

i) 1969 - the vaccine against rubella;

j) 1985 – the vaccine against *Haemophilus influenzae* type b;

k) 1996 – the vaccine against varicella (chickenpox);

l) 1998 – the vaccine against rotavirus;

m) 2000 – the vaccine against hepatitis A;

n) 2001 - the pneumococcal vaccine;

o) 2002 – the vaccine against influenza;

p) 2014 - meningococcal serogroup B vaccine;

q) 2020 - the vaccine against Covid-19.

2.2.2. The role of the IP in innovation

Having in view the spread of the Covid-19, the vaccine is the only way for us to obtain the immunity against the virus and in the end to regain our freedom of movement and to start travelling again.

The WTO mentions in an information note from 15 October 2020 that „A full response to the Covid-19 crisis requires wide access to an extensive array of medical products and other technologies, ranging from protective equipment to contact tracing software, medicines and diagnostics, as well as vaccines and treatments that are yet to be developed. The way in which the IP system is designed – and how effectively it is put to work – can be a significant factor in facilitating access to existing technologies and in supporting the creation, manufacturing and dissemination of new technologies."[55]

The vaccine means innovation and for creating a vaccine many hours of research are invested, many researchers are involved, many technologies are used, many attempts and testing are made. Therefore, it results that creating a vaccine involves a lot of costs for the pharmaceutical companies, this being the main reason for which they want to protect it through the patents system. In addition, the protection under IP is the reward for the hard work of the people involved in research.

However, prior to having approved the vaccines against Covid-19, multiple international organizations, or non-governmental organisation wondered if the IP represented a barrier to access to the vaccines, especially in cases where "the innovation produces effective results, and (…) the countries are not able to obtain the innovation on appropriate and affordable terms"[56].

A response to the above situation is that one of the many roles of IP, especially in crisis, is "to provide an incentive framework in which innovation can be encouraged and provided with a safe passage through the many, often perilous, stages from invention to commercial product or service"[57], in other words the reward for the people making the hard work and on which the entire world counts on. We understand therefore the CEO of AstraZeneca who stated that: "I think IP is a fundamental part of our industry and if you don't protect IP, then essentially there is no incentive for anybody to innovate."[58] IP rights support the investments in research and development by giving the opportunity of a return.

2.2.3. Compulsory and voluntary licenses

Governments cannot simply cancel the patent rights, but in some situations, like crisis situations, there are legal possibilities to make available the patents to overcome that crisis.

Article 7 of the TRIPS Agreement describes the objectives of the IP system in terms of a balance of rights and obligations. The objectives refer to the protection and enforcement of IP rights in a manner which contributes to „the promotion of technological innovation", „the transfer and dissemination of technology" to the mutual advantage of both „producers and users of technological knowledge", and also „social and economic welfare". Article 8 states that members may adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development that are consistent with the provisions of the TRIPS Agreement"[59].

With application to a crisis such as the Covid-19, art. 30, 31 and 31bis of the TRIPS Agreement provide the member states with three situations in which patents rights may be restricted.

The first one regulated by art. 30 provides members states with the possibility to establish limited

[55] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 1, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

[56] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 1, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[57] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 2, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[58] Sarah Newey, *WHO patent pool for potential Covid-19 products is „nonsens", pharma leaders claim*, The Telegraph, 29.05.2020, https://www.telegraph.co.uk/global-health/science-and-disease/patent-pool-potential-covid-19-products-nonsense-pharma-leaders/ (accessed on 19.03.2021).

[59] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 8, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

exceptions to the exclusive rights conferred by a patent, under two conditions (a) that such exceptions do not unreasonably conflict with the normal exploitation of the patent and (b) do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties. Such situation may refer to[60]:

a) The exception for research and experimental – in such a case, the use of the patented product for scientific experimentation, during the term of the patent and without consent, is not an infringement. This exception enables researchers to examine the patented inventions and to conduct research on improvements without having to fear that they are infringing the patent;

b) The exception for regulatory view – which allows potential competitors to use a patented invention during the patent term without the consent of the patent owner for the purpose of obtaining marketing approval for a prospective generic product.

The second situation is regulated by art. 31 of the TRIPS Agreement and provide the member states with the possibility to allow the use of a patent without the authorisation of the right holder, including use by the government or third parties authorised by the government if the following conditions are cumulatively accomplished:

a) authorization of such use shall be considered on its individual merits;

b) in case of a **national emergency** or **other circumstances of extreme urgency** or in cases of public non-commercial use;

c) the scope and duration of such use shall be **limited to the purpose for which it was authorized**, and in the case of semi-conductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive;

d) such use shall be non-exclusive;

e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use;

f) any such use shall be authorized predominantly for the supply of the domestic market of the state authorizing such use;

g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances;

h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization;

i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that state;

j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that state;

k) where such use is authorized to permit the exploitation of a patent („the second patent") which cannot be exploited without infringing another patent („the first patent").

Such possibility is known as "compulsory license" which "allow rival companies to manufacture and sell generic versions of a patented drug, thus breaking the inventor's monopoly and keeping prices as low as possible."[61]

For example, the Romanian law on patents[62] offers in cases of national urgency, circumstances of extreme urgency (such as the pandemic of Covid-19) or in circumstances of public utility for non-commercial purposes the possibility that the Bucharest Court to grant a compulsory license at the request of any interest person if the following conditions are accomplished:

a) the license to be granted at the expiry of a four-year term from the filing date of the patent request or of a three-year term from the granting of the patent, being applicable the term which expires the latest – this means that compulsory licenses will only be relevant for older registered inventions which prove to be useful against Covid-19[63];

b) the granted license is non-exclusive;

c) the remuneration of the right holder is established based on the commercial value and granted licenses.

d) However, even if such possibility exists, Romania did not offer yet such compulsory license.

If we analyse the list created by the World Intellectual Property Organization[64], we will see that such possibility exists in many states, however only three states having granted them:

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[60] For more details, see World Trade Organization, *The TRIPS Agreement and Covid-19*. *Information note*, 2020, p. 1, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

[61] Abi Millar, *Intellectual Property in the time of Covid-19*, https://pharma.nridigital.com/pharma_jul20/intellectual_property_covid-19# (accessed on 19.03.2021).

[62] Law no. 64/1994 on patents republished on the Official Gazette Part I no. 613 / 2014.

[63] Christopher Stothers, Alexandra Morgan, *op. cit.*, p. 590.

[64] WIPO, *Covid-10 IP Policy Tracker*, https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/access (accessed on 19.03.2021).

a) Colombia, which through a Decree issued in March 2020 declared of public interest the drugs, medical devices, vaccines, and other health technologies that are used for diagnosis, prevention and treatment of Covid-19;

b) Israel, for the importation of generic versions of Abbvie's patents associated with lopinavir/ritonavir, branded as Kaletra;

c) Russia, for inventions related to the production of Remdesivir.

Among the entities which offered for free their patents we mention[65]:

a) the company Abbvie which voluntarily requested in Chile the cancellation of six of its patents related to the drugs Norvir (ritonavir) and Kaletra (ritonavir/lopinavir)[66];

b) Moderna, which announced that it will not enforce during the pandemic the patents for the vaccine against Covid-19 based on a messenger RNA[67];

c) Amazon Corporation, which announced that it will collaborate with the World Health Organization to supply advanced cloud technologies and technical expertise to track the Covid-19 virus, understand the outbreak, and better contain its spread;

d) Hewlett Packard Enterprise, which granted free access to all its patented technologies for the purpose of diagnosing, preventing, containing and treating Covid-19, including to supercomputing software and applications and compute and storage systems to advance diagnosis or treatment of Covid-19;

e) Novartis Corporation, which has made available a set of compounds from its libraries that it considers suitable for in vitro antiviral testing.

There are also companies which explored various forms of collaboration to speed up vaccine development, such as Pfizer who entered into a partnership with biotech company BioNTech, Sanofi who has teamed up with GSK to share technologies[68].

The third situation is regulated by art. 31bis of the TRIPS Agreement and provide that the condition regarding the use in the national market of the patent shall not apply for the purposes of production of a pharmaceutical product(s) and its export to another state which is least-developed or to another state that has made a notification of its intention to use this possibility, for example only in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. Therefore, it is ensured „a legal pathway for a country to permit the manufacturing of patented medicines under compulsory licence exclusively for export to countries with insufficient or no local manufacturing capacities in the pharmaceutical sector."[69]

Regarding the compulsory licenses, as usual, there are two groups: one supporting them, meaning the publication for free of the patent related to drugs, medical devices, vaccines, and other health technologies that are used for diagnosis, prevention, and treatment of Covid-19 and the other being against such idea. Among those supporting the free, compulsory licenses, we found the WTO, Costa Rica[70], India.

The group being against the waiving of the IP rights for drugs, medical devices, vaccines, and other health technologies that are used for diagnosis, prevention, and treatment of Covid-19 is arguing that:

a) "IP has not been an impediment to the common goal of ending this pandemic and rather has enabled the development of several medicines and vaccines that are now being tested for additional use in the fight against the COVID-19," and "we have never needed innovation so much as now"[71];

b) "this is probably the worst possible time to weaken IP, when biopharmaceutical companies are investing significantly and are taking many risks without any guarantee that their medicines or vaccines will make it past the finishing line"[72];

c) "far from being a barrier, IP is part of the solution", allowing "the innovator to control which partners manufacture the product, ensuring high quality

[65] WIPO, *Covid-19 Policy Tracker*, https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/voluntary-actions-text (accessed on 19.03.2021).

[66] National Office of Intellectual Property Chile, *Patents of experimental use drugs for Coronavirus are released in Chile*, 2020, https://www.inapi.cl/sala-de-prensa/detalle-noticia/liberan-en-chile-patentes-de-medicamentos-de-uso-experimental-para-coronavirus (accessed on 19.03.2021).

[67] „We feel a special obligation under the current circumstances to use our resources to bring this pandemic to an end as quickly as possible. Accordingly, while the pandemic continues, Moderna will not enforce our COVID-19 related patents against those making vaccines intended to combat the pandemic. Further, to eliminate any perceived IP barriers to vaccine development during the pandemic period, upon request we are also willing to license our intellectual property for COVID-19 vaccines to others for the post pandemic period." For more details, please see *Statement by Moderna on Intellectual Property Matters during the Covid-19 pandemic*, 2020, https://investors.modernatx.com/news-releases/news-release-details/statement-moderna-intellectual-property-matters-during-covid-19 (accessed on 19.03.2021).

[68] Abi Millar, *op. cit.*

[69] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 10, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

[70] Sarah Newey, *op. cit.*

[71] James Bacchus, *An unnecessary proposal. A WTO waiver of Intellectual Property Rights for Covid-19 Vaccines*, Free Trade Bulletin, 2020, no. 78, p. 3, https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines (accessed on 19.03.2021).

[72] Abi Millar, *op. cit.*

supplies, and to maximise low-cost access for low and middle-income countries.", the TRIPS waiver, being the "wrong approach" because COVID-19 therapeutics and vaccines are complex biological products in which the main barriers are production facilities, infrastructure, and know-how. "IP is the least of the barriers"[73];

d) "every researcher, scientist, business owner relies on a patent to put a great idea on paper. Patents also have many benefits: They prevent good ideas from being stolen; they help formalize developing economies by encouraging cooperation between government and the private sector; they encourage increased investments in biomedical and biopharmaceutical research; and they reward the hard work of inventors and creators everywhere ensuring (…) that better medicines are on the way"[74];

e) "the private research and development business model, underpinned by IP rights, has been foundational to most of the existing treatments that are now being tested for coronavirus. It has also enabled companies to make bold investments in research and development for new products;

f) "generally speaking, nearly 70% of research and development is funded by the commercial sector, while around 30% is funded by the State. Around 70% of research and development is also performed by the commercial sector and 30% by the State. An effective strategy or approach to encouraging innovation must ensure that the right incentives are in place to encourage the major funders and performers of research and development to deliver results. IP is a central part of those incentives."[75]

In addition, others mention that „With the belief that medicines should be "public goods," there is literally no support in some quarters for the application of the WTO TRIPS Agreement to IP rights in medicines. Any protection of the IP rights in such goods is viewed as a violation of human rights and of the overall public interest. This view, though, does not reflect the practical reality of a world in which many medicines would simply not exist if it were not for the existence of IP rights and the protections they are afforded."[76]

After vaccines against Covid-19 were created and were in process of authorization, as of 21st December 2020 existing 219 vaccines[77], the group supporting the IP rights concluded that "this major achievement is a testament to how well the IP system has worked during the pandemic" and that "the existence of multiple vaccines means there is no Covid-19 vaccine "monopoly", and minimal risk of premium pricing."[78]

2.3. Designs during Covid-19

The designs are also important IP rights, including during Covid-19, when lots of products used by medical staff are protected under the design system.

Just like in case of works protected by copyright and products protected by patents, the creators of designs also made available for free their creation for fighting against Covid-19. For instance[79]:

a) an anaesthesiologist from Taiwan, designed an "aerosol box" to protect medical personnel when performing endotracheal intubations and made his design available for use by others under a Creative Commons license, being free of charge to the public on condition that it is not used for commercial purposes and be properly attributed to the inventor[80];

b) producers from fashion industry from Taiwan made a design for a protective suit to be used by medical personnel and made it accessible for replication by uploading it online, being after that used in Australia, Egypt, Mexico, Morocco, Botswana, Thailand, etc.[81];

c) Medtronic Corporation, which made freely available the design specifications and software for their ventilator under the trademark Puritan Bennett 560 (PB560)[82];

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[73] Philip Stevens, Mark Schultz, *op. cit*.

[74] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 4, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[75] WIPO, *Some Considerations on Intellectual Property, Innovation, Access and COVID-19*, 2020, p. 4, https://www.wipo.int/export/sites/www/about-wipo/en/dg_gurry/pdf/ip_innovation_and_access_24042020.pdf (accessed on 19.03.2021).

[76] James Bacchus, *op. cit.*

[77] Philip Stevens, Mark Schultz, *op. cit.*

[78] Philip Stevens, Mark Schultz, *op. cit.*

[79] WIPO, *Covid-19 Policy Tracker*, https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/voluntary-actions-text (accessed on 19.03.2021).

[80] ABC Mundial, *Taiwanese doctor creates cheap protective device amid coronavirus crisis*, March 2020, https://abcmundial.com/en/2020/03/22/asia/technology/taiwanese-doctor-creates-cheap-protective-device-amid-coronavirus-crisis apud. Ma. Sophia Editha Cruz – Abrenica, Renson Louise Yu, *IP in the Time of Covid-19: Limiting IP rights for Covid-19 Solutions*, 2020, https://www.lexology.com/library/detail.aspx?g=f681793e-f830-40a7-988c-13d7b689d792 (accessed on 19.03.2021).

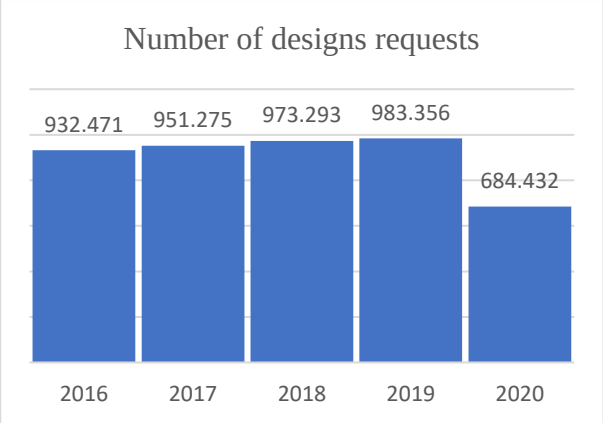
[81] Joaquin Singson, *In focus: How Mich Dulce's PPE Designs Are Saving Lives Across The World*, April 2020, https://lifestyle.abs-cbn.com/articles/8621/mich-dulce-ppe-design apud. Sophia Editha Cruz – Abrenica, Renson Louise Yu, *IP in the Time of Covid-19: Limiting IP rights for Covid-19 Solutions*, 2020, https://www.lexology.com/library/detail.aspx?g=f681793e-f830-40a7-988c-13d7b689d792 (accessed on 19.03.2021).

[82] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 4, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

d) General Motors, which made available its designs specifications for masks to the Original Equipment Suppliers Association and the Michigan Manufacturers Association;

e) Smiths Technology, which has made available one of its ventilators for other manufacturers to produce as part of a coordinated attempt to tackle a shortage of live-saving equipment as Covid-19 spreads.

To make an analysis of the impact of Covid-19 on design rights, we will present the situation of design applications during the period 2016 – 2020, which is the following[83]:



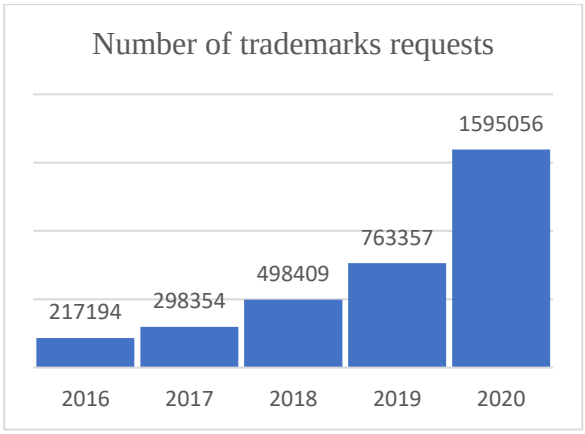
Analysing the above situation, we may notice that in the years prior to Covid-19 pandemic, the number of designs applications was constant, while in 2020, the year when the pandemic started, the number of designs applications decreased with 30,39% compared to 2019.

2.4. Trademarks during Covid-19

According to art. 15 of the TRIPS Agreement, a trademark is represented by any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings.

The first recorded trademark in the world is the Czech beer trademark PILSNER from 1859 which is still in force and since then until 23.03.2021, there were 28.418.372 registered trademarks all over the world[84].

Regarding the applications of trademarks during the period 2016 - 2020, the situation is the following[85]:



Analysing the above situation, we may notice that in the years prior to Covid-19 pandemic, the number of trademarks increased year-on-year with less than 50%, but the biggest increase was in 2020, the year when the pandemic started, when the number of trademarks applications increased by more than 100% compared to 2019.

According to the European Union Intellectual Property Office database, 90.567 applications out of the total number of applications in 2020 were for pharmaceutical products.

According to WTO[86], to monitor Covid-19-related trademark applications, some members have introduced guidance for IP offices, other members are offering assistance to trademark registration applicants. For example:

a) Australia –implemented the Trade Mark Covid-19 Helpline which supports and assists small to medium Australian businesses that are having to quickly adapt to changing circumstances due to Covid-19;

b) China - introduced guidance to increase the monitoring or investigation of certain trademark applications related to Covid-19;

c) Chinese Taipei - produced a list of the names of pandemic prevention products and services and is offering a fee reduction with respect to trademark applications which designate goods or services identical to those on the list. In addition, the IP office launched a trademark consultation hotline in order to assist applicants with trademark searches;

d) United States - launched the Prioritized Examination Program for certain trademark and service mark applications, which allows COVID-19-related

[83] The data is filled by using the Design View database kept by the European Union Intellectual Property Office to which 71 IP Offices are members.

[84] The data is filled by using the TM View database kept by the European Union Intellectual Property Office to which 71 IP Offices are members.

[85] The data is filled by using the TM View database kept by the European Union Intellectual Property Office to which 71 IP Offices are members.

[86] World Trade Organization, *The TRIPS Agreement and Covid-19. Information note*, 2020, p. 7, https://www.wto.org/english/tratop_e/covid19_e/trips_report_e.pdf (accessed on 19.03.2021).

trademark applications to be prioritized and immediately assigned for examination.

There are voices which suggest that big clothing manufacturers (or fashion companies) must take a step to comply with their duty obligation in a way of not relying anymore on force majeure and not to exit from agreements with companies located to low-cost developing countries having in view that the big clothing manufacturers "rely on trademark licensing to outsource the manufacturing of their garments to low-cost developing countries"[87].

2.5. Measures taken by the IP Offices

To support the applicants in the process of trademark, design, patents registration, but also the holders of registered trademarks, designs, patents during the Covid-19 crisis in 2020, the governments have issued regulations extending the time limits, the deadlines for payment of fees and also have started to work remotely and received online applications[88]. For example, WIPO adapted its work process to ensure continued delivery of its IP services, the official meetings being moved to hybrid and virtual modes and offering a wide range of webinars with information about its services and IP in general[89].

3. Conclusions

This study had the purpose to present how the Covid-19 affected the IP and if people (e.g. individual creators, businesses) remained interested in protecting and defending their rights related to their creations.

Our conclusion is that even if the humanity is facing a pandemic, lockdowns having and still being instated in many countries, we may see that the IP remained alive, still making part of our lives and the rights related to it being also in force, in principle due to the efforts of many people involved in research and development, in creative industries, in technology industries and who try every day to defend and to keep applicable the rights related to IP.

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[87] Irene Calboli, *Trade mark licensing and Covid-19: why fashion companies have a duty to comply with their legal obligation*, Journal of Intellectual Property Law & Practice, Volume 15, Issue 7, July 2020, Pages 489–490, https://doi.org/10.1093/jiplp/jpaa088 (accessed on 19.03.2021).

[88] For information about each state, please see WIPO, *Covid-19 Policy Tracker*, https://www.wipo.int/covid19-policy-tracker/#/covid19-policy-tracker/voluntary-actions-text (accessed on 19.03.2021).

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TRADE NAMES IN THE TRADEMARK REGIME: COMEBACK OF THE FORGOTTEN TWIN?

Paul-George BUTA*

Abstract

Just like Venus, once considered Earth's twin and largely forgotten for more than 50 years, was back in the spotlight after an unexpected discovery, trade names, left in the shadows by their more successful 'twin' – trademarks, are surprisingly mentioned in the latest EU trademark Directive. Could this be the premise for a comeback of the forgotten right? We briefly analyze the position of trade names in the trademark regime before the new trademark Directive and the changes brought by the new EU act. Looking at the case-law and literature related to the previous regime, we argue that the premise the new regime was based on (in what concerns the interference between trade names and trademarks) is not accurate and that, as a consequence, an imbalance in the relative protection of these rights has been created. We propose that the appropriate remedy is the adopting, at the national level of the EU Member States, of specific legislation concerning the protection of trade names. Fortuitously, this would also allow some EU Member States to discharge an international obligation neglected for over a century.

Keywords: *trade name, trademark, industrial property, overlapping rights, interference of rights, EU law, Paris Convention.*

1. Introduction

"Every time the long-forgotten people of the past are remembered, they are born again!" ― Mehmet Murat Ildan

1.1. The Forgotten Twin

On 14 September 2020, news that phosphine (PH3), an organic compound "only associated [on Earth] with life that does not need oxygen to survive (anaerobic microbes)",[1] was detected in the clouds on Venus[2] has prompted a flurry of interest in developments related to our planet's closest neighbor.[3]

This was unusual because general interest in Venus had waned since the 80s.[4] This happened because while Hollywood movies in the 60s (among the last of which was Curtis Harrington's 1965 film, "Voyage to the Prehistoric Planet", a rip-off of the Soviet 1962 film "Planeta Bur", with Harrington's film itself being remade into Peter Bogdanovich's 1968 "Voyage to the Planet of Prehistoric Women", featuring a bikini-clad Mamie van Doren as leader of the Venusians) revealed a general perception of Venus as a jungle-covered planet, the Soviet Venera 3 probe of 1965 and the NASA Mariner 5 mission of 1967 revealed a surface temperature of 460 degrees Celsius which clearly excluded any type of life on the surface of Venus.[5]

Previously dubbed "Earth's twin", Venus had become just a non-interesting uninspiring hot rock with no chances of supporting extraterrestrial life and consequently was, for a long time, forgotten to all but a handful of scientists who continued to look to Venus to find out why the planet has evolved in the way it has and what implications they can draw from that with regard to the evolution of conditions on Earth.

1.2. The Forgotten Right

Trade names were, just like Venus in the 60s, of significant interest at the end of the 19th century.

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[1] Planetary News, „Phosphine in Venus' Atmosphere Could Indicate Life in the Clouds", *https://www.lpi.usra.edu/planetary_news/2020/09/21/phosphine-in-venus-atmosphere-could-indicate-life-in-the-clouds/*, accessed on 7 May 2021.

[2] Jane S. Greaves and Anita M. S. Richards and William Bains and Paul B. Rimmer and David L. Clements and Sara Seager and Janusz J. Petkowski and Clara Sousa-Silva and Sukrit Ranjan and Helen J. Fraser, „Recovery of Spectra of Phosphine in Venus' Clouds" *arXiv preprint arXiv:2104.09285* (2021).

[3] Shortest distance from Earth to Venus is about 38 million km, while shortest distance to Mars is about 55 million km – Ms. O'Brien's Blog, „Shortest Distance from Planets to Earth", *https://blogs.socsd.org/aobrien/science-2/curiosity-rover/shortest-distance-from-planets-to-earth/*, accessed on 7 May 2021.

[4] Abigail Beall, „Race to Venus: What we'll discover on Earth's toxic twin", in *Science Focus*, 16 January 2020, *https://www.sciencefocus.com/space/race-to-venus-what-well-discover-on-earths-toxic-twin/*, accessed on 7 May 2021.

[5] Nole Tayler Redd, „Venus, once billed as Earth's twin, is a hothouse (and a tantalizing target in the search for life)", in *Space.com, https://www.space.com/venus-earth-twin-evolution-life-search.html*, accessed on 7 May 2021.

Although some legal provisions for the protection of trade names had been instituted in some countries in the mid-1800s (notably in France where a special law for the protection of the manufacturer's name had been adopted in 1824), a protection of trade names at the international level was felt to be needed.[6]

In fact, at that time, trade names were argued to be "first among trademarks",[7] subject to a "special property right", governed by natural international law, unlimited in time, not subject to any kind of estoppel and protected without need for any deposit or other formality.[8]

Thus, it is not surprising that trade names were on the agenda of international industrial property law protection ever since the principles that would ground the first ever international agreement on the subject (the 1883 Paris Convention for the Protection of Industrial Property) were drafted at the 1878 Trocadero Congress.[9]

Equally unsurprising is the fact that said Convention specifically provided for the international protection of trade names by means of article 8, which reads: "A trade name shall be protected in all the countries of the Union without the obligation of filing or registration, whether or not it forms part of a trademark."

What is surprising, on the other hand, are the fact that this provision has suffered no major amendment in nearly 140 years[10] and that, in those 140 years, little research seems to have been undertaken in respect of this "first among trademarks" right relative to the significant interest raised by its 'twin' right, i.e., the 'regular' trademark right.

Just like Venus became uninteresting when the expectations as to how the planet was like were contradicted by the scientific findings, trade names have been relegated to the far background of the industrial property law debate when trademarks have become the better preferred means of securing protection for the purpose of distinguishing the economic output and activity of traders worldwide.

2. Trade names in the trademark regime

2.1. Trade names and trademarks prior to the new Trademark Directive

Trade names were not mentioned as such in the First Trademark Directive[11] nor in the 2008 Trademark Directive.[12]

The interferences between prior trade names and trademarks were dealt with under article 4 par. (4), letters (b) and (c) of the two Directives,[13] and, with regard to maintenance of prior use of "an earlier right which only applies in a particular locality" in article 6 par. (2).

In the parallel system of the Community Trademark (as it then was), these provisions were mirrored by article 8 par. (4)[14] and article 53 par. (2) of Regulation 207/2009[15] while the maintenance of prior use was dealt with in article 111. Important mention should be made of the fact that, under the CTM system, the prior right to a sign "used in the course of trade of more than mere local significance" could only be

[6] Count of Maillard de Marafy, „Rapport presenté au nom de la section des marques de fabrique et de commerce" in Ministére de l'agriculture et du commerce, *Congrés international de la propriété industrielle tenu a Paris du 5 au 17 septembre 1878*, Imprimerie Nationale (Paris – 1879), p. 101.

[7] Conclusions of Jules Pataille, attorney for the appelants, in *Veuve d'Étienne-Beissel et fils v. Selckinghaus et Roger et C^ie*, Paris Court of Appeals, 20 December 1878 in *Annales de la propriété industrielle, artistique et littéraire*, tome XXIII/1878, pp. 337-351.

[8] Jules Bozérian, Commentary on *Veuve d'Étienne-Beissel et fils v. Selckinghaus et Roger et C^ie*, French Court of Cassation, 13 January 1880 - *Annales de la propriété industrielle, artistique et littéraire*, tome XXV/1880, pp. 126-132.

[9] Ministére de l'agriculture et du commerce, *Congrés international de la propriété industrielle tenu a Paris du 5 au 17 septembre 1878*, Imprimerie Nationale (Paris – 1879), pp. 360-361.

[10] Only the words „or registration" were added at the Hague revision conference of 1925.

[11] First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, *OJ* L 040/11.02.1989.

[12] The text was substantially identical in the two directives: „4. Any Member State may, in addition, provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where, and to the extent that: [...] (b) rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark, and that non-registered trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark; (c) the use of the trade mark may be prohibited by virtue of an earlier right other than the rights referred to in paragraph 2 and point (b) of this paragraph and in particular: (i) a right to a name; (ii) a right of personal portrayal; (iii) a copyright; (iv) an industrial property right;"

[13] Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, *OJ* L 299/8.11.2008.

[14] With the amendment that the sign opposed be "used in the course of trade of more than mere local significance".

[15] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, *OJ* L 78/24.03.2009 which codified the first Community Trademark Regulation, Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, *OJ* L 11/14.01.1994, p. 1 which contained the same provisions with the same numbering, except for the maintenance of prior use which was provided for in article 107 in the initial Regulation.

invoked in trademark annulment proceedings and not in opposition proceedings.[16]

EU courts have established that the "use in commerce" and "more than of mere local significance" (where applicable) are to be evaluated according to Community law standards while the "anteriority" and "right to prohibit use of the mark" conditions are to be assessed by reference to applicable national law.[17] In respect if which is the applicable national law, the EU court has indicated that this refers to the "law governing the sign relied on."[18] Without going into details, by application of article 8 of the Paris Convention, in respect of the existence and anteriority of the right to the trade name, the law of the state where the right is claimed to have been born should be applied while, in respect of the possibility that, claiming under such right, a prohibition of use of the mark is possible, application of the law of the state where protection is sought ought to apply. Mention should also be made of the fact that article 8 of the Paris Convention does not have direct horizontal effect between parties in the same Member State.[19]

Though the condition for the trade name to be used in commerce (mention should be made that the assessment of the conditions is made by reference to the deposit/priority date of the posterior trademark concerned)[20] is not subject to the strenuous test of the "effective use" for trademarks,[21] the "attempt to obtain an economic advantage" criterion requires more than use in income statements and invoices unrelated to the sale of goods or services to customers.[22]

The condition (only applicable under the CTM Regulation) that the sign be of more than mere local significance requires an *in concreto* assessment of the geographic scope of use (which needs to not be limited to a reduced part of the relevant territory, from the perspective of interested third parties)[23] and of the economic dimension of the use (showing the impact of that sign on the territory where used as a distinctive sign),[24] mere fact that the right is protected on a national scale or that it is used for a mail order business or proof of registration with the Trade Registry and use in catalogues is not sufficient *per se* to satisfy this condition.[25]

Anteriority of the trade name is, usually, closely linked with its use (also on account of the application of article 8 of the Paris Convention) and its birth is assessed by reference to the law of the state where such trade name is first protected.

Meeting the last condition (prior right allows the owner to prohibit use of posterior trademark) seems to be the most difficult to meet since this condition (when involving trade names) relies on the national law of the state where protection is sought (in what CTMs are concerned, due to their unitary character, this is usually the same state where protection was obtained, if an EU Member State). The EU Courts have held that, for such condition to be met, the owner would need to show that "the sign at issue is within the scope of the law of the relevant Member State and that it allows prohibiting use of the more recent trademark",[26] thus requiring proof "not only that this right arises under the national law, but also the scope of that law."[27] Therefore the owner

[16] Guy Tritton, Richard Davis, Michael Edenborough, James Graham, Simon Malynicz, Ashley Roughton *Intellectual Property in Europe*, 3rd ed., Sweet & Maxwell (London – 2008), p. 347.

[17] TEU, *Alberto Jorge Moreira da Fonseca, Lda v OHIM (intervening: General Óptica SA*) (T-318/06-T-321/06), decision of 24 March 2009 in *ECR* 2009-II, p. 663, par. 33.

[18] Idem, par. 34.

[19] See *Camper, SL v Office for the Harmonization of the Internal Market (OHIM), JC AB (intervening)* (T-43/05), Decision of 30 November 2006 in ECR 2006 II-95; *Galileo International Technology LLC et al v Commision of the European Communities* (T-279/03), Decision of 10 May 2006 in *ECR* 2006 II-1296; TEU, *Conceria Kara Srl v OHIM* (*intervening: Dima – Gida Tekstil Deri Insaat Maden Turizm Orman Urünleri Sanayi Ve Ticaret Ltd Sti*) (T-270/10), Decision of 3 May 2012 ECLI:EU:T:2012:212, par. 70.

[20] OHIM, 1st Board of Appeal, *WIT-SOFTWARE, CONSULTORIA E SOFTWARE PARA A INTERNET MÓVEL, S.A. v CONSTRULINK, TECNOLOGIAS DE INFORMAÇÃO, S.A.* (R 1059/2013-1), Decision of 6 March 2014, par. 49.

[21] See TEU, *Construcción, Promociones e Instalaciones, SA v OHIM* (*intervening: Copisa Proyectos y Mantenimientos Industriales SA*) (T-345/13), Decision of 4 July 2014 (unpublished), par. 43 and par. 44 referencing TEU, *Raffaello Morelli v OHIM* (*intervening: Associazione nazionale circolo del popolo della libertà* and *Michela Vittoria Brambilla*) (T-321/11 și T-322/11), Decision of 14 May 2013 (unpublished), par. 33; TEU, *Grain Millers, Inc. v OHIM* (*intervening: Grain Millers GmbH & Co. KG*) (T-430/08), Decision of 9 July 2010 in *ECR* 2010-II, p. 145, par. 30, 40, 41 and 45.

[22] See TEU, *Construcción, Promociones e Instalaciones, SA v OHIM* (*intervening: Copisa Proyectos y Mantenimientos Industriales SA*) (T-345/13), Decision of 4 July 2014 (unpublished), par. 49-50.

[23] TEU, *Alberto Jorge Moreira da Fonseca, Lda v OHIM (intervening: General Óptica SA*) (T-318/06-T-321/06), decision of 24 March 2009 in *ECR* 2009-II, p. 663, par. 37.

[24] Idem, par. 38.

[25] Idem, par. 39. See also TEU, *K-Mail Order GmbH & Co. KG v OHIM* (*intervening: IVKO Industrieprodukt-Vertriebskontakt GmbH*) (T-279/10), Decision of 14 September 2011 in *ECR* 2011-II, p. 283, par. 23, 27. However use for one import operation and is a press release and press article, being means of advertising are enough – TEU, *Grain Millers, Inc. v OHIM* (*intervening: Grain Millers GmbH & Co. KG*) (T-430/08), Decision of 9 July 2010 in *ECR* 2010-II, p. 145, par. 43.

[26] CJEU, *Peek & Cloppenburg KG (Dusseldorf) v OHIM* (*intervening: Peek & Cloppenburg KG (Hamburg)*) (C-325/13), Decision of 10 July 2014 (unpublished), par. 47.

[27] TEU, *macros consult GmbH – Unternehmensberatung für Wirtschafts- und Finanztechnologie v OHIM* (*intervening: MIP Metro Group Intellectual Property GmbH & Co. KG*) (T-579/10), Decision of 7 May 2013 (unpublished), par. 62.

of the prior right to a trade name would need to provide "not only with particulars showing that he satisfies the necessary conditions, in accordance with the national law of which he is seeking application, [...], but also particulars establishing the content of that law."[28]

Moreover, in order to use the trade name as a prior right to bar registration to a more recent trademark, use in commerce of the trade name ought to be proved for all products or services for which the bar is sought.[29]

Where the reliance on applicable national law is proven, the test provided for in that law is applied.[30] This is usually a risk of confusion test[31] but can also be a passing off test.[32]

The lack of specific national law provisions with regard to protection of trade names and the unclear protection conferred by article 8 of the Paris Convention (cumulated with the doubts as to the horizontal effect of the latter's provisions) has proven a high hurdle in the willingness to oppose prior trade names to the registration of later trademarks.

Thus, although the interpretation on assessment of the use in commerce and priority conditions seem to give trade names an advantage over trademarks, the "more than of mere local significance" criterion (only applicable where CTMs are concerned) and, even more so, the possibility to prohibit use of a later trademark criterion, seem to have deterred only but the most resolute from basing their attacks on trademarks on prior trade names.

It is equally true that the reverse also holds true: cases where owners of a prior trademark have sought to prohibit use of a later trade name appear to have been even more rare.

Also, neither the two Directives nor the two CTM Regulations have provided, expressly, that the rights conferred by the trademark would allow its owner to prohibit use of a later trade name.

The Court of Justice of the European Union was very clear in its analysis of the interference in this direction when, in *Céline*,[33] it held that such interference would fall under the 'regular' scope of the rights of the trademark owner, provided by article 5 par. (1) of the Directives (corresponding to art. 9 par. (1) of the CTM Regulations), with four conditions to be cumulatively met: (1) the trade name was used in commerce; (2) the trade name was used without the consent of the trademark owner; (3) the trade name was used for products/services identical[34] to the ones the trademark was registered for; and (4) use of the trade name affects/is likely to affect the functions of the trademark, especially its essential function of guaranteeing to consumers the commercial source of the products/services.

"Use for products/services" was considered to include application of the trade name to products but also use in such a manner so as to establish a link between the trade name and the products/services marketed by the owner of the trade name.[35] The court did point out, however, that use for purposes other than distinguishing between products/services would fall under the provisions of article 5 par. (5) of the Directives.[36]

Where article 5 par. (5) is deemed applicable, the EU courts have held that national law is wholly responsible for providing whether trademark proprietors can obtain redress from such use being made of later trade names.[37] AG Sharpston has argued, in her conclusions in *Céline*, that such protection can however only be afforded under national law "where use of the sign is without due cause and takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark."[38]

The above seem to show that, under the previous EU harmonized trademark regime, the possibility of a prior trademark owner to prohibit later use of a trade name was limited to situations where the trade name was used as a trademark (and therefore infringement was assessed under the 'regular' scope of trademark rights as per the provisions of article 5 par. (1)) or, if not the case, was wholly dependent upon specific

[28] CJEU, *Edwin Co. Ltd v OHIM* (*intervening:Elio Fiorucci*) (C-263/09), Decision of 5 July 2011 in *ECR* 2011-I, p. 5853, par. 50.

[29] TEU, *Fundação Calouste Gulbenkian v OHIM* (*intervening: Micael Gulbenkian*) (T-541/11), Decision of 26 June 2014 (unpublished), par. 43-44.

[30] TEU, *Olive Line International, SL v OHIM* (*intervening: Reinhard Knopf*) (T-485/07), Decision of 14 September 2011 in *ECR* 2011-II, p. 280, par. 56.

[31] See TEU, *Fercal – Consultadoria e Serviços, L^da v OHIM* (*intervening: Jacson of Scandinavia AB*) (T-474/09), Decision of 24 January 2013 (unpublished) – confirmed by the CJEU (C-159/13), Order of 12 December 2013.

[32] See TEU, *Tresplain Investments Ltd v OHIM* (*intervening: Hoo Hing Holdings Ltd*), Decision of 9 December 2010 in *ECR* 2010-II, p. 5659.

[33] CJEU, *Céline SARL v Céline SA* (C-17/06), Decision of 11 September 2007 in *ECR* 2007-I, p. 7041.

[34] The court in Céline was tasked with analyzing infringement under article 5 par. (1) (a) of the Directives, which presupposes double identity. The same conditions (alongside the additional test for likelihood of confusion) would apply if article 5 par. (1) (b) was claimed under, as literature has suggested – the indicated authors arguing that activities indirectly related to products/services could be qualified as retail services and would require that the analysis be made pursuant to the provisions of article 5 par. (1) (b) anyway: Spyros Maniatis, Dimitris Botis *Trade Marks in Europe: A Practical Jurisprudence*, 2nd ed., Sweet & Maxwell (London – 2010), p. 521.

[35] CJEU, *Céline SARL v Céline SA* (C-17/06), Decision of 11 September 2007 in *ECR* 2007-I, p. 7041, par. 22, 23.

[36] Idem, par. 20.

[37] CJEU, *Robelco NV v Robeco Groep NV* (C-23/01), Decision of 21 November 2002 in *ECR* 2002-I, p. 10913, par. 35.

[38] Opinion of AG Sharpston in CJEU, *Céline SARL v Céline SA* (C-17/06), Opinion of 18 January 2007, par. 41.

additional protection being granted under national law, itself limited to those situations where use of the trade name was deemed to be made "without due cause" and "taking unfair advantage or being detrimental to the distinctive character/repute of the trademark".

One could conclude that, under the previous trademark regime, interferences between trade names and trademarks were exceptional as a result of both law and practice and therefore trade names could be mostly left to the realm of theoretical research.

2.2. Trade names and trademarks in the new Trademark Directive

Given the above, publication of the new Trademark Directive[39] was akin to the finding of phosphene on Venus. Preamble 27 of the Directive includes the following statement: "In order to create equal conditions for trade names and trade marks against the background that trade names are regularly granted unrestricted protection against later trade marks."

While the statement could hold true in theory (meaning that, should national law of the Member States provide for such protection, this would not be restricted under EU law), the statement by itself seems to suggest that, somehow, trade names had regained their "first among trademarks" status and became a strong right trademark applicants were facing against.

We could not identify the evidence for this in the *travaux preparatoires* of the Directive. In fact, the very identical proposition exists ever since the Proposal for the Directive was adopted by the European Commission on 27 March 2013.[40] The Commission indicates at its "Detailed explanation of the proposal" that, given the judgment of the CJEU in *Céline*, which held that "Article 5(1) of the Directive is applicable where the public considers the use of a company name as (also) relating to the goods or services offered by the company", "It is therefore appropriate to treat trade name use of a protected trade mark as an infringing act, if the requirements of use for goods or services are met."

Preamble 20 of the Proposal then goes on to state that "Infringement of a trade mark should also comprise the use of the sign as a trade name or similar designation as long as the use is made for the purposes of distinguishing goods or services as to their commercial origin." Preamble 25 continues to the effect that "The exclusive rights conferred by a trade mark should not entitle the proprietor to prohibit the use of signs or indications which are used fairly and in accordance with honest practices in industrial and commercial matters. In order to create equal conditions for trade names and trade marks against the background that trade names are regularly granted unrestricted protection against later trade marks, such use should be considered to include the use of one's own personal name."

The text of the Directive itself was proposed to be amended so as to specifically include "using the sign as a trade or company name or part of a trade or company name" as one of the infringing acts which can "in particular" be prohibited by the trademark proprietor and the amendment of the provisions on limitation of the effects of a trademark in what concerns use of the "own name" to specifically only apply in respect of the "personal name".

These proposals were unchallenged during the legislative procedure and were incorporated with only minor alteration in the final text of the new Directive. One change that is notable (personal name was finally enacted as name of the third party, where that third party is a natural person) is the elimination of the reference to "distinguishing goods or services as to their commercial origin" in preamble 20, which has lost, in its final version, the "as to their commercial origin" part, thereby potentially opening the door to the finding of infringement where trademark functions other than the indication of commercial origin are deemed affected by use of the trade name. We believe that this possibility already existed, at least in theory, after *Céline*, as the fourth condition under the test there provided for required that use of the trade name affects/is likely to affect the functions of the trademark, *especially* its essential function of guaranteeing to consumers the commercial source of the products/services.

The Directive therefore appears to have codified existing case-law (the *Céline* criteria) in respect of the possibility of trademark owners to pursue use of later trade names where these later trade names are used (1) without the trademark proprietor's consent, (2) in the course of trade, and (3) in relation to goods or services, provided that the additional conditions under article 10 par. (2) are also met.

The new Directive also makes clear that protection is also conferred vis-à-vis identical and similar trade names where the trade name is used for products/services that are identical, similar or different from those for which the trademark is registered but, in the latter case, only where the prior trademark "has a reputation in the Member State", (2) use of that trade name is without due cause, and (3) that use takes unfair

[39] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, *OJ* L 336/23.12.2015.

[40] European Commission, Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast), (COM/2013/0162 final), 27 March 2013.

advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

The change to the limitations to the effects of trademarks is, however, a roll-back on the findings of the CJEU in *Anheuser-Busch*[41] where the court held the limitation to also cover use of a trade name.

This has left, as literature has stated, a narrow, if at all existent space, for the holder of a trade name "to use the sign in an area where conflicts may occur."[42]

The modifications were also mirrored by the new European Union Trademark Regulation.[43]

The changes reflect an enhancement to the position of earlier trademarks when in conflict with later trade names,[44] with some commentators also arguing that the inclusion of article 9 (3) d) to the EUTM Regulation would allow trademark proprietors to overcome the hurdle (which is said to have been common in practice) of having their claims dismissed because the trademark was not affixed to the infringing products/services.[45]

No changes were however made to the position of earlier trade names when in conflict with later trademarks, probably stemming from the position reflected in the preambles that trade names were already "regularly granted unrestricted protection against later trade marks."

As we believe that proposition to not reflect the situation in practice, we consider that the new harmonized regime has created an imbalance between trade names and trademarks by only enhancing the protection of earlier trademarks against later trade names and not also that of earlier trade names against later trademarks.

This imbalance can be corrected either by legislative action (i.e. by specifically regulating under national law proper means of protection of the right to trade names) or jurisprudentially (by limiting the scope of application of article 10 of the Directive, in its national transposition form).

Needless to say that the preferred option should be the former, given that limiting application of article 10 would be of little effect (the *Céline* test has already been applied as such by national courts and a limiting interpretation would go both against the text of the Directive and the clear intention of the legislator), could be unjustified when considered in relation to rights other than those to a trade name, and would do nothing to address the imbalance created by the exclusion of trade names from the application of article 14. Last, but not least, it would be the expression of a negative creation of an equilibrium (i.e. it would bring trademark protection down in order to limit the imbalance between owners of trademarks and owners of trade names).

Legislating specific protection for trade names would create the desired level of protection for trade names with no encroachment on EU law, would leave protection of earlier trademarks at the enhanced level wished by the European legislator, would allow for unitary application of the law in practice and would create a positive equilibrium, by enhancing the level of protection of earlier trade names up to a position closer to that of earlier trademarks.

3. The comeback

We've shown how trade names, once deemed the 'better twin' of trademarks, have lost their mainstream appeal in the last century.

Never mentioned in the main pieces of EU trademark law, trade names have only exceptionally surfaced in the core case-law of the EU courts and in the main debates on industrial property. The courts seem to have been intent on keeping the interference between trade names and trademarks to a minimum which has also contributed to the relegation of trade names to the far background of the industrial property law debate of late.

Starting from an assumption that appears strange when considered in practice, the new EU trademark package enhances the protection of trademarks vs. trade names.

This enhancement was neither contested nor discussed in the procedure for the adoption of the new EU trademark laws.

The normal and best way to remedy such imbalance would be to specifically address trade name protection at the national level of the EU Member States. Specifically legislating the protection afforded to trade names is an obligation that most EU Member States have arguably undertaken by joining the Paris Union and then tacitly neglected for over 100 years. Maybe the transposition into national law of new EU trademark Directive will provide those states with the occasion to do so. Perhaps the long-forgotten twin of trademarks will make a comeback and retake its place.

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[41] CJEU, *Anheuser-Busch Inc. v Budějovický Budvar, národní podnik* (C-245/02), Decision of 16 November 2004 in *ECR* 2004-I, p. 10989, par. 80-81.

[42] Annette Kur, Martin Senftleben, *European Trade Mark Law. A Commentary*, OUP (Oxford – 2017), p. 411.

[43] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark *OJ* L 154/16.06.2017.

[44] Ranee van der Straaten, „The risks of personal branding" in *IEFnl*, 26 September 2017, *https://www.ie-forum.nl/artikelen/ranee-van-der-straaten-the-risks-of-personal-branding*, accessed on 7 May 2021.

[45] Eddie Powell, Michael Beaber, „IP Update – EU Trade marks" in *ILN IP Insider*, 17 May 2016, *https://www.ilnipinsider.com/2016/05/ip-update-eu-trade-marks/*, accessed on 7 May 2021.

Pessimists will say it's more likely that Venus become the focus of our planetary interests than Member States legislating trade name protection but then again, before phosphine was thought to have been found less than a year ago, Venus hardly ever came up in discussions in the previous 50 years, so we could yet be surprised.

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- TEU, Fundação Calouste Gulbenkian v OHIM (intervening: Micael Gulbenkian) (T-541/11), Decision of 26 June 2014 (unpublished);
- TEU, Construcción, Promociones e Instalaciones, SA v OHIM (intervening: Copisa Proyectos y Mantenimientos Industriales SA) (T-345/13), Decision of 4 July 2014 (unpublished);
- OHIM, 1st Board of Appeal, *WIT-SOFTWARE, CONSULTORIA E SOFTWARE PARA A INTERNET MÓVEL, S.A. v CONSTRULINK, TECNOLOGIAS DE INFORMAÇÃO, S.A.* (R 1059/2013-1), Decision of 6 March 2014;
- Veuve d'Étienne-Beissel et fils v. Selckinghaus et Roger et C^{ie}, Paris Court of Appeals, 20 December 1878 in Annales de la propriété industrielle, artistique et littéraire, tome XXIII/1878, pp. 337-351;
- First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ L 040/11.02.1989;
- Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11/14.01.1994, p. 1;
- Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, OJ L 299/8.11.2008;
- Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ L 78/24.03.2009;
- European Commission, Proposal for a Directive of the European Parliament and of the Council to approximate the laws of the Member States relating to trade marks (Recast), (COM/2013/0162 final), 27 March 2013;
- Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, OJ L 336/23.12.2015;
- Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark OJ L 154/16.06.2017.

GEOGRAPHICAL INDICATIONS, DESIGNATION OF ORIGIN VERSUS EUROPEAN UNION TRADEMARK – CONFLICT OR CO-EXISTENCE?

Adrian CURELEA*

Abstract

The study aims to highlight the situations that may arise in the context of the registration of a European Union trademark that refers to the same type of product for which a system of protection by geographical indication or designation of origin is established.

After brief introductory considerations, there will be approached the definitions given to geographical indications, designations of origin and trademarks in the European Union legislation, highlighting the similarities and differences between them, an approach that the study proposes in order to precisely delimit the boundaries between the three notions.

Being thus clarified these aspects, there will be identified in the European legislation the conflict situations that may arise between the geographical indications and designations of origin on the one hand and the European Union trademark on the other hand, as well as the modalities in which they may coexist, being finally analysed the relevant aspects in this matter in the jurisprudence of the Court of Justice of the European Union.

Keywords: *geographical indication, designation of origin, European Union trademark, generic mentions, use in trade, evocation, imitation, usurpation.*

1. Introduction

In a society where symbols predominate and where the development of trade offers many alternatives on the existing consumer market, there is a tendency for consumers around the world to appreciate products whose origin is determined, due to the fact that they bear an obvious imprint of the area and the conditions from which they come or of their characteristics and qualities.

More and more consumers give more importance to the quality of products they consume than to the quantity, which generates a demand for products whose geographical origin is specified.

However, it is possible that neither the origin nor the basic characteristics of a product are the only elements on which consumers base their decisions but also its authenticity, a context in which it is necessary to properly differentiate the label of the product which benefits from "added value".

If in the past the production and consumption of foodstuffs and not only took place locally, in recent years it has been found that they have exceeded the boundaries of a given territory, so that now the two processes take place in different territories (production in one territory and consumption in one or more territories other than the place of production).

That is why it was necessary to establish a protection system in order to give efficiency to the connection between the products and the quality given by the reputation of a country, region and territory.

Products identified by a geographical indication or designation of origin are certainly the result of traditional processes and knowledge passed down from generation to generation by a community from a given region.

The issue of protection of designations of origin of foodstuffs arose for the first time when signing the 1958 Lisbon Agreement on the international protection and registration of designations of origin[1], the contracting parties being obliged to protect on their territories the designations of origin of the products of other contracting parties recognized and protected as such in the country of origin and registered with the International Bureau of WIPO, unless they declare within one year from the application for registration that they cannot provide protection.

The Geneva Act of the Lisbon Agreement on designations of origin concluded in 2015 extends the Lisbon system also for the geographical indications (until then it referred only to designations of origin) and makes, in Article 6, the mention that the (Member) States undertake to "*protect the designations of origin and the geographical indications"* in accordance with their own legal system and practice and that *"the contracting parties which do not distinguish, in their national or regional laws, between the designations of origin and the geographical indications are not*

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[1] The Lisbon Agreement (Arrangement) on the protection of designations of origin and their international registration was signed in Lisbon on October 31, 1958; it was revised in Stockholm on June 14, 1967.

required to make such a distinction in their national or regional legislation."

According to the Agreement, the geographical indications are defined as indications that identify a good as originating in the territory of a Member State, or a region or locality in that territory, where a certain quality, reputation or other characteristic of it can be attributed to its geographical origin and provides additional protection of geographical indications for wines and spirits.

Evidence that particular importance has been given to the specification of origin and of commercial origin of products and that the Member States undertake to protect in their territories the designations of origin of products from other countries is represented by the fact that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of April 15, 1994[2], a separate chapter has been allocated to them, and by Article 22 paragraph 1there was provided a definition of the geographical indication as being any indication identifying a product as originating in the territory of a third Member State, or from a region or locality in that territory, in case a quality, reputation or other characteristic of that product can be attributed, in essence, to that geographical region.

Following the adoption of TRIPS in 1994, the right on geographical indications has been of interest to a large number of political class officials, traders and producers, so it can rightly be said that this Agreement has been the source of the success for the geographical indications in a considerable number of countries.

The protection of the designations of origin and the geographical indications is essentially intended to guarantee to the consumers that the agricultural products bearing a registered geographical indication have certain specific characteristics due to their origin in a given geographical area and therefore offer a quality assurance due to their geographical origin, in order to allow operators who have agreed to make real qualitative efforts to obtain higher revenues in return and to prevent third parties from abusively taking advantage of the reputation arising from the quality of these products.

The trademarks are signs used to distinguish products or services on the market; inform the consumers about the origin of a product or service and allow the association of a product or service with a specific undertaking, due to the precise quality or reputation provided by the available information of the manufacturer who manufactures or proposes it.

Therefore, the sign symbolizing the geographical origin or commercial origin of the product has a considerable impact on the purchase of that product.

As such, given the diversity of products placed on the market and the abundance of information about them, the consumer must, in order to make a better choice, have clear and concise information on the origin of the product.

In other words, when faced with a variety of foodstuffs, the consumer must know in particular and distinguish the products which have a particular origin or which belong to a particular trader, in order to finally choose the product which possesses certain characteristics and whose place of origin is clearly known to him and to avoid the risk of misleading regarding the characteristics or geographical or commercial origins of the products purchased.

2. Geographical indication, designation of origin and European Union trademark

Without going into detail about the registration procedures, the acquisition of protection and the modalities in which the protection of the rights to these signs is lost, which are not the subject of this study, there will be identified the definitions given to the geographical indications, the designations of origin and the European Union trademark by different normative acts, following to highlight the similarities and differences between them as well as the specific functions of each, in order to more easily understand situations of conflict or coexistence between designations of origin and geographical indications on the one hand and the European Union trademark on the other.

The EU Regulation no. 1151/2012 on systems in the field of quality for agricultural products and foodstuffs[3], defines the designation of origin as a designation identifying a product originating in a particular place, region or, in exceptional cases, country whose characteristics are mainly or exclusively due to a certain geographical environment with its own natural and human factors and whose production stages all take place in a delimited geographical area (Article 5 paragraph 1).

The same Regulation defines in Article 5 paragraph 2 the geographical indications as a name that

[2] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April, 15, 1994 constitutes Annex 1C to the Agreement establishing the World Trade Organization (WTO), signed in Marrakech and approved by the Decision 94/800/ EC of the Council of December 22, 1994 concerning the conclusion, on behalf of the European Community, in the fields of its competence, of the agreements reached during the multilateral trade negotiations in Uruguay Round (1986-1994), published in OJ L 336, p. 1, Special Edition, 11/vol. 10, p. 3.

[3] Regulation (EU) No 1151/2012 of the European Parliament and of the Council of November 21, 2012 on quality systems for agricultural products and foodstuffs, published in OJ L 343, 14.12.2012, p.1-23.

identifies a product originating from a certain place, region or country, in which case a certain quality, reputation or other characteristic can be attributed mainly to the geographical origin of the product and when at least one of the production stages takes place in the defined geographical area.

In the wine sector there are relatively similar definitions of the geographical indications and the designations of origin that describe products that must meet the requirements of Article 93 paragraph 1 letters a and b of the EU Regulation No. 1308/2013[4], namely to hold a quality which is mainly or exclusively due to a certain geographical environment with its own natural and human factors or which can be attributed to a certain geographical area.

In other words, in the case of the designation of origin there must be elements to establish the link between the quality or characteristics of the product and the geographical environment as described in Article 5 paragraph 1, and in the case of the geographical indication elements to establish the link between a certain quality, reputation or other characteristic of the product and the geographical origin mentioned in Article 5 paragraph 2 of the Regulation.

Trademarks of products or services registered under the conditions and according to the norms provided by the EU Regulation no. 2017/1001[5] are called "European Union trademarks".

According to Article 4 of the EU Regulation no. 2017/1001 may constitute an EU trademark any sign, especially words, including names of persons, or drawings, letters, numbers, colours, the shape of the product or its packaging or sounds provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings and are represented in the Register of the European Union Trade Marks, in such a way as to enable the competent authorities and the public to determine clearly and precisely the object of the protection conferred to the holder of that trademark.

An EU certification trademark is according to the definition given by the provisions of Article 83 of Regulation 2017/1001, an EU trademark designated as such on the date of submitting the trademark application and which is able to distinguish, on the one hand, the products or services for which the material, the manner of manufacture of the goods or the provision of services, the quality, accuracy or other characteristics, except geographical origin, are certified by the trademark holder and, on the other hand, the goods and services which do not benefit from a such certification.

In this context, it has been appreciated in the doctrine that only the collective trademark can be geographically descriptive, it can be confused in some cases with the individual trademark that involves a geographical name used in an arbitrary manner[6].

However, the European legislature has expressly recognized by Directive (EU) 2015/2436[7] that the Member States may register collective trademarks or descriptive geographical certification trademarks, stipulating that by way of derogation from Article 4 paragraph (1) letter (c), the Member States may provide that signs or indications which may be used to designate, in trade, the geographical origin of products or services may constitute guarantee/certification trademarks (Article 29 paragraph 3 of the Directive) or collective trademarks (Article 30 paragraph 2 of the Directive).

Protected designations of origin and geographical indications may be used by any operator trading a product in accordance with the specifications, and in the case of products originating in the Union and traded under a protected designation of origin or a protected geographical indication, the Union symbols associated with them appear on the labels; representations of the geographical area of origin may also appear on them, as well as representations in the form of text, graphic representations or symbols relating to the Member State and/or region in which the geographical area of origin is located.

In other words, the rights on geographical indications and designations of origin are always collective rights, which are exercised by an association or a group of producers located in a certain area and cannot be transferred to other persons.

Unlike geographical indications and designations of origin, trademarks may pass freely into the patrimony of another manufacturer, and it is not mandatory that for the use the trademark the

[4] Regulation (EU) No 1308/2013 of the European Parliament and of the Council of December 17, 2013 establishing a common organization of the markets in agricultural products and repealing Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007 of the Council, published in OJ L 347, 20.12.2013, p. 671-854.

[5] Regulation (EC) No. 2017/1001 of the European Parliament and of the Council of June 14, 2017 on the European Union trade mark, published in OJ L 154, 16.06.2017, p.1-88, repealed Regulation (EC) No. 207/2009 of the Council of February 26, 2009 on the European Union trade mark.

[6] Le Goffic, Caroline, La marque de nature collective fait-elle bon menage avec l'indication geographique? in Th.Georgopoulos, Marques vitivinicoles et appelations d'origine. Conflits, mimetismes et nouveaux paradigmes, Ed. Mare&Martin vol. 6, p.234.

[7] Directive (EU) 2015/2436 of the European Parliament and of the Council of December 16, 2015 on the approximation of the laws of the Member States relating to trade marks, published in OJ L 336, 23.12.2015, p. 1-26.

manufacturer prove the connection with a particular region and traditional manufacturing methods[8].

It should be mentioned that since the early 1970s, the Court of Justice of the European Union (CJEU) has specified the function of the protected designation of origin, that of informing and ensuring that the designated product has qualities and characteristics due to its geographical location; the existence of a spatial and qualitative connection was required[9].

The geographical function has as essential function that of guaranteeing the identification by the public of the geographical origin and/or of certain characteristics specific to the product.

The rights conferred to the holder of a registered trademark are intended to enable it to exercise its essential function of indicating the origin and to play an essential role of the competition system, those rights may be maintained only if the function for which they were assigned is actually exercised on the market[10].

3. Conflict or co-existence between geographical indications, designations of origin and the European Union trademark. Evocation, imitation, usurpation, commercial use

So, we have seen what a geographical indication, a designation of origin as well as a trademark mean and how they are regulated in the European Union legislation, obviously the natural question is whether a product can be covered simultaneously by various legally protected distinctive signs, such as trademark, designation of origin and geographical indication and whether a sign can simultaneously protect several titles such as trademark, designation of origin and geographical indication?

In order to provide an answer to both questions and to determine the conditions under which a product may be covered simultaneously by various legally protected distinctive signs and whether a sign may simultaneously protect several titles as those covered by this title and to determine whether this is appropriate, we consider relevant the provisions of Article 7 paragraph 1 letter j of the EU Regulation no. 2017/1001 which establishes an absolute reason for refusal to register the trademarks that conflict with trademarks that are excluded from registration under the Union legislation, of national law or of international agreements to which the Union or the Member State concerned is a party, which provide the protection of the designations of origin and of the geographical indications.

These provisions should be linked to the provisions of other regulations applicable to geographical indications and designations of origin in order to establish the manner of interference and possible situations which might arise in case of conflict between the signs which are the subject of this study.

Thus, in the case of a conflict between the geographical indications and the designations of origin on the one hand and trademarks on the other hand, their regime is governed by the provisions of Article 13 paragraph 1 letters a-d of the EU Regulation no. 1151/2012.

Similar regulations can be found in Article 103 paragraph 2 of the EU Regulation no. 1308/2013 regarding wines, Article 20 paragraph 2 of the EU Regulation no. 251/2014[11] regarding the aromatized wine products, as well as in Article 16 of the EC Regulation no. 110/2008[12] regarding spirits.

The protection conferred by the stated texts must be interpreted in relation to the objective pursued by the registration of the latter, namely to enable the products to be identified as having their origin in a given territory, where a certain quality, reputation or other characteristic of those products may be essentially attributed to their geographical origin.

The first situation described provides direct or indirect use modalities and the comparable different products in respect of which the protection afforded by the Protected Designation of Origin (PDO) and the Protected Geographical Indication (PGI) must be opposed, while the other situations refer to certain abusive behaviours from which the PDO and PGI holders may defend themselves, in the case of such uses the intention to exploit that reputation shall be presumed.

First, the registered names shall be protected against any direct or indirect commercial use of a registered name for products which are not covered by the registration, if those products are comparable to

[8] M.Blakeney, Proposal for the International Regulation of Geographical Indications, in The Journal of World Intellectual Property, Vol. 4, Issue 5, 2001, p. 632.

[9] Judgment of 20 February 1975, Commission v Germany, C-12/74, EU: C: 1975: 23.

[10] Opinion of Advocate General Giovanni Pitruzella delivered on 18 September 2019 case C-622/18 AR v. Cooper International Spirits LLC, St Dalfour SAS, Etablissements Gabriel Boudier SA, point 71.

[11] Regulation (EU) No 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labeling and protection of geographical indications of aromatised wine products and repealing Council Regulation (EEC) No 1601/91, published in OJ L 84, 20.03.2014, p. 14-34.

[12] Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008 on the definition, designation, presentation, labeling and protection of geographical indications of spirit products and repealing Council Regulation (EEC) No 1576/89, published OJ L 39, 13.2.2008, p. 16-54.

those registered under that name or if by a such use is exploited the reputation of the protected name, including where those products are used as ingredients.

The direct and indirect use of a designation of origin or of a geographical indication did not pose particular problems. The trademark which is disputed that it flagrantly reproduces a protected name: „Ibiza Flirt"(Spanish protected designation of origin „Ibiza")[13], „Tres toros" (Spanish protected designation of origin „Toro")[14], „Tempos Vega Sicilia"(Italian protected designation of origin „Sicilia")[15], „Domaine de l'île Margaux" (French protected designation of origin „Margaux")[16], „Carlos Serres" (Greek protected designation of origin „Serres")[17], „Manzanilla Gonzales Pallacios" (Spanish protected designation of origin „Manzanilla")[18], „Duque de Villena"(Spanish protected designation of origin „Villena")[19] were all censored without much difficulty in the European jurisprudence.

In case of comparable products, PDOs and PGIs must be opposed when they do not comply with the specifications, while in the case of non-comparable products it must be proved that they exploit the reputation of the PDO or PGI[20].

The use of the expression "direct or indirect commercial *use* of a registered geographical indication" implies the use of the indication in question in the form in which it was registered or, at least, in a form which has such close links with it, that the term „*use*" requires, by definition, the very use of the protected geographical indication, which must be present identically or at least similarly, phonetically and/or visually, in the sign in dispute[21].

Unlike "direct" use, which requires that the protected geographical indication be applied directly to the product concerned or its packaging, an "indirect" use means that this indication is included in the additional vectors of marketing or of information, such as an advertising for the product concerned or documents relating to it[22].

The Court has already established defining elements regarding the notion of "direct" use, acknowledging that it may be the use of a mark containing a geographical indication or a term corresponding to that indication and its translation for products which do not meet the appropriate specifications, as it was the case of figurative marks which were the subject of the main proceedings.

Thus, the situation referred to in letter a expressly prohibits other operators from using for commercial purposes a registered geographical indication for products which do not meet all the required specifications, in particular in order to take undue advantage of the reputation of that geographical indication.

Second, the registered names are protected against any misuse, imitation or evocation, even if the true origin of the products or services is indicated or if the protected name is translated or accompanied by words such as "gender", "type", "method", "as prepared in", "imitation" or other similar words, including when those products are used as ingredients.

It is noted that three distinct notions are used, namely: evocation, imitation and usurpation which are not defined by any of the Regulations relating to geographical indications and designations of origin[23].

As such, the doctrine has suggested that the three notions should be distinguished according to the intentional element of reproduction; evocation refers to a simple connection of image or perception in the mind of the consumer that is really much less powerful than the usurpation or imitation[24].

The wording of the letter b in question does not contain any element which would enable the precise definition of the meaning of the concept of evoking a protected geographical indication. At most, an analysis in the context in comparison with the other two hypotheses mentioned earlier in that provision, namely "usurpation" and "imitation", allows to consider that the concept of "evocation" is somewhat similar to the geographical indication in question, even if it seems to

[13] EUIPO, R 2531/2015-2, Ibiza Flirt.

[14] TUE, 28 September 2017, T-206/16, Tres Toros 3, EU:T:2017:673.

[15] TUE, 9 February 2017, T 695/15, Tempos Vega Sicilia, EU:T:2017:69.

[16] OHMI, 21 January 2015, R 248/2014-4, Domaine de l'Île Margaux.

[17] OHMI, 14 March 2008, R 984/2007-1, Carlos Serres.

[18] OHMI, 11 June 2004, R 946/2002-1, Manzanilla Gonzalez Palacios.

[19] OHMI, 11 December 2002, R 1220/2000-2, Duque de Villena.

[20] Le Goffic, Caroline, La protection des indications geographiques, Editura Litec, Paris, 2010, p.137.

[21] Opinion of the Advocate General Henrik Saugmandsgaard ØE delivered on 22 February 2018 in Case C - 44/17 The Scotch Whiskey Association, The Registered Office v. Michael Klotz, point 28.

[22] Judgement Scotch Whisky Association v. Michael Klotz, C-44/17, EU:C:2018/415, point 32.

[23] Leonie Bourdeau, Stefan Martin, *Le conflit entre marques et indications geographiques: la notion d'evocation et sa mise en oeuvre par les instances europeenes*, in Th.Georgopoulos, Marques vitivinicoles et appelations d'origine. Conflits, mimetismes et nouveaux paradigmes, Ed. Mare&Martin vol. 6, p. 120.

[24] Theodore Georgopoulos, Les marques commerciales nationales a l'epreuve des indications geographiques europeenes-A propos de l'affaire Cognac, RD.Rur., no.401, mars 2012.

assume the lowest degree of similarity of the three notions[25].

The notion of "evocation" is an objective notion which does not require the proof of the intention of the trademark holder to evoke a PDO or PGI[26].

The cases of evoking a protected name are complex, its disguise being very subtly made, aspects that are to be highlighted in the light of the jurisprudence of the Court of Justice of the European Union (CJEU).

The concept of "evocation" covers the case where the term used to designate a product incorporates part of a protected name, so that the consumer, in the presence of the product name, is induced, as a reference image, the goods benefiting from that name[27].

By the decision pronounced in Case C-614/17[28], the Court of Justice of the European Union examined the protection of designations of origin in relation to the graphic representations which might suggest a link between a product and the protected geographical origin by a designation of origin and established that the use of figurative signs evoking the geographical area with which a designation of origin is associated may constitute an evocation of the latter and may therefore be prohibited even if those figurative signs are used by a manufacturer established in that region, but whose products, similar or comparable to those protected by that designation of origin, are not covered by it.

The Court also ruled that in order to determine the existence of an "evocation", the national court must take into account the presumed expectation of an average consumer, normally informed, sufficiently attentive and informed, including the consumer in the Member State where the product is manufactured, which gives rise to the evocation of the protected name and in which it is consumed mainly in order to determine whether the figurative signs are capable of inducing them directly, as a reference image, the authenticity of the products benefiting from that name[29].

In the context in which, according to the relevant regulations, a protected designation of origin can only be represented by words and not by images, what brings new in the jurisprudence of the Court the Queso Manchego decision is the fact that the legal protection of the designation of origin involves the prohibition of some graphical representations that could suggest to the consumer a link between the product and the protected designation of origin.

In its jurisprudence, the Court has also examined the situation of phonetic or visually similar product names with a PDO or PGI for similar products, ruling that in order to assess whether this constitutes an "evocation", the referring court must take into account the phonetic and a visual similarity of these names, as well as any elements which may indicate that such a resemblance is not accidental, so as to verify whether, in the presence of a product name, the average European consumer, normally informed and sufficiently attentive and knowledgeable, is induced, as a reference image, the product benefiting from the protected geographical indication[30].

There is also an "evocation" of a protected designation of origin when, in the case of products with visual analogies, the sales names bear a phonetic and visual[31] similarity, such a resemblance is obvious if the term used to designate the product in that case it ends in the same two syllables as the protected name and comprises the same number of syllables as it; in the analysis of the existence of an evocation, account must be taken of any elements which may indicate that the phonetic and visual similarity between the two names is not accidental.

There may also be an "evocation" even in the absence of any risk of confusion between the products in question[32], being especially important not to create in the public perception an association of ideas about the origin of the product, nor to allow an operator to obtain undue benefits from the reputation of a protected geographical indication.

In the consumer's perception, the link between the manufacturer's reputation and the quality of the

[25] Opinion of Advocate General Henrik Saugmandsgaard ØE delivered on 22 February 2018 in Case C - 44/17 The Scotch Whiskey Association, The Registered Office v Michael Klotz, point 53.

[26] Opinion of Advocate General Jacobs delivered on 17 December 1998 in Case C-87/97, point 33.

[27] Judgement of Bureau national interprofessionnel du Cognac, C-4/10 and C 27-10, EU:C:2011:484, pct.56, Judgement Consorzio per la tutela del formagio Gorgonzola, C87/97, EU:C:1999:115, pct.25 and Judgement Commission/Germany, C-132/05, EU:C:2008:117, pct.44.

[28] CJUE, 2 May 2019, Fundación Consejo Regulador de la Denominación de Origen Protegida Queso Manchego împotriva Industrial Quesera Cuquerella SL, Juan Ramón Cuquerella Montagud, C-614/17, ECLI:EU:C:2019:344.

[29] Judgement Mars, C-470/93, EU:C:1995:224, point 24, Judgement Gut Springenheide and Tusky, C-210/96, EU:C:1998:369, punctul 31, Judgement Estée Lauder, C-220/98, EU:C:2000:8, point 30, Judgement Lidl Belgium, C-356/04, EU:C:2006:585, point 78, Judgement Severi, C-446/07, EU:C:2009:530, point 61, Judgement Lidl, C-159/09, EU:C:2010:696, point 47, as well as Judgement Teekanne, C-195/14, EU:C:2015:361, point 36).

[30] Judgement Viiniverla Oy, C-75/15, EU:C:2016:35, point 48.

[31] Judgement Bureau national interprofessionel du Cognac, C-4/10 and C 27-10, point 57, Judgement Consorzio per la tutela del formagio Gorgonzola, C-87/97, point 27 and Judgement Commission/Germany, C-132/05, point 46.

[32] Judgement Consorzio per la tutela del formagio Gorgonzola, C-87/97, point 26 and Judgement Commission/Germany, C-132/05, point 45.

products depends on the belief that the products sold under the designation of origin are authentic[33].

The jurisprudence of the Court has also ruled that the notion of "evocation" covers the case where the term used to designate a product incorporates part of a protected name, so that the consumer, in the presence of the product name, is induced as a reference image the product benefiting from that name[34].

It should be noted that the ban on evocation is not necessarily linked to the existence of real public confusion; it is not necessary for a consumer to consider that the evocative mark covers what the PDO protects.

Thirdly, the registered names are protected against any false or misleading indication as to the provenience, origin, nature or essential qualities of the product, which appears on the inside or outside of the packaging, in the advertising material or documents relating to the product concerned, and against packaging the product in a packaging likely to create an erroneous impression as to its origin.

Thus, in order to establish the existence of a "false or misleading indication" prohibited by that provision, no additional information must be taken into account with the sign in question in the designation, presentation or labelling of the product concerned, in particular as regards the real origin of the latter.

It is sufficient for a false or misleading indication to be present on one of the three supports referred to in that provision, namely "in the designation, presentation or labelling" of the product in question, to be considered "likely to give a false impression regarding its origin", within the meaning of that provision[35].

Finally, the registered names are protected against any other practice which could mislead the consumer as to the true origin of the product.

In addition to the three cases presented above, the fourth situation evokes other practices which are not considered by the three and which could mislead the consumer as to the true origin of the product.

In the context of the interference of a trademark containing geographical connotations and indications that take into account the same region, country, place, the situation that may arise is governed by the provisions of Article 14 of EU Regulation No. 1151/2012, according to which, if a designation of origin or geographical indication is registered under the Regulation, the registration of a trademark the use of which would be contrary to Article 13 paragraph 1 and relating to the same type of product must be refused if the trademark application is submitted after the date of submission with the Commission of the application for registration in respect of the designation of origin or the geographical indication.

According to Article 6 paragraph 4 of the Regulation, a name proposed for registration as a designation of origin or geographical indication is not registered if, given the reputation and name of a trademark, as well as its duration, the registration of the proposed name as a designation of origin or geographical indication is likely to mislead the consumer as to the true identity of the product.

Also relevant are the provisions of Article 7 paragraph 1 letter g of Regulation no. 2017 / 1001, according to which the registration of trademarks that are likely to deceive the consumer public is rejected, for example on the nature, quality or geographical origin of the product or service.

A trademark may be registered only if it is established that, by its use, it acquired a distinctive character in that part of the Community in which it had a distinctive character *ab initio*.

As such, it is sufficient for a trademark to be devoid of any distinctive character in a single Member State in order to block registration at Community level; on the contrary, once the trademark whose Community registration is sought acquires that distinctive character in the territory in which it was devoid of any distinctive character, the ground for refusal is no longer applicable.

The use of a trademark must take place exclusively in the context of a commercial activity aimed at an economic advantage and not in the private sector.

In order to establish the existence of a commercial use, the territory in which the protection of the sign is invoked must be taken into account; aspect that derives especially from the principle of territoriality.

An application of registration for a Community trademark may be refused only if it is put to serious use in the territory of the Member State in which it is protected.

The relevant territory for examining the scope of these exclusive rights is the one on which is applicable each of these legal rules in which those rights originate[36].

The trademark must be used as a distinctive element in the sense that it must enable the identification of an economic activity carried on by its holder.

A distinction must be made between the scope of the sign and the extent of its use; a sign whose geographical extent of protection is only local has a local scope only.

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[33] Judgement Budejovicky Budvar, C-478/07,EU:C:2009:521, point 110.

[34] Judgement Bureau national interprofessionel du Cognac, C-4/10 and C 27-10, point 56, Judgement Consorzio per la tutela del formagio Gorgonzola, C-87/97, point 25 and Judgement Commission/Germany, C-132/05, point 44, Judgement Viiniverla Oy, C-75/15, point 21.

[35] Judgement Scotch Whisky Association v. Michael Klotz, C-44/17, EU:C:2018/415, point 67.

[36] Judgement TUE 24.03.2009 Moreira da Fonseca General Optica T-318/06, T-321/06, Rep. P.II-649, point 40.

The scope of a sign cannot depend solely on the geographical extent of its protection.

In order to be able to prevent the registration of a sign, the one invoked in support of the opposition must be effectively used in a sufficiently significant way in trade and have a geographical extent that goes beyond the local domain; in other words, the use should take place on an important part of the respective territory.

In order to establish this aspect, account must be taken of the duration and intensity of the use of that sign as a distinctive element for its recipients, who are buyers and consumers, as well as suppliers and traders.

The use of the sign made exclusively or for the most part between the date of submitting the Community trademark application and the publication of this application will not be sufficient to establish that this sign has been used commercially in order to demonstrate that it has not a sufficient scope (see the device Judgement CJUE 29.03.2011, C-96/09-Budvar).

There is the possibility of invocation within an opposition to the registration of a Community trademark of other signs which are not registered trademarks or well-known trademarks and which have been the subject of prior registration, such as geographical indications, but there have to be excluded the geographical indications which have been registered at community level; only those that benefit from protection at national level are targeted.

Finally, it should be mentioned that the geographical indications may coexist with the trademarks, Article 13 of the Geneva Act of the Lisbon Agreement explicitly recognizing the coexistence of the designations of origin or the geographical indications with earlier rights conferred by the trademark. Thus, the text allows the contracting parties to grant limited exceptions to the rights conferred by a trademark in the sense that such an earlier trademark may not, in certain circumstances, entitle its holder to prevent the granting of protection or the use in the contracting party of a designation of origin or registered geographical indications.

Moreover, the provisions of Article 14 paragraph 2 of EU Regulation no. 1151/2012 stipulate that a trademark whose use is contrary to Article 13 paragraph 1 of the Regulation and which has been requested, registered or established by its use in good faith in the territory of the Union, if this possibility is provided for by the legislation in question, before the date on which the application for protection of the designation of origin or geographical indication is sent to the Commission, may continue to be used or renewed for that product, despite the registration of a designation of origin or geographical indication, if the trademark does not fall within the grounds for cancellation or revocation provided for in the Community Trademark Regulation; in such cases, the use of the protected designation of origin, the protected geographical indication and the relevant marks is permitted.

These issues were also noted by the CJEU in Bavaria I[37], namely that the acquisition of the status of protected geographical indication does not have the effect of restricting the rights to similar trademarks, previously registered in good faith, unless there are good grounds for cancellation or revocation of the trademark, in the present case not being identified an impediment to the coexistence of the trademark with the protected name, the trademark "Bavaria" being prior to the protected name, the Court establishing that the relative presumption of good faith has not been overturned.

This decision is relevant in the light of the analysis of the coexistence of geographical names and similar trademarks, which appear on the same market and in respect of the product from the same range.

Thus, the continued use of a trademark in conflict with a PGI or a PDO is possible only if, in the first place, the trademark was registered in good faith before the date of submitting the application for registration of the designation of origin or geographical indication and, secondly, that the mark is not affected by the grounds for invalidity or forfeiture provided for.

If the earlier trademark was not registered in good faith or, even if it was registered in good faith, even if that mark may be affected by grounds for invalidity or revocation, protection of the registered designation of origin or geographical indication shall prevail on the earlier mark.

In the context of the above regarding the conflict between trademarks, the question arises as to the legal regime of generic names, in this sense taking into account the provisions of Articles 6 and 7 of paragraph 1 of the Lisbon Agreement on the protection and designation of their origin and international registration provide that the designation of origin registered under the Arrangement cannot be considered generic as long as it is protected as a designation of origin in the country of origin.

It is considered that the generic names cannot be registered, just as the protected names cannot become generic, and the generic elements of a registered name cannot be protected.

It is common ground that a geographical name could, in so far as it is used, become a generic name, in the sense that it could be regarded by the consumers as an indication of a particular type of product rather than as an indication of the geographical origin of the product, an example in this sense being the names "Camembert" and "Brie".

[37] Judgement Bavaria NV, Bavaria Italia Srl v. Bayerischer Brauerbund eV, C-343/07, ECLI:EU:C:2009:415, point 119.

Thus, in assessing the generic nature of a name, account must be taken of the places where that product was produced both inside and outside the Member State which obtained the registration of that name, the consumption of that product and how this name is perceived by consumers inside and outside the Member State concerned, the existence of special national legislation on the product in question and how that name has been used in accordance with Community law[38].

The Court was called upon to rule on this issue in Bavaria I[39], ruling that a name becomes generic only if it disappears the direct link between, on the one hand, the geographical area of the product and, on the other hand, a specific quality of this product, its notoriety or any other characteristic of it which may be attributed to that origin, and the name merely describes a genus or a type of products.

4. Conclusions

It is common ground that the association of a trademark with a geographical indication or designation of origin confers economic advantages to its holder and offers a high degree of legal protection.

Trademark recognition is an essential element of trade and the geographical indications and designations of origin play a key role in highlighting brands for products whose quality is given by the place of origin, in other words, the geographical indications can add value to a region, they can help to create a "regional brand".

I have seen that the protection afforded by the Union regulations does not apply to all designations of origin or geographical indications, but only to those defined in those regulations.

The system of protection of registered names in the European Union is based on the principle that the registration of a name containing more than one term confers protection on both the constituent elements of the compound name and its composition as a whole, unless that element is the name of an agricultural product or foodstuff considered a generic name.

It is necessary to differentiate between value-added products due to the characteristics of the product related to its geographical origin and products bearing the mark of a particular producer, in order to prevent malicious practices, to achieve market transparency and fair competition, all with the common denominator of consumer protection against misleading practices.

The provisions governing situations of conflict between trademarks and registered names, as analysed in the light of the jurisprudence of the CJEU, indicate that the first situation is limited to acts of use of a protected geographical indication / designations of origin, the second situation is limited to acts of usurpation, imitation or evocation, so that the third situation extends the scope by including the "indications" (for instance information provided to consumers) that appear in the designation, presentation or labelling of the product in which, although they do not really evoke the protected geographical indication, are classified as 'false or misleading' as to the links which the product has with the latter, the latter referring to any other practice which might mislead the consumer regarding the true origin of the product.

The purpose of these regulations is to protect the geographical indications and designations of origin, both in the interests of the consumers, who must not be misled by misleading indications, and in the interests of the economic operators who incur higher costs to guarantee the quality of products and who must protect against acts of unfair competition.

Although more difficult to accept, I have noticed that protected names may coexist with trademarks, the provisions of Article 13 of the Geneva Act of the Lisbon Agreement and Article 14 paragraph 2 of EU Regulation no. 1151/2012 recognizing explicitly the coexistence of designations of origin or geographical indications with the earlier rights conferred by trademarks.

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[38] Judgement din 25 octombrie 2005, Germany, Denmark/Commission, C-465/02 și C-466/02, ECLI:EU:C:2005:636, points 76-99, Judgement din 26 februarie 2008, Commission/Germania, C-132/05, ECLI:EU:C:2008:117, point 53.

[39] Judgement Bavaria NV, Bavaria Italia Srl / Bayerischer Brauerbund eV, C-343/07, point 107.

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THE NICE CLASSIFICATION – EVOLUTION AND INTERPRETATION

George-Mihai IRIMESCU*

Abstract

In the attributive system, an important element of the trademark registration procedure is the designation by the applicant of the goods and services for which it wishes its trademark to be protected. If in the declarative system the extent of trademark protection is given by the goods and / or services for which the trademark is actually used, therefore by an element of fact, in the attributive system the extent of protection is dictated by the applicant's expression of will, by choice, when filing a trademark application. As such, one of the main criticisms of this trademark protection system was that applicants may abuse the registration procedure in order to obtain protection for a wider range of products and / or services than those for which the trademark is, in fact, used. In this context, the Nice Classification is an essential tool accepted and used in most countries of the world for the designation of goods and services. Its wide spread use is determined, at a practical level, by the need for unitary cross-border protection of rights. At a legislative level, it was mainly imposed through international agreements. However, we will see below that European case law has sought to reduce the shortcomings of the attributive protection system, where the use of the Nice Classification is of essence, by encouraging trademark owners to seek protection for specific products and services, in full congruence with the use of those marks on the market.

Keywords: *Nice Classification, attributive system, declarative system, IP Translator, SkyKick.*

1. Introduction

In the attributive system, an essential legal instrument in the trademark registration procedure is the Nice Classification. Using this classification, the applicant chooses those goods and services for which he wants his trademark to be registered.

As such, this choice dictates which are the goods and / or services in relation to which the proprietor will hold exclusive rights in respect of his trademark. Therefore, the designation by the proprietor of the goods and / or services for which it seeks protection formally replaces the public use of the mark in the from the declarative system. In other words, if in the system of priority by use the scope of protection is more or less obvious, in the attributive system the scope of protection is "chosen" by the applicant. However, as we will see below, trademark laws and the practice of courts and intellectual property offices have made efforts to balance the reality of registers with that of the market, and to eliminate possible abuses by applicants, as a result of their ability to freely choose the goods and services for which they seek protection.

Thus, given the need to designate goods and services in the trademark applications, and given that trade relations often extend across borders, so that trademark proprietors become entitled to registered rights in many jurisdictions, it was necessary that the trademark registration procedures be standardized in relation to designating goods and services.

To this end, according to the World Intellectual Property Office (hereinafter "WIPO"), "*use of the Nice Classification by the competent trademark offices has the advantage of filing trademark registration applications with reference to a single classification system. The drafting of applications is thereby greatly simplified as the goods and services to which a given mark applies will be classified in the same way in all countries that have adopted the Classification. Moreover, as the Classification exists in several languages, applying the indications of goods and services of the alphabetical list can save applicants a considerable amount of translation work when filing a list of goods and services in a language other than that of the office of origin*".[1]

Although the above-listed advantages are, without doubt, a reality, as we will see below, the road to a uniform practice with respect to the designation of goods and services did meet obstacles and difficulties.

2. Historical considerations regarding the Nice Classification

Historically, the doctrine notes that the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, concluded at the Nice Diplomatic Conference on June 15, 1957, came in

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[1] Frequently Asked Questions: Nice Classification, section available on the WIPO website at the following link: https://www.wipo.int/classifications/nice/en/faq.html, accessed on April 10, 2021, at 21:31.

support of trademark applicants because it aimed to harmonize the practice with respect to designating goods and services in trademark applications, in different jurisdictions. To this end, the agreement created a system for classifying goods and services available to national intellectual property offices, in order to try to create a level of coherence in the classification of goods or services designated in the registration procedures. A uniform classification would make it easier for trademark proprietors to apply for trademarks in several jurisdictions and also to enable states which adopt such a classification to organize and administer their own trademark registers.[2]

The Nice Classification was revised in 1967 in Stockholm, in 1977 in Geneva and then amended in 1979. According to the agreement, each party has the obligation to apply the Nice Classification in connection with the registration of trademarks, either as the principal classification or as a subsidiary classification, and must include in the official documents and publications relating to its registrations the numbers of the classes in the classification to which the goods or services for which the trademark are registered belong. With respect to its content, the Nice Classification is based on the classification prepared by the United International Bureaux for the Protection of Intellectual Property (BIRPI) - the predecessor of WIPO - in 1935. It initially consisted of a list of 34 classes and an alphabetical list of goods, which was adopted under the Nice Agreement and later expanded to include eleven classes of services. The Nice Agreement provides for the establishment of a committee of experts in which all countries parties to the agreement are represented. The Committee of Experts shall decide on any changes to the classification, in particular the transfer of goods and services between different classes, the updating of the alphabetical list and the introduction of the necessary explanatory notes. The Committee of Experts has held numerous sessions since the entry into force of the Nice Agreement on 8 April 1961 and, among its most notable achievements, we note the general revision of the alphabetical list of goods and services in terms of form (in the late 1970s), substantial changes in general remarks, class headings and explanatory notes (in 1982), introduction of a "base number" for each good or service in the alphabetical list (in 1990), a number that allows the user to find the good or the equivalent service in the alphabetical lists of other language versions of the Classification, and the revision of services class 42 by creating classes 43-45 (in 2000). [3]

Currently in force is the 11th edition of the Nice Classification, updated in 2021, and all editions, including the current one, can be consulted on the website of the World Intellectual Property Office.[4]

The Nice Classification has also been adopted by supranational offices or other international treaties: by the International Bureau of WIPO, under the Madrid Agreement and Protocol, by the African Intellectual Property Organization, by the African Regional Intellectual Property Organization, by to the Benelux Intellectual Property Office and by the European Union Intellectual Property Office (EUIPO).[5] Naturally, if we take into account the fact that this classification is indispensable for procedures such as invoking the conventional priority, conversions or transformations of European or international trademarks etc.

It should be noted, however, that the purpose of the Nice Classification was never fully achieved, in the sense that it did not lead to a perfect harmonization of the practices of the states or jurisdictions that adopted it. Although there is this common tool that Member States use to designate goods and services in trademark applications of proprietors, divergent practices continue to exist because of different interpretations, in different jurisdictions, of the list of goods and services designated by a trademark and their scope of protection.

From this point of view, the practice has identified a number of shortcomings due to either a too generous interpretation of the lists of designated products or services, which could lead to an unjustifiably wider protection offered to holders in relation to the goods or services for which the trademark is, in fact, used, or due to the lack of clarity of certain terms that constitute the Nice classification.

Thus, there are numerous initiatives and materials that have been created in order to contribute to the efforts to reach a uniform interpretation of the Nice Classification, carried out either by the European office, or by international associations. An example of this is a paper by the International Classification Subcommittee (2018–2019 Term), a subcommittee of the Harmonization of Trademark Law Practice Committee of INTA (International Trademark Association), which deals with the different interpretation of retail services and of those wholesale

[2] Jessie N. Roberts, *International Trademark Classification: A Guide to the Nice Agreement*, Oxford University Press, Fourth Edition, 2012, New York, p. xiii.

[3] Nice Classification, a presentation available on the website of the Hungarian IPO, which may be accessed at the following link: http://classifications.sztnh.gov.hu/nice/ennpre.html, accessed on March 28, 2021, at 21:04.

[4] The Nice Classification can be consulted on the official website of WIPO, at the following link: https://www.wipo.int/classifications/nice/nclpub/en/fr/.

[5] Jessie N. Roberts, *Idem*, p. 285.

in different jurisdictions.[6] This study serves as a perfect example on how even one of the most basic of commercial activities may lead to different interpretations, when it comes to trademarks designating this type of services.

3. The Madrid Agreement and Protocol - catalysts for the standardization of practices concerning the Nice Classification

As shown above, the main role of the classification was to determine a unitary practice regarding the designation of goods and services by the trademark applications. Undoubtedly, the Madrid Agreement and Protocol, designed to make it easier for trademark holders to break through the territorial limits of trademark protection, have to a large extent contributed to the spread of this classification system. However, they also highlighted the situations where the harmonization of practices regarding the designation of goods and services encountered difficulties due to local practices. We consider two examples eloquent in this regard.

For example, the American doctrine emphasizes that one of the reasons why the United States was hesitant to join the Madrid Agreement system was the different practices regarding the extent of trademark protection. Thus, in the United States, the practice has led applicants to adopt lists of goods and services that are very specific in terms of the scope of protection. However, given that, through the Madrid System, applicants did not have the opportunity to extend in designated contracting parties the scope of protection of their basic applications or registrations, they were at a disadvantage in those markets where the scope of protection benefited from a much broader interpretation. In other words, the disadvantage came from the fact that local national trademarks, designating more general specifications, benefited from a larger scope of protection. The American local practice has, in fact, been determined by the fact that in the United States the trademark registration process is strictly dependent on its use.[7] As such, trademark owners have sought to designate highly detailed and specific goods or services in order to obtain coverage consistent with the actual use of their trademarks. From this point of view, it is important to note that until 1973, the United States used its own classification system for goods and services, the Nice Classification being applied to trademark applications filed starting with 1 September 1973.[8]

Another conclusive example from this point of view is Canada. In this jurisdiction, in 2019, two major changes took place: Canada became part of the Madrid Protocol and, we believe, as a consequence, it adopted the Nice Classification as a system for classifying designated goods and services.[9] Until then, Canadian applicants had the option of simply naming the goods and services for which they sought protection in "*ordinary commercial terms*". This system, however, causes applicants to choose, again, very specific goods or services. By way of example, offered by practice, an applicant could not simply identify his goods as "headrests"; but it had to indicate whether they were, for example, "vehicle seat headrests", "surgical operating table headrests" and so on.[10]

From the above, we can draw the following conclusions: firstly, the Nice Classification is an important tool in the implementation of international treaties on trademarks, thus helping to facilitate the means of obtaining cross-border protection. Second, the purpose of the Nice Classification, namely to standardize international practice regarding the designation of goods and services, has had to confront the realities and practices of other jurisdictions, such as the United States and Canada, which, either because obtaining protection through use was fundamental, or because the classification of products or services was never regulated, they had a stricter, more detailed, and perhaps more thorough approach with respect to determining the scope of trademark protection.

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[6] The study *Nice Classification of Goods and Services—Retail and Wholesale Services in Class 35: A Study of Different Local Practices and Examination Standards* could be analysed at the following link:
https://www.inta.org/Advocacy/Documents/2020/INTA_Nice_Classification_Retail_Services_Report_040120.pdf, accessed on April 20, 2020, at 15:38.

[7] For a more detailed analysis, please consult Daniel C. Schulte, *The Madrid Trademark Agreement's Basis in Registration-Based Systems: Does the Protocol Overcome Past Biases (Part II)*, published in Journal of the Patent and Trademark Office Society, vol. 77, no. 9, 1995, pp. 738 – 748.

[8] For more details you may consult *Trademark Manual of Examining Procedure*, available on the USPTO website at the following link: https://tmep.uspto.gov/RDMS/TMEP/Jan2017#/Jan2017/TMEP-1400d1e20.html, accessed on April 03, 2021, at 15:58.

[9] For a detailed analysis of recent changed of the Canadian trademark legislation you may consult *Legal Update: On June 17, Canada will join the Madrid Protocol and offer broader rights to TM holders*, article published in June 2019 on the website of the company Sideman Bancroft LLP, which may be consulted at the link: https://www.sideman.com/legal-update-on-june-17-canada-will-join-the-madrid-protocol-and-offer-broader-rights-to-tm-holders/, accessed on April 03, 2021, at 16:23.

[10] Toni Polson Ashton, *Is it Time to Dispense with Trademark Classification Systems?*, article published on the website Lexology on July 07, 2017, available at the following link: https://www.lexology.com/library/detail.aspx?g=c0a32f8d-be3c-4a4c-889e-d0f8869a564e, accessed on April 03, 2021, at 16:33.

4. What are those considerations for which a good choice of designated products and services is essential, and why the interpretation regarding the scope of protection matters so much

The main importance of using the Nice Classification is undoubtedly the fact that, by designating the goods and services for which registration is sought, the proprietor defines the scope of his trademark protection. However, this leads to a number of procedural consequences.

As such, some of the absolute grounds for refusal are examined in relation to the goods and services designated by the trademark. In that regard, we consider the absolute grounds for refusal relating to the distinctiveness of the trademarks: "*Again, according to settled case-law, such distinctiveness can be assessed only by reference, first, to the goods or services in respect of which registration is sought and, second, to the relevant public's perception of that sign (Procter & Gamble v OHIM, paragraph 33; Eurohypo v OHIM, paragraph 67; and Audi v OHIM, paragraph 34).*"[11] As such, naturally, the descriptiveness of a trademark, as a particular situation of lack of distinctive character, is also analysed in relation to the designated goods or services. Furthermore, the ground for refusal relating to signs or indications which have become customary in the current language or in the bona fide and established practices of the trade shall, in turn, be considered in relation to the designated goods or services: "*Article 3(1)(d) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as only precluding registration of a trade mark where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought.*"[12] Finally, for the following absolute grounds for refusal, the reporting of the analysis to the designated goods and / or services clearly results from the actual text of the legal provisions: "*A trade mark shall not be registered or, if registered, shall be liable to be declared invalid, for the following absolute grounds: (...) d) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics thereof; e) signs which consist exclusively of the shape, or another characteristic which results from the nature of the goods themselves or which is necessary to obtain a technical result or which gives substantial value to the goods; f) trade marks which are of such a nature as to deceive the public, for instance, as to the nature, quality or geographical origin of the goods or service;*"[13].

Further, Law no. 84/1998 provides that some of the absolute grounds for refusal regulated at letters (b), (c) and (d) may be overcome in so far as the applicant proves the distinctive character acquired by its trademark as a result of its use on the market.[14] This is another reason why the choice made by the applicant is important because, in the scenario described by this article of law, it will acquire protection only for those or goods for which the trademark has been used in such a way as to conclude the acquisition of character distinctive.

Furthermore, the choice of products or services is also relevant from the perspective of avoiding conflict with other earlier trademarks. Indeed, with the exception of the special situation of conflict with earlier trademarks enjoying reputation, the principle of the specialty of trademarks requires that similar or identical marks may coexist in different markets. In other words, "*The right of the owner of a mark to prevent third parties from using that mark in trade is subject to the principle of specialty, according to which this right can only be asserted with regard to those goods and services in respect of which the trademark is protected, usually as a result of registration. In principle, other traders may use an identical trademark for dissimilar goods or services, provided that no risk of confusion, association or dilution is caused.*"[15]

Last but not least, the way in which the designated goods and services are chosen protects the trademark owner or, on the contrary, exposes him to the risk of loss or subsequent limitation of his rights, if the revocation of his trademark is caused due to not being used. In such a context, the case-law has shown that the applicant is not only in danger of losing the designation of those goods or services for which his trademark is not used, but also of suffering the limitation of a larger

[11] Para. 24 of the Judgment of the Court of July 12, 2012 in the matter C-311/11 P, in the proceedings Smart Technologies ULC vs. Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM).

[12] Pt. 1 of the operative part of Judgment of the Court of October 4, 2001 in the matter C-517/99, in the proceedings regarding the preliminary ruling in the proceedings pending before that court brought by Merz & Krell GmbH & Co.

[13] Art. 5 para. (1) letters d), e) and f) of Law no. 84 of April 15, 1998 (republished) on trademarks and geographical indications, published in the Official Bulletin no. 856 of September 18, 2020.

[14] *Idem*, Art. 5 para. (2).

[15] Standing committee on the law of trademarks, industrial designs and geographical indications, Relation of Established Trademark Principles to New Types of Marks, 2007, p.8, paper available on WIPO's website at the following link:
https://www.wipo.int/edocs/mdocs/sct/en/sct_17/sct_17_3.doc, accessed on March 28, 2021, at 19:12.

category of goods or services: "*Second, as the Advocate General noted in point 52 of her Opinion, with regard to goods or services in a broad category of goods, which may be sub-divided into several independent subcategories, it is necessary to require the proprietor of the earlier mark to adduce proof of genuine use of that mark for each of those autonomous subcategories. Indeed, if the proprietor of the earlier mark has registered his trade mark for a wide range of goods or services which he may potentially market, but which he has not done during the period of five years preceding the date of publication of the trade mark application against which it has filed an opposition, his interest in enjoying the protection of the earlier mark for those goods or services cannot prevail over his competitors' interest in registering their trade mark for those goods or services.*"[16]

Consequently, the choice of the designated goods and services must take into account at least three essential elements: their relation to the sign chosen as trademark, in so far as they may give rise to an absolute ground for refusal, possible conflicts with other earlier rights and, last but not least, the reality of the market, namely which are those products or services for which the trademark is actually used.

5. The IP Translator judgment

As we have seen above, the interpretation of the scope of trademark protection, either in the registration or post-registration procedure, is essential. Nevertheless, one of the reasons that brought inconsistency with respect to the interpretation of the scope of protection for trademarks was the structure of the Nice Classification itself. As we know, the Nice Classification consists of a class heading, explanatory notes and an alphabetical list of goods and / or services. In practice, applicants use wordings from all three elements, and also descriptions that are not enclosed in the classification, when it comes to designated the desired specifications in their trademark applications.

As such, one of the most debated elements of interpretation regarding the Nice Classification, which benefited from different solutions at the level of the Member States of the European Union, and which was to be decided by European jurisprudence, was to determine the scope of protection for the trademarks designating the class headings contained in the Nice Classification.

At a practical level, this type of designation could allow three interpretations: either that the applicant wanted to obtain protection exclusively for those goods or services described in the class heading, strictly related to their meaning, or that his intention was to designate all goods or services designated in the alphabetical list of that class or, in general terms, the fact that the applicant has considered all the goods or services that could be included in that class. However, given the importance of understanding the designated products and services and the continuing dynamism of that classification, the above interpretations undoubtedly showed significant differences.

It is also worth mentioning that the structure of the class headings does not follow the same patterns. Some class headings, such as those of classes 15 or 25, consist of general indications that are able to cover all the goods or services they cover. Other classes, and from this standpoint class 9 is the best example, include both general and very specific indications. Consequently, especially for these types of classes, the interpretation approach is of high importance.

Moreover, in our opinion, the more generous the interpretation of the scope of protection for the trademarks designating these class headings is, the more we believe that it is moving further and further away from the reality of the market, namely the goods and services for which the trademark is actually being used.

In this context, the IP Translator judgment was issued, where the European jurisprudence established the following guidelines in interpreting the extent of the protection offered by class headings:

"*Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that it requires the goods and services for which the protection of the trade mark is sought to be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that basis alone, to determine the extent of the protection conferred by the trade mark.*

Directive 2008/95 must be interpreted as meaning that it does not preclude the use of the general indications of the class headings of the Classification referred to in Article 1 of the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, concluded at the Nice Diplomatic Conference on 15 June 1957, last revised in Geneva on 13 May 1977 and amended on 28 September 1979, to identify the goods and services for which the protection of the trade mark is sought, provided that such identification is sufficiently clear and precise.

An applicant for a national trade mark who uses all the general indications of a particular class heading

[16] Para. 43 of the Judgment of the Court of July 16, 2020 in the matter C-714/18 P, in the proceedings ACTC GmbH vs. the European Union Intellectual Property Office (EUIPO) and Taiga AB.

of the Classification referred to in Article 1 of the Nice Agreement to identify the goods or services for which the protection of the trade mark is sought must specify whether its application for registration is intended to cover all the goods or services included in the alphabetical list of that class or only some of those goods or services. If the application concerns only some of those goods or services, the applicant is required to specify which of the goods or services in that class are intended to be covered. "[17]

As such, the IP Translator judgment raised two key issues. First, it emphasized the need for the designated goods and services to be clear and precise enough to establish the extent of protection, without ambiguity and without the need for further research. However, we are of the opinion that this requirement brings the attributive system closer to the declarative one, in the sense that, if in the case of the latter the scope of protection is established without a doubt, by simply observing the goods or services for which the trademark is being used, in the attributive system the applicant, who has the prerogative to choose the designated goods and services without being able to be censored, has nevertheless the obligation to make this specification in a manner that does not give rise to ambiguity regarding the scope of protection.

However, the main novelty brought by this judgment concerns the interpretation of the class headings of the Nice Classification. The practice of class headings covering a wide range of goods or services remains in place, but two amendments are made: first, the interpretation of the scope of protection for these class headings in general, for the "entire class" is excluded, and its maximum extent can be represented by the "*alphabetical list of the Nice Classification*". A list that, although very generous, does not include a multitude of goods or services that would naturally be classifiable in certain classes. Secondly, for such an extensive interpretation, the applicant needs to make an express statement to the effect that this was his intention at the time the trade mark application was filed.

It should be noted, however, that the solution adopted by the Court seems to be, rather, a compromise solution. In that regard, we note that, in his view, Advocate General Yves Bot recommended that the Court should conclude in the sense that „*Communication No 4/03 of the President of the Office for Harmonization in the Internal Market (Trade marks and designs) (OHIM) of 16 June 2003 concerning the use of class headings in lists of goods and services for Community trade mark applications and registrations, by which the President indicates that OHIM does not object to the use of any of the general indications and class headings as being too vague or indefinite and that the use of those indications constitutes a claim to all the goods or services falling within the class concerned, does not guarantee the clarity and precision required for the purposes of the registration of a trade mark, whether a national or a Community trade mark*".[18] However, the court did not follow this recommendation, but neither did it encourage the practice of designating, through class headings, a wider range of goods or services. It chose what appears to be a middle ground.

Thus, the European practice tends to restrict the scope of protection afforded by the use of class headings, encouraging applicants to adopt brief, clear and precise classifications that describe only those goods or services for which they intend to actually use the trademark.

6. Common communications following the IP Translator judgment and the approach of the New Directive

But what were the practical consequences of this decision?

A first step was the review by some EU Member States of how they interpret the designation of class headings by applicants. The Romanian Office - OSIM - is one of the offices that, taking note of this decision, modified its own practice. According to the Common Communication on the Implementation of 'IP Translator' v1.2 of 20 February 2014, for trademarks filed after the IP Translator ruling containing full class headings of the Nice Classification, OSIM will interpret the scope of protection of these classes as follows: "*Class headings cover the literal meaning of the class headings plus the alphabetical list of the edition of Nice at the time of filing*"[19], practice showing that the choice of one of the two options is made by the applicants at the time of filing the trademark application.

The next step was to establish the interpretation offered by IP Translator judgment the at legislative level. Thus, unlike its predecessor, the New Directive devotes a special article to the interpretation of the

[17] Operative part of the Judgment of the Court of June 19, 2012 in the matter C-307/10, in the proceedings concerning Chartered Institute of Patent Attorneys vs. Registrar of Trade Marks.

[18] Opinion of Advocate General Bot delivered on November 29, 2011, in the matter C-307/10, in the proceedings Chartered Institute of Patent Attorneys vs. Registrar of Trade Marks.

[19] *Common Communication on the Implementation of 'IP Translator' v1.2 of 20 February 2014*, p. 5, available on the Romanian PTO's website at the following link: https://osim.ro/wp-content/uploads/2017/12/RO-Common-Communication-1-updated-v1-2.pdf, accessed on April 18, 2020, at 20:50.

classification of goods and services covered by a trademark[20]. Thus, the directive focuses on the principles set by the *IP Translator* judgment as described above, and which were analyzed in the subsequent common communications of February 2014. The directive sates that „*The use of general terms, including the general indications of the class headings of the Nice Classification, shall be interpreted as including all the goods or services clearly covered by the literal meaning of the indication or term. The use of such terms or indications shall not be interpreted as comprising a claim to goods or services which cannot be so understood*". At the same time, the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark established the following: "*Proprietors of EU trade marks applied for before 22 June 2012 which are registered in respect of the entire heading of a Nice class may declare that their intention on the date of filing had been to seek protection in respect of goods or services beyond those covered by the literal meaning of the heading of that class, provided that the goods or services so designated are included in the alphabetical list for that class in the edition of the Nice Classification in force at the date of filing.*"[21] This practice was adopted by numerous national legislations at the time of the implementation of the New Directive, including by the Romanian legislator.[22]

It should be mentioned that such a practice is indeed desirable, in order to align the interpretation with respect to the scope of protection for trademarks filed before the IP Translator decision and before implementing the New Directive, with that of more recent trademarks. However, in our opinion, the time-window offered by the Romanian law (of approximately 2 months and a half) to trademark owners to file such declarations was unreasonably constraining. For trademark owners with significant portfolios, the need to file the declaration was more of a race for trying to meet the deadline, instead of an effort to make an informed and calculated decision. Time-wise, we believe the Finnish legislation found the right solution to this problem, where "*the owners of trademark registrations must specify their list of goods and services by the renewal of the respective trademark registrations at the latest to ensure that they follow the new classification provisions. However, if the last date for the renewal of a trademark is within six months of the law's entry into force, such specification may be submitted within six months from the entry into force of the new act*".[23]

7. The SkyKick Judgment

Also in the sense of encouraging trademark owners to limit their list of designated goods and services to restricted categories, which they actually use in the market, we mention the judgment in the SkyKick case.

This case aroused great interest when Advocate General Evgeni Tanchev launched his opinion, as follows: "(…) *if registration can be obtained too easily and/or too widely, then the result will be mounting barriers to entry for third parties as the supply of suitable trade marks is diminished, increasing costs which may be passed on to consumers, and an erosion of the public domain; (...)If terms which are not applicable, but which anyway appear in the register, are vague and uncertain, then this will also lead to a dissuasive effect on competitors considering entering the market, in so far as a company such as Sky will appear larger on the market than it is in reality; (...) In certain circumstances, applying for registration of a trade mark without any intention to use it in connection with the specified goods or services may constitute an element of bad faith, in particular where the sole objective of the applicant is to prevent a third party from entering the market, including where there is evidence of an abusive filing strategy, which it is for the referring court to ascertain.*"[24].

This opinion has caused a great deal of controversy, creating the expectation of a radical court decision. Finally, the Court ruled as follows: "*1. Articles 7 and 51 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, as amended by Council Regulation (EC) No 1891/2006 of 18 December 2006, and Article 3 of First Council*

[20] Art. 39 of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, published in the Official Journal of the European Union of December 23, .2013.

[21] Art. 33 para. (8) of the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, published in the Official Journal of the European Union of June 16, 2017.

[22] See provisions of art. 11 of Law no. 84 of April 15, 1998 (republished) on trademarks and geographical indications, published in the Official Bulletin no. 856 of September 18, 2020.

[23] *The New Finnish Trademarks Act entered into force on 1 May 2019*, article published on the website of Borenius on May 02, 2019, at the link: https://www.borenius.com/2019/05/02/the-new-finnish-trademarks-act-has-entered-into-force-on-1-may-2019/, accessed on April 11, 2021, at 17:11.

[24] Opinion of Advocate General

Tanchev of October 16, 2019, in the matter C-371/18 Sky plc., Sky International AG, Sky UK Limited vs. SkyKick UK Limited, SkyKick Inc., para. 62, 72, 143, consulted on the Curia website at the link:

http://curia.europa.eu/juris/document/document.jsf?text=&docid=219223&pageIndex=0&doclang=RO&mode=req&dir=&occ=first&part=1&cid=7381341 on December 14, 2019, at 15:23.

Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that a Community trade mark or a national trade mark cannot be declared wholly or partially invalid on the ground that terms used to designate the goods and services in respect of which that trade mark was registered lack clarity and precision.

2. Article 51(1)(b) of Regulation No 40/94, as amended by Regulation No 1891/2006, and Article 3(2)(d) of First Directive 89/104 must be interpreted as meaning that a trade mark application made without any intention to use the trade mark in relation to the goods and services covered by the registration constitutes bad faith, within the meaning of those provisions, if the applicant for registration of that mark had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark. When the absence of the intention to use the trade mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that application constitutes bad faith only in so far as it relates to those goods or services.

3. First Directive 89/104 must be interpreted as not precluding a provision of national law under which an applicant for registration of a trade mark must state that the trade mark is being used in relation to the goods and services in relation to which it is sought to register the trade mark, or that he or she has a bona fide intention that it should be so used, in so far as the infringement of such an obligation does not constitute, in itself, a ground for invalidity of a trade mark already registered."[25].

In reaching that conclusion, in paragraph 66 of the recitals, the Court held that "*In that regard, it suffices to note that the concept of 'public policy', (...), cannot be construed as relating to characteristics concerning the trade mark application itself, such as the clarity and precision of the terms used to designate the goods or services covered by that registration, regardless of the characteristics of the sign for which the registration as a trade mark is sought.*"[26].

Regarding the aspect of bad faith, the literature notes that in this context it can be retained if objective evidence can be provided regarding the applicant's intention to undermine the activity of third parties. However, as one of the practitioners called to comment on this decision very well points out, it remains to be seen how these conditions will be analysed, related to the subjective attitude of the applicant.[27]

As far as we are concerned, we agree that the mere fact of registering a trademark for goods or services for which it is not used does not automatically lead to the conclusion that there is conduct in bad faith. No one can assume that the applicant did not intend to use the trademark for all designated goods or services, as long as the law generally gives him a five-year grace period to use the trademark for those goods or services. We therefore agree that bad faith must be proved, which, according to the case law of the court, "*presupposes the presence of a dishonest state of mind or intention*".[28].

The above-mentioned judgment made the literature write "*SkyKick: the Disappointment of the Decade*", considering that following this decision the trademark owners will continue to agglomerate the trademark register with trademarks designating goods or services they do not actually use, and the specifications will not become shorter. However, the quoted author argues that, at some point, this practice will be discontinued, and other approaches or lobbies will have to be found to change the applicants' practice.[29]. In another article, from the same publication, the article describes this judgment as "*a disappointing end to an exciting series of events*".[30] However, without commenting on the issue brought before the court, namely whether the software goods are indeed sufficiently clear and precise, we agree that too broad an interpretation of the grounds for annulment of a trade mark may trigger a subsequent non-uniform practice. Also, even if it did not have the result expected by some practitioners, this judgment is intended to call into question the need for applicants to choose more carefully the goods and services designated under their trademark applications. The

[25] Operational part of the Judgment of the Court of January 20, 2020 in the matter C-371/18, in the proceedings Sky plc., Sky International AG, Sky UK Ltd vs. SkyKick UK Ltd, SkyKick Inc.

[26] *Idem*, Pt. 66.

[27] Jonathan Walfisz, *Sky v SkyKick: "sigh of relief" or "sting in the tail"? Legal experts react to CJEU's long-awaited decision*, article published in the *World Trademark Review* on January 29, 2020, available at the link https://www.worldtrademarkreview.com/brand-management/sky-v-skykick-sigh-relief-or-sting-in-tail-legal-experts-react-cjeus-long, accessed on March 20, 2020, at 12:41.

[28] Para. 45 of the Judgment of the Court of September 12, 2019 in the matter C-104/18 P, in the proceedings regarding Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ vs. European Union Intellectual Property Office (EUIPO), Joaquín Nadal Esteban.

[29] Darren Meale, *SkyKick: the disappointment of the decade*, editorial published in the Journal of Intellectual Property Law & Practice, 2020, at the link https://academic.oup.com/jiplp/article/doi/10.1093/jiplp/jpaa045/5819581?searchresult=1, accessed on de April 18, 2020, at 22:05.

[30] Darren Meale, *SkyKick: a disappointing end to an exciting series of events*, article published in the Journal of Intellectual Property Law & Practice, 2020, at the link https://academic.oup.com/jiplp/article/doi/10.1093/jiplp/jpaa046/5819578?searchresult=1, accessed on April 18, 2020, at 22:20.

reactions to this decision, as exemplified above, show just that. Furthermore, we consider that this judgment is intended to increase the examiners' attention in the preliminary examination procedure of the trademark applications, and thus the echoes aroused by this decision are not without consequences.

In this, we mention the conclusion of Léon Dijkman, which we consider brief and correct. He notes that "*from a systematic point of view, the CJEU's decision in Sky is convincing*" in the sense that legal certainty would be rather infringed if the cancellation of a trademark were accepted for a legally unforeseen express reason, or if other reasons would be "forced" to cover the situation of unclear and imprecise specifications. The problem of these specifications, however, remains unresolved. Therefore, the quoted author concludes, probably the solution at this time is to make the trademark offices stricter at the time of registration, in order not to allow the registration of trademarks for such terms.[31].

8. Conclusions

The choice of the goods and services designated by a trademark application is of particular importance, both for the registration procedure and for subsequent procedures in which the trademark may be involved during its validity.

The Nice Classification has been a fundamental instrument in tayloring the practice around concerning the designation of goods and services at international level. However, in time, the use of the Nice Classification lead to intepretations of the scope of trademarks' protection that were inconsistent with the realities on the market.

In this context, the tendency of European case law is to direct applicants to choose designations that are as clear, precise and as specific as possible, in order to avoid trademark protection for those goods and services for which it is not actually used.

Thus, even if the SkyKick judgment was not, perhaps, as courageous as some practitioners wanted, it came in addition to the IP Translator judgment, which has already outlined a series of principles in this regard. The SkyKick judgment certainly drew attention to the need for trademarks to designate goods or services that are clear, precise, specific, and that express as accurately as possible the intention to use of the applicant or of their proprietor.

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[31] Léon Dijkman, *Furry thoughts on Sky v. Skykick – Part 1: trade marks lacking sufficient clarity and precision*, article published on January 30, 2020 on the website IPKat, at the link http://ipkitten.blogspot.com/2020/01/furry-thoughts-on-sky-v-skykick-part-1.html, accessed on April 20, 2020, at 15:27.

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- Darren Meale, SkyKick: a disappointing end to an exciting series of events, article published in the Journal of Intellectual Property Law & Practice, 2020, at the link: https://academic.oup.com/jiplp/article/doi/10.1093/jiplp/jpaa046/5819578?searchresult=1;
- Léon Dijkman, Furry thoughts on Sky v. Skykick – Part 1: trade marks lacking sufficient clarity and precision, article published on January 30, 2020 on the website IPKat, at the link http://ipkitten.blogspot.com/2020/01/furry-thoughts-on-sky-v-skykick-part-1.html.

COPYRIGHT AND RELATED RIGHTS INJUNCTIONS

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Abstract

The national general copyright legislative framework, in particular, the national laws transposing the EU acquis related to online copyright infringement and enforcement procedures (IPRED, InfoSoc Directive, Conditional Access Directive, E-Commerce Directive, Rental Rights Directive, etc.), is providing, in case of copyright and related rights infringements, the possibility for the Courts to take measures against the infringers, especially injunctions. We can distinguish between interlocutory injunctions like provisional and precautionary measures and injunctions following a decision on case merits like blocking and take-down injunctions, including forward-looking, live and dynamic injunctions which are being increasingly applied to certain types of online rights infringements. The article will underline the national legal framework in the field and Romanian, European and international case-law.

Keywords: *online copyright infringements, enforcement procedures, injunctions, interlocutory injunctions, injunctions following a decision on case merits, European Directives in the field, case-law.*

1. Introduction

The Romanian legal framework on copyright and related rights enforcement is set up by the Law no. 8/1996 on copyright and related rights. The law was subsequently amended, revised and modified, including for transposing into the national legislation the EU Directives in the field (for example, the Directive 2001/29/CE on the harmonization of certain issues of copyright and related rights in the information society[1] was transposed starting from 2004 by Law no. 285 for modifying and supplementing Law no. 8/1996 and the Directive 2004/48/CE on the enforcement of intellectual property rights was transposed starting from 2005 by the Government Ordinance no. 123 for modifying and supplementing Law no. 8/1996). The Law no. 8/1996 was republished in 2018 and its last amendment took place in 2020 by Law no. 8. In this article I will refer to Law no. 8/1996 on copyright and related rights, republished, with modifications and completions as Law no. 8/1996 on copyright and related rights or Law no. 8/1996.

The special enforcement dispositions regulated in Law no. 8/1996 on copyright and related rights, especially the procedural provisions, are completed with the general ones (common law) provided by the Civil and Procedure Code and Criminal and Procedure Code.

The Law no. 8/1996 on copyright and related rights dedicates a whole section to the enforcement of copyright: Section II 'Procedures and sanctions' in Chapter III 'Measures of protection, proceedings and sanctions' of Title III 'Management and Protection of Copyright and Related Rights'. 14 articles are regulating the enforcement of copyright and related rights: article 187 to article 200.

Mainly, the regulatory texts are the following and they will be detailed further: provisional and precautionary measures (art. 188 par. 3-6); measures for preserving evidence (art. 188 par. 7-9); claims and measures (art. 188 par. 10-15); contraventions (art. 190 letters f) and g), art. 191-192); and criminal offences (art. 193 - art. 200).

According to the Law no. 8/1996 on copyright and related rights the copyright infringements can involve: civil, contravention or criminal liability, as the case may be. By consequence, the protection of copyright and related rights is made by administrative, civil and criminal law measures.

The rightholders may request to the Courts or other competent bodies, as the case may be, the acknowledgment of their rights and the establishment of the infringing thereof, and may claim damages for the redressing of the prejudice caused. The same requests can be lodged on behalf and for the rightholders by the collective management organizations, by the associations fighting against piracy or by the persons authorized to use the rights protected by the Law no. 8/1996 on copyright and related rights, according to the mandate given for this purpose. When the rightholder has started an action, the persons authorized to use the rights protected by the Law no. 8/1996 on copyright and related rights can intervene in the lawsuit, claiming the remedy of the prejudice caused to them.

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[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029.

2. Content

As regards the provisional and precautionary measures, if the rightholder or the collective management organizations, the associations fighting against piracy or the persons authorized to use the protected rights, according to the mandate given for this purpose, credibly proves that the copyright is subject-matter of an illicit action, present or imminent and that this action risks to create a prejudice difficult to repair, it may request the Court to take provisional measures. The Court may decide in special:

a) forbidding the infringement or its provisional cease;

b) ordering the measures to be taken for conserving the probes;

c) ordering the measures to be taken for ensuring the remedy of the damage; for this purpose, the Court can order the ensuring measures to be taken on the movable and immovable assets of the person presumed to have infringed the protected rights, including the blocking of his/her bank accounts and other assets. For this purpose, the competent authorities can order the communication of the banking, financial or commercial documents or adequate access to the pertinent information;

d) ordering the taking or handing over to the competent authorities of the goods in connection with which suspicions exist on the violation of a protected right in order to prevent their introduction in the commercial circuit.

In this case, the applicable procedural disposals are provided for in the Civil Procedure Code related to IPR provisional measures.

The same measures can be requested, under the same conditions, against an intermediary whose services are used by a third party for the infringement of a protected right.

The above-mentioned measures can include the detailed description with or without the sampling of the specimen, or the real seizure of the goods under dispute and, as the case may be, of the materials and instruments used to produce and/or distribute such goods, as well as the documents thereof. Such measures shall be taken into account in the enforcement of Criminal Procedure Code provisions (art. 169-171).

In respect the measures for preserving evidence, article 6 [2] of the IPRED Directive[3], namely 'Evidence' was transposed in Law no. 8/1996 on copyright and related rights in art. 188 par. 7 as it follows: 'The Court may authorize the taking of objects and documents that constitute evidences of the infringing of copyright or related rights, in original or in copy, even when they are in the possession of the opposite party. In case of infringements committed on commercial scale, the competent authorities can also order the communication of banking, financial or commercial documents or adequate access to the pertinent information'.

For the adoption of the above-mentioned measures, subject to the insurance of confidential information protection, the Courts shall request for the plaintiff to provide any element of evidence, reasonably accessible, in order to prove, with sufficient certainty, that his right was infringed, or that such an infringement is imminent. It is considered as a reasonable evidence the number of copies of a work or of any other protected object, at the Court appreciation. In this case, the Courts can request for the plaintiff to deposit a sufficient bail to ensure the compensation of any prejudice that might be suffered by the defendant (art. 188 par. 8).

The insurance measures for evidences or to ascertain a fact-finding disposed by the Court are applied through a bailiff. The rightholders of the rights supposed to be infringed or to which there is the danger to be infringed, as well as their representatives, have the right to take part at the application of the measures for evidence conservation or for ascertain a fact-finding.

Article 13 [4] of the IPRED Directive, namely 'Damages' was transposed in Law no. 8/1996 on copyright and related rights as it follows:

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[2] *Article 6* Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

2. Under the same conditions, in the case of an infringement committed on a commercial scale Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.

[3] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0048R(01)&from=EN.

[4] *Article 13* Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

'In establishing the damages, the Court takes into account (art. 188 par. 2):

a) either criteria such as the negative economic consequences, particularly the non-earned benefit, the benefits earned unlawfully by the offender and, as the case may be, other elements besides the economic factors, such as the moral damages caused to the rightholder;

b) either granting of damages representing the triple of the amounts that would have been lawfully owed for the type of utilization that made the object of the illicit deed, in the case when the criteria provided under letter a) cannot be applied'.

The Court may authorize measures for preserving evidence, provisional and precautionary measures and establish the damages taking into account, on one hand, the economic factors: the rightsholder's non-earned benefit and the benefits earned unlawfully by the offender and, on the other hand, the moral damages caused to the rightholder.

Under the Romanian legislation, the conditions for civil offence liability are: the existence of an illicit deed, the existence of a prejudice, the existence of connection between the illicit deed and the prejudice and the existence of guilt.

For claims and measures, the owners of the infringed rights may claim to the Court for ordering the enforcement of any of the following measures:

a) remittance, in order to cover the prejudices suffered, of the income resulted from the unlawful deed;

b) destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed;

c) removal from commercial circuit by seizure and destruction, of the illegally made copies;

d) dissemination of information referring to the Court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender; under the same conditions the Courts may order additional publicity measures adapted to the particular circumstances of the case, including an extensive publicity.

The Court orders the enforcement of the above measures at the expense of the offender, except the case when well-grounded reasons exist for, and the offender will not bear the expenses. The measures provided for under letters b) and c) may be ordered also by the prosecutor with the occasion of classifying or renouncing to prosecuting.

In ordering the above-mentioned measures the Court shall respect the principle of proportionality with the seriousness of the protected rights infringement and it shall take into account the interests of third parties susceptible for being affected by such measures.

Legal authorities shall communicate to the parties the solutions adopted in the cases of copyright and related rights infringement.

Government of Romania, through the Romanian Copyright Office supports the preparing, by the professional associations and organizations, of the ethics codes at the Community standard, intended to contribute to the ensuring of the copyright and related rights observance, particularly with respect to the utilization of the codes that allow the identification of the manufacturer, affixed on optical disks. Also, the Government of Romania supports the delivery to the European Commission of the ethics codes drafts at the national or Community level and of the appraisals referring to the enforcement thereof.

The following infringements are considered contraventions/offences:

- fixation, without the authorization or consent of the rightholder of the performances or of the radio or television broadcasts (art. 190 letter f);

- communication to public, without the consent of the rightholder of works or related rights products (art. 190 letter g);

- the deed of the legal or authorized natural persons for permitting the access in the spaces, to the equipment, means of transport, goods or own services, with a view to committing, by another person of a contravention provided for by the Law no. 8/1996 on copyright and related rights (art. 191 par. 1).

The above-mentioned contraventions are established and applied by the persons empowered by the Romanian Copyright Office Director General or by the police officers or agents within local police or the Ministry of Interior Affaires with competences in the field.

The sanctions for the above-mentioned contraventions are applying also to the legal persons. If the contravener, legal person, is carrying out activities that involve, according to its object of activity, communication to the public of works or related rights products, the limits of the contravention fines are twice increased.

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a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity

The contravener may pay, within 48 hours from the date of the reception of the document establishing the contravention, half from the minimum fine provided.

The provisions of Government Ordinance no. 2/2001 regarding the legal regime of contraventions, approved with modifications and completions by Law no. 180/2002, with subsequent amendments and completions are applying to the contraventions provided in Law no. 8/1996.

According to the Law no. 8/1996 on copyright and related rights the following infringements are considered criminal offences:

- making of pirate goods, for the purpose of the distribution (art. 193 par. 1 letter a); placing of the pirate goods under a final import or export customs regime, under a suspensive customs regime or in free zones (art. 193 par. 1 letter b); any other modality of introducing the pirate goods on the domestic market (art. 193 par. 1 letter c); offering, distribution, possession, or storage and transportation of pirate goods, for the purpose of distribution (art. 193 par. 2); the promotion of the pirate goods through any means and in any modality, including the utilization of public announcements or electronic means of communication, or through the exhibiting or presentation to the public of the lists or catalogues of products or through any similar means (art. 193 par. 5);

In these cases, shall not be punished the person who, before starting the criminal proceedings, denounces to the competent authorities its participation in an association or agreement with a view to committing one of the above-mentioned criminal offences, thus allowing for the identification and criminal accountability of the other participants.

Also, the person that has committed one of the above-mentioned criminal offenses and who, during the criminal proceedings, denounces and facilitates for the identification and criminal accountability of other persons who have committed offences connected to pirated goods or to pirated access control devices, benefit from the reduction by half of the punishment limits.

- making available to the public, including through the Internet or other computer networks, without the right, of works or related rights products or products involving *sui generis* rights of the databases makers or copies thereof, regardless of their support, so that the public may access them from any place and at any time individually chosen by them (art. 194);

- unauthorized reproduction on computer systems of computer programs in any of the following modalities: installation, storing, running or execution, display or transmission in the domestic network (art. 195);

- the following deeds committed without the authorization or consent of the rightholders: reproduction of works or related rights products (art. 196 par. 1 letter a); distribution, rental or import, on domestic market, of works or related rights products, other than the pirate goods (art. 196 par. 1 letter b); broadcasting of works or related rights products (art. 196 par. 1 letter c); cable retransmission of the works or related rights products (art. 196 par. 1 letter d); making of derivative works (art. 196 par. 1 letter e); fixation for commercial purpose of performances or radio or television broadcasts (art. 196 par. 1 letter f);

- the deed of a person to assume, without right, totally or in part, the work of another author and to present it as his own intellectual creation (art. 197 par. 1);

- production, import, distribution, possession, installing, maintaining or replacing in any way, access control devices, either original or pirate ones, used for conditional access programs services (art. 198 par. 1); the deed of a person who unlawfully connects to or unlawfully connects another person to conditioned access programs (art. 198 par. 2); using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices to the conditioned access programs services, as well as the exhibiting or presentation to the public in any mode, unlawfully, of the information needed for making devices of any sort, capable to ensure the unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3); sale or rental of the pirate access control devices (art. 198 par. 4);

- the deed of a person that, unlawfully, produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for selling purposes, devices or components that allow the neutralization of the technological protection measures or performs services which lead to the neutralization of the technological protection measures, including in the digital environment (art. 199 par. 1);

- the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime (art. 199 par. 2).

In case the persons that have committed the above-mentioned criminal offences repaired, until the end of the first Court inquiry, the prejudice done to the rightholder, the special limits of the punishments are half reduced.

As regards the online infringements, some considerations regarding the criminal offence regulated in art. 194 of Law no. 8/1996 on copyright and related rights need to be made on making available to the

public right, including through the Internet or other computer networks, without the right, of works or related rights products or products involving *sui generis* rights of the databases makers or copies thereof, regardless of their support, so that the public may access them from any place and at any time individually chosen by them

The making available right is a part of communication to the public right regulated in art. 20 of the law as any communication of a work, directly or by any technical means, made in a place opened for public or in any other place where a number of persons exceeding the normal circle of a family members and of its acquaintances assemble, including stage performance, recitation or any other public form of performance or direct presentation of the work, public display of plastic art works, of applied art, of photographic art and of architecture, public projection of cinematographic and of other audiovisual works, including of digital art works, presentation in a public place, by means of sound or audiovisual recordings, as well as presentation in a public place, by any means, of a broadcast work. Any communication of a work by wire or wireless means, including by making the works available to the public, via Internet or other computer networks, so that any member of the public to have access to it, from anywhere or at any moment individually chosen, shall also be considered as communication to the public.

The right to authorize or prohibit communication to the public or making available to the public of the works is not subject to exhaustion by any act of communication to the public or of making available to the public.

The making available right is regulated as an exclusive right – to authorise or to prohibit – of the copyright and related rights holders: art. 13 lit. f) for authors; art. 96 par. 1 letter i) for performers; art. 106 par. 1 letter g) for phonograms producers; art. 110 par. 1 letter g) for audiovisual recordings producers; and art. 129 letter i) for broadcasters.

The deed of making available to the public is made without right which includes the cases done without the authorisation of the rightholder and also the ones made by third parties.

The material element of the criminal offence is making available to the public, including through the Internet or other computer networks, without the right, of works or related rights products. Even that the provisions are stipulating the nouns' plural, the offence' material object is emphasizing also only one work or related rights product or (a) fragment(s) or (a) part(s) of a work or a related right product[5].

The criminal offences are not differentiated depending on acting for profit. The infringement is considered as a criminal offence no matter if the deed is made with or without the purpose of obtaining profit. The deeds regulated as infringements are in fact, in the majority of the cases, made with the scope of obtaining profit. Still, acting for profit can be considered by the Courts in establishing the punishment.

The subjective part of the criminal offences is the intent. When the criminal offence is made with the purpose of obtaining profit, the intent is qualified by its scope.

In this case, the Law no. 8/1996 on copyright and related rights is defining the notion of 'commercial purpose' as aiming to obtain, directly or indirectly, of an economic or material benefit (art. 193 par. 7). The only criminal offence for which the law is express stipulating the 'commercial purpose' is the one provided in art. 199 par. 2 (the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime).

All the criminal offences regulated in the Law no. 8/1996 on copyright and related rights are sanctioned with imprisonment or fines. So, the law is providing an alternative way for sanctioning the criminal offences. The fines' quantum is not regulated in the Law no. 8/1996 on copyright and related rights and there are two major categories of imprisonment: 6 months to 3 years and 3 months to 2 years. For only two infringements the level of imprisonment is higher: 2 to 7 years if the deeds provided in art. 193 par. 1 and par. 2 are made for commercial purpose and 1 year to 5 years for the sale or rental of the pirate devices for access control (art. 198 par. 4), and for only one infringement a lower level, respectively 1 month to 1 year for using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices of the conditioned access programs services, as well as the exhibiting or presentation to the public in any mode, unlawfully, of the information needed for making devices of any sort, capable to ensure the

[5] C. Duvac, *Analiza infracțiunii prevăzută de art. 139 ind. 8 din Legea nr. 8/1996*, în Revista Română de Dreptul Proprietății Intelectuale nr. 4/2007, p. 51, nota 66 (*The analysis of the criminal offence provided by art. 139 ind. 8 of Law no. 8/1996*, in Romanian Journal of Intellectual Property Law no. 4/2007, page 51, note 66); V. Lazăr, *Infracțiuni contra drepturilor de proprietate intelectuală*, (*Intellectual Property Rights Criminal Offences*, Lumina Lex Publishing House, Bucharest, 2002, page 48); B. Florea, *Unele considerații privind modificările aduse asupra infracțiunii prevăzute de art. 139 ind. 8 din Legea nr. 8/1996 prin legea nr. 187/2012 pentru punerea în aplicare a Legii nr. 286/2009 privind Codul Penal*, în Revista Română de Dreptul Proprietății Intelectuale nr. 1/2015, p. 48 (*Some considerations regarding the changes brought on the criminal offence provided by art. 139 ind. 8 of Law no. 8/1996 by law no. 187/2012 for the implementation of Law no. 286/2009 regarding the Criminal Code*, in Romanian Journal of Intellectual Property Law no. 1/2015, page 48).

unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3).

As mentioned before, in case the persons that have committed the criminal offences regulated in the Law no. 8/1996 on copyright and related rights repair, until the end of the first Court inquiry, the prejudice done to the rightholder, the special limits of the punishments are half reduced.

The criminal proceedings are applying for all the criminal offences regulated in the Law no. 8/1996 on copyright and related rights.

All the criminal offences are committed with direct or indirect intent. Committing the offences from indirect intent/negligence is not regulated in our national law. Also, the active subject of these criminal offences isn't circumstantiated, thus they can be committed by any natural or legal person without the need to prove any special quality. All the criminal offences infringe intellectual property rights, with their specificity, generally being exclusively patrimonial economic rights. The passive subject of the criminal offences is the rightholder, being essential to proof the existence and validity of the alleged infringement. Most criminal offences have alternative forms (sanctioned as a contravention, if is not a criminal crime and sanctioned with imprisonment or fine) and aggravated forms in relation to their purpose (commercial purpose).

The competence to judge cases having as object offenses under the IPR regime belongs to the courts, according to the provisions of the Criminal Procedure Code, and the police is carrying out the criminal investigation for any crime that is not given, by law, in the competence of the special criminal investigation bodies or to the prosecutor according also to the provisions of the Criminal Procedure Code. The notice methods are also provided by the Criminal Procedure Code: complaint, denunciation, ex officio notification and acts concluded by other finding bodies provided by law.

Carrying out the criminal investigation involves the administration of evidence that serves to establish the existence or non-existence of the criminal offence, to identify the person who committed it and to know the circumstances necessary for the just solution of the case and which contributes to finding out the truth in the criminal proceedings.

The criminal activity that takes place through a site can be prove by any means of proof provided in the Criminal Procedure Code, for example, screenshots, minutes, documents etc., whether they are filed with the complaint by the injured party or whether they are administered by the judicial officer. Given that the offenses which are provided by law as infringements of intellectual property rights are committed without the consent of the right holder, in all cases the judicial officer should check the rightholder lack of consent. Also, the judicial officer should take measures for conserving the site content and data information traffic. These measures are applying in relation with the internet service provider.

The prejudice is not an element of IPR criminal offences, thus the existence and dimension of the prejudice it is a proof that has to be pointed by the civil part, that is claiming the civil action within the criminal one.

There were identified more steps for investigating an IPR crime like[6]: identifying the rightholder/s, checking the existence and functioning of the site, site domain location (national or foreign), identifying the site administrator or the person that registered the domain (natural or legal persons), identifying profiles on the social networks, identifying methods for paying on the site (if there are), IP location, etc.

In order to transpose Article 5 [7] of the Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access (Conditional Access Directive)[8], Law no. 8/1996 on copyright and related rights regulates the following infringements as criminal offences:

- production, import, distribution, possession, installing, maintaining or replacing in any way, the devices for the control of the access, either original or pirate ones, used for the conditioned access programs services (art. 198 par. 1) – the sanctions are imprisonment from 6 months to 3 years or fine;

- the deed of a person who unlawfully connects to or unlawfully connects another person to conditioned access programs (art. 198 par. 2) - the sanctions are imprisonment from 3 months to 2 years or fine;

- using public announcements or of electronic communication means for the purpose of promoting the pirate access control devices of conditioned access programs services, as well as the exhibiting or

[6] http://www.inm-lex.ro/fisiere/d_1443/Ghid%20de%20investigare%20a%20infractiunilor%20de%20proprietate%20intelectuala%20savarsite%20in%20mediul%20digital.pdf - site accessed on 20 March 2021.

[7] *Article 5* Sanctions and remedies:

1. The sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity.

2. Member States shall take the necessary measures to ensure that providers of protected services whose interests are affected by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for disposal outside commercial channels of illicit devices.

[8] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31998L0084

presentation to the public in any mode, unlawfully, of the information needed for making any sort of devices, capable to ensure the unauthorized access to the said conditioned access programs services, or intended for the unauthorized access in any mode to such services (art. 198 par. 3) - the sanctions are imprisonment from 1 month to 1 year or fine; and

- sale or rental of the pirate access control devices (art. 198 par. 4) - the sanctions are imprisonment from 1 year to 3 years or fine.

The Law defines the pirate access control devices as any device of whose making has not been authorized by the rightholder in relation to a certain service of conditioned access television programs, made to facilitate the access to that service (art. 198 par. 5).

Within an action referring to the infringement of the rights protected under the Romanian Law on copyright and related rights and as a response to a justified application, the Court is entitled to demand supplementary information about the origin and distribution networks of the goods or services prejudicing a right provided for in the law either from the offender and/or from any other person that, among other, was using for commercial purposes, services through which the protected rights were infringed (art. 187 par. 2 letter b); was submitting, for commercial purposes, goods or services used in activities through which the protected rights were infringed (art. 187 par. 2 letter c); and was indicated, by any of the persons mentioned before, as being involved in the production, execution, manufacturing, distribution or rental of the pirate goods or of the pirate access control devices or in the supplying of the products or services through which the protected rights were infringed (art. 187 par. 2 letter d).

According to art. 187 par. 3, the above-mentioned information includes, as the case may be:

a) name and address of the producers, manufacturers, distributors, suppliers and of the other previous holders of the goods, devices or of the services, transporters included, as well as the consignee wholesalers and of the retail sellers;

b) information regarding the quantities produced, manufactured, delivered or transported, received or ordered, as well as the price obtained for the respective goods, devices and services.

The provisions mentioned before shall apply without prejudicing other legal provisions, which:

a) grant to the owner the right to receive more extensive information;

b)provide for the use, in the civil or criminal cases, of the information communicated according to this disposition;

c) provide for the abuse of liability information right;

d) give the possibility to reject the supplying of information that could constrain the person for which is applying the civil, administrative or criminal liability to admit its own participation or the one of its close relatives in an activity through which the protected rights are infringed;

e) provide for the confidentiality protection of informing sources or for processing of the personal character data.

The Law no. 8/1996 on copyright and related rights transposes Articles 6 and 8 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive). Art. 6 of the Directive is referring to obligations as to technological measures, and art. 8 to sanctions and remedies.

The technological measures are defined as the use of any technology, of a device or component that, in the course of its normal operation, is destined to prevent or restrict the acts, that are not authorized by the rightholders (art. 185 par. 2). The technological measures can be put in place by the author of a work, performer, phonograms or audiovisual recordings producer, radio or television broadcasting organizations or the database maker (art. 185 par. 1). Even that the regulatory text is enumerating the persons that can institute technological measures, there is no interdiction that other persons, meaning other rightholders, to put in place such measures[9].

The technological measures are considered effective where the use of a protected work or other subject-matter of protection is controlled by the rightholder through application of an access control or protection process, such as encryption, coding, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, if the measures fulfil the assuring protection objective (art. 185 par. 3).

The rightholders that have instituted technical protection measures have the obligation to make available to the beneficiaries of the exceptions provided for in art. 35 par. (1) letters a), c) and e), art. 35 par. (2) letters d) and e) and art. 39 of Law no. 8/1996 the necessary means for the legal access to the work or any other protection object (art. 185 par. 4). They have also the right to limit the number of copies made under the

[9] B. Florea, *Contribuţii la analiza infracţiunilor prevăzute în art. 143 din Legea nr. 8/1996 privind dreptul de autor şi drepturile conexe, astfel cum a fost modificat prin Legea nr. 187/2012*, în Revista Română de Dreptul Proprietăţii Intelectuale nr. 3/2015, p. 30 (*Contributions to the analysis of the offenses provided in art. 143 of Law no. 8/1996 on copyright and related rights, as amended by Law no. 187/2012*, in Romanian Journal of Intellectual Property Law no. 3/2015, page 30).

aforementioned conditions (art. 185 par. 5). These provisions are not applied to the protected works made available to the public, according to the contractual clauses agreed between the parties, so that the members of the public to have access to them in any place and at any time chosen, individually (art. 185 par. 6).

The exceptions mentioned before are referring to the following:

Uses of a work already disclosed to the public shall be permitted without the author's consent and without payment of a remuneration, provided that such uses conform to proper practice, are not contrary with the normal exploitation of the work and are not prejudicial to the author or to the exploitation rights owners:

- art. 35 par. (1) letter a) - the reproduction of a work in connection with judicial, parliamentarian or administrative procedures or public security purposes;

- art. 35 par. (1) letter c) - the use of isolated articles or brief excerpts from works in publications, television or radio broadcasts or sound or audiovisual recordings exclusively intended for teaching purposes and also the reproduction for teaching purposes, within the framework of public education or social welfare institutions, of isolated articles or brief extracts from works, to the extent justified by the intended purpose;

- art. 35 par. (1) letter e) - specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not made for direct or indirect economic or commercial advantage.

In the conditions provided above, the reproduction, distribution, broadcasting or communication to the public, with no direct or indirect commercial or economic advantage, are allowed:

- art. 35 par. (2) letter d) - of works, for the sole purpose of illustration for teaching or scientific research;

- art. 35 par. (2) letter e) - of works, for the benefit of people with disabilities, which are directly related to that disability and to the extent required by the specific disability.

Art. 39 is regulating the broadcasting right assignment of a work to a radio or television broadcasting organization that shall entitle it to record the work for its own broadcasts needs with a view to a single authorized broadcast to the public. A new authorization from the authors shall be required in case of any new broadcast of the work so recorded, against a remuneration that cannot be waived. If no such authorization is requested within 6 months as from the broadcast, the recording must be destroyed. In the case of ephemeral recording of particular works made by the radio or television broadcasting organizations and by their own means for their own broadcasts, the preservation of these recordings in official archives is permitted if the recording has a special documentary value.

Also, for transposing the articles 6 and 8 of InfoSoc Directive, the Romanian copyright law regulates that the rightholders may provide, in electronic format, associated to a work or any subject-matter of protection, or in the context of their communication to the public, rights-management information (art. 185 par. 1).

The rights-management information is defined as any information provided by the rightholders which identifies the work or other subject-matter of protection, of the author or of other rightholder, as well as the conditions and terms for using the work or any other subject-matter of protection, as well as any number or code representing such information (art. 185 par. 2).

The infringements of the above-mentioned provisions are sanctioned as criminal offences as it follows:

- the deed of a person that, unlawfully, produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for selling purposes, devices or components that allow the neutralization of the technological protection measures or performs services which lead to the neutralization of the technological protection measures, including in the digital environment (art. 199 par. 1);

- the deed of a person who, without right, removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable copyright or related rights regime (art. 199 par. 2).

As mentioned before, the rightholders and the other persons entitled may request to the Courts or other competent bodies, as the case may be, the acknowledgment of their rights and the establishment of the infringing thereof, and may claim damages for redressing the caused prejudice. The Courts may take provisional and precautionary measures and, also, measures for preserving the evidence. Respecting the principle of proportionality, at the request of the infringed rights holder, the Courts may apply the following enforcement measures: the remittance, in order to cover the prejudices suffered, of the income resulted from the unlawful deed, destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed, removal from commercial circuit by seizure and destruction, of the illegally made copies and dissemination of information referring to the Court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender.

A special emphasise has to made regarding Articles 12 to 15 (liability of intermediary service

providers) and Articles 16 to 20 (implementation) of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive)[10], which are transposed into Romanian legislation by the Law no. 365/2002 on the e-commerce and the Methodological Norms from 20 November 2002 for applying the Law no. 365/2002 on the e-commerce approved by the Government Decision no. 1308/2002.

Art. 11 of Law no. 365/2002 on the e-commerce is regulating the general principles regarding the service providers liability. The title of Directive 'Liability of intermediary service providers' was incorrect translated, because Law no. 365/2002 is mentioning the 'Liability of service providers. This incorrect translation can create juridical incertitude since the services providers are defined as any natural or legal person who provides/makes available to a fixed or indefinite number of persons with society services information (art. 1 point 3).

The general principles are referring to the fact that civil, criminal and contravention liability is applying to the service providers; service providers shall be responsible for information provided by themselves or on their behalf; and the service providers are not responsible for the information transmitted, stored or to which they facilitate access, under the conditions provided in art. 12-15. So, the general liability principle of service providers is that they are responsible only for the information provided by themselves or on their behalf (their liability can be put in place in any field, including copyright and related rights), and the liability exceptions are limited provided by the law in articles 12-15.

Art. 12 of Law no. 365/2002 on the e-commerce, regulating the 'Mere conduit'[11], is reproducing merely identically the dispositions of art. 12 par. (1)-(2) of the E-Commerce Directive. The same mention is done also for art. 13 of Law no. 365/2002 on the e-commerce which is regulating the temporary storage of information, caching-storage[12].

Art. 14 of Law no. 365/2002 on the e-commerce is regulating the permanent storage of information, hosting-storage[13]. Comparing the text of the Romanian Law with the one of the Directive, results that art. 14 par. (1) of the law is reproducing merely identically the dispositions of art. 14 par. (1) letter a) first thesis of the E-Commerce Directive, but the second thesis of the same article is translated differently.

As for the Romanian law the liability exemption takes place only in the cases in which the service provider doesn't have effective knowledge that the activity or information stored is illegal or facts and circumstances which show that the activity or information in question could harm the rights of a third party. The exemption is not applying in cases in which the service provider had the possibility to find out the character of these facts.

The distinction between 'having knowledge' and 'have the opportunity to have knowledge' wasn't applied nor for art. 14 par. (1) letter b) of the E-

[10] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031.

[11] (1) If an information society service consists in transmitting in a communications network the information provided by a recipient of that service or in ensuring access to a communications network, the provider of that service shall not be liable for the information transmitted if the following conditions are cumulatively fulfilled: a) the transmission was not initiated by the service provider; b) the choice of the person receiving the transmitted information did not belong to the service provider; c) the content of the transmitted information has not been influenced in any way by the service provider, in the sense that neither the selection nor any possible modification of this information can be attributed to it.

(2) The transmission of information and ensuring access, mentioned in par. (1), shall also include the automatic, intermediate and temporary storage of the information transmitted, in so far as this operation takes place solely for the purpose of transiting the communications network and provided that the information is not stored for a period exceedingly unjustifiably the time required for its transmission.

[12] If an information society service consists in the transmission in a communications network of information provided by a recipient of that service, the provider of that service shall not be liable for the automatic, intermediate and temporary storage of the transmitted information, in so far as this operation takes place exclusively in order to make the transmission of information to other recipients more efficient, at their request, if the following conditions are cumulatively met: a) the service provider does not make changes to the information transmitted; b) the service provider meets the legal conditions regarding the access to the respective information; c) the service provider complies with the rules or customs regarding the updating of information, as they are widely recognized and applied in the industry; d) the service provider does not prevent the legal use by any person of technologies widely recognized and applied in the industry, in order to obtain data on the nature or use of information; e) the service provider acts swiftly in order to delete the information it has stored or to block access to it, from the moment it has actually known that the information originally transmitted has been removed from the communications network or that access to it has was blocked or the fact that the removal or blocking of access took place as a result of a public authority decision.

[13] (1) If an information society service consists in storing the information provided by a recipient of that service, the provider of that service shall not be liable for the information stored at the request of a recipient, if any of the following conditions are met:

a) the service provider is not aware that the activity or information stored is illegal and, as regards actions for damages, is not aware of facts or circumstances which show that the activity or information in question could harm the rights of a third party;

b) having knowledge of the fact that the activity or information is illegal or of facts or circumstances which show that the activity or information in question could harm the rights of a third party, the service provider acts quickly to eliminate or block access to it.

(2) The provisions of par. (1) do not apply if the recipient acts under the authority or control of the service provider.

(3) The provisions of this article shall not affect the possibility for the judicial or administrative authority to require the service provider to cease or prevent data breach and shall also not affect the possibility of establishing government procedures to limit or interrupt access to information.

Commerce Directive. This implementation particularity has probative consequences, in the sense that, in order to apply the provider's liability, based on Romanian law, it must be proved that the provider was actually aware of the illegal facts.

Regarding these dispositions of the Law no. 365/2002 and Law no. 8/1996, it was identified the following case – law.

In 2009, the Bucharest Tribunal was notified of the lawsuit filed by the Romanian Music Industry Association (named AIMR)[14] against the website www.trilulilu.ro and the hosting provider Hostway requesting their obligation to pay damages, stopping use of phonograms and videograms from the AIMR repertoire and the establishment of technical protection measures by digital fingerprinting. The dispute was resolved through a transaction through which Trilulilu assumed the responsibility to implement the technical measures required by the action and to conclude license agreements with all AIMR members for the use of phonograms and videograms from their repertoire on the website www.trilulilu.ro.

In 2013, the same association AIMR notified Clax Telecom, a hosting service provider, to remove pirated content or suspend hosting services for sites with pirated content: www.muzicalove.ro, www.mp3alese.info, www.muzica.onlinefree.ro, www.netxplor.ro, www.vitanclub.net, www.allmuzica.com, www.muzicazu.net, www.muzicmp3.ws. These sites promoted national and international music repertoire, without paying the rights due to the production companies. Following the company's refusal to comply with the law, AIMR sued Clax Telecom, requesting the payment of the damage caused by the refusal to eliminate the pirated hosted content. The Bucharest Court of Appeal ordered Clax Telecom to pay damages and Court costs for its refusal to remove pirated content at the request of AIMR. The liability of the hosting service provider was analysed in relation to the provisions of Law no. 365/2002 on e-commerce and Law no. 8/1996 on copyright and related rights. The Court decided that according to art. 14 of Law no. 365/2002 a hosting service provider, following the notifications from the rights holders, is obliged to eliminate the hosted pirated content or to suspend the hosting service of the respective site[15].

The case-law regarding Peer-to-peer and BitTorrent indexing websites is referring to The Pirate Bay - ThePirateBay.org – and is emphasising blocking and dynamic injunctions (main site and proxy sites) established by the Court. In the Bucharest Tribunal case no. 28072/3/2017 – judgement no. 2229 on 05.11.2018 – the international film production companies: TWENTIETH CENTURY FOX FILM CORPORATION, UNIVERSAL CITY STUDIOS PRODUCTIONS LLLP, UNIVERSAL CABLE PRODUCTIONS LLC, WARNER BROS. ENTERTAINMENT INC., PARAMOUNT PICTURES CORPORATION, DISNEY ENTERPRISES, INC., COLUMBIA PICTURES INDUSTRIES and SONY PICTURES TELEVISION INC. have obtained in Court the access blocking of internet service providers: RCS & RDS S.A., TELEKOM ROMANIA COMMUNICATIONS S.A., UPC ROMANIA SA, DIGITAL CABLE SYSTEMS S.A., AKTA TELECOM S.A. and NEXTGEN COMMUNICATION S.R.L. users to pirated movie sites:

- www.filmehd.net, that can be accessed to the following on-line location: www.filmehd.net;
- www.filmeonline2013.biz, that can be accessed to the following on-line location: www.filmeonline2013.biz;
- www.thepiratebay.org, that can be accessed to the following main on-line location: www.thepiratebay.org ; and the following on-line proxy locations: http://bay.maik.rocks, http://bayproxy.net , http://piratebay.click, http://piratebay.red, http://piratebayblocked.com, http://pirateproxy.click and http://ukpirate.click .

In April 2020, the largest Romanian torrent site, hosting dozens, perhaps hundreds of terabytes, of movies, games, music, software and pirated books, was closed by High Court of Cassation and Justice prosecutors. When accessing the old address, www.filelist.ro , a message signed by the Ministry of Justice appears: 'This domain name is seized in accordance with the provisions of art. 249 from the Criminal Procedure Code. This domain name is the subject of a criminal offence proceeding'[16]. Just a few days after the site was shut down, it is back online, but on the .io domain, dedicated to the British Indian Ocean Territory[17]. The anonymous representatives of the torrent site published a message as a result of what happened, showing that they know nothing more than that the .ro domain was seized without further notice and that the site protection systems prevent the user's identification.

Art. 15 of Law no. 365/2002 on the e-commerce is regulating information search tools/search engines

[14] https://www.aimr.ro/- site accessed on 20 March 2021.
[15] https://www.aimr.ro/furnizorii-de-servicii-de-hosting-sunt-raspunzatori-de-continutul-pirat-gazduit/ - site accessed on 20 March 2021.
[16] http://www.filelist.ro/ - site accessed on 20 March 2021.
[17] https://filelist.io/login.php?returnto=%2F - site accessed on 20 March 2021.

and links to other web pages/hyperlinks[18]. This exception is not regulated in the Directive, it is a particularity of the Romanian legislation and to other EU Member States (e.g., Spain).

Comparing art. 15 of the Law no. 365/2002 on the e-commerce with art. 14 of the same law, results that the liability of services providers under art. 15 is the same as for hosting (art. 14), still in the Romanian practice/jurisprudence there are no cases for applying or/and interpret art. 15 of Law no. 365/2002 on the e-commerce.

The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive)[19] has not been transposed yet into the Romanian legislation, thus we cannot indicate the measure in which the injunctions procedures regarding copyright and related rights will be transformed.

At the present, there is an ongoing process for amending the Law no. 8/1996 on copyright and related rights on two subjects. The first subject is referring to the transposition of the DSM Directive and the Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC into the Law, and the second to the revision of the current dispositions of the Law. On December 15, 2020 a working group for revising the Law no. 8/1996 on copyright and related rights, was created by Ministry of Culture decision [20]. The decision raised now a-days a lot of controversies in Romania, in fact the structure of the working group, because the structure is not containing the representatives of all the collective management organisations in Romania nor the representatives (e.g., associations) of all the rightholders (e.g., broadcasters, cable retransmission operators, etc.).

Taking into account the above-mentioned legal provisions, we can conclude that Law no. 8/1996 on copyright and related rights is regulating the injunction procedures as transposing the dispositions of the IPRED Directive.

The injunctions are divided in two main forms:

The first form is the interlocutory injunctions provided for in art. 188 par. 3 and referring to:

a) forbidding the infringement or its provisory cease;

b) ordering the measures to be taken for conserving the probes;

c) ordering the measures to be taken for ensuring the damage remedy; for this purpose, the Court can order the ensuring measures to be taken on the movable and immovable assets of the person presumed to have infringed the rights acknowledge by the law, including the blocking of his/her bank accounts and other assets. For this purpose, the competent authorities can order the communication of the banking, financial or commercial documents or adequate access to the pertinent information;

d) ordering the taking or handing over to the competent authorities of the goods in connection with which suspicions exist on the violation of a right provided for by the law to prevent their introduction in the commercial circuit.

The interlocutory injunctions against intermediaries are available under the same conditions (art. 188 par. 5), thus any third party that uses in an unauthorized way in the commercial activity the IP right (including the transporters, Internet Service Providers, online shopping sites) may be subject to a preliminary proceeding initiated by the injured party.

Also, the Courts may order the precautionary seizure of the movable and immovable property of the alleged infringer in respect of infringements (art. 188 par. 6).

The measures for assuring the evidences or to ascertain a fact-finding disposed by the Court are applied through a bailiff. The rightholders of the rights supposed to be infringed or to which there is the danger to be infringed, as well as their representatives, have the right to take part at the application of the evidence conservation measures or for ascertain a fact-finding (art. 188 par. 9).

[18] (1) The provider of an information society service that facilitates access to information provided by other service providers or by recipients of services provided by other providers, by providing its service recipients with information retrieval tools or links to other web site pages, is not responsible for the information in question, if any of the following conditions are met:

a) the provider is not aware that the activity or information to which it facilitates access is illegal and, as regards actions for damages, is not aware of facts or circumstances which show that the activity or information in question could harm the rights of a third party;

b) being aware of the fact that the activity or information in question is illegal or of facts or circumstances which show that the activity or information in question could harm the rights of a third party, the provider acts quickly to eliminate the possibility of access or block its use.

(2) The service provider shall be liable for the information in question where its illegality has been established by a decision of a public authority.

(3) The provisions of par. (1) shall not apply if the recipient acts on the order or under the command of the service provider.

[19] https://eur-lex.europa.eu/eli/dir/2019/790/oj.

[20] http://www.cultura.ro/infiintarea-grupului-de-lucru-pentru-modificarea-legii-81996-privind-dreptul-de-autor-si-drepturile - site accessed on 20 March 2021.

The second main form is related to the injunctions following a decision on case merits. In this case, the Court may issue, by the final decision on case merits establishing an IPR infringement, an injunction aimed at prohibiting the infringement from continuing against the infringer and/or the intermediaries whose services are used by a third party to infringe the IPR, if the case may be. Also, the Court may dispose the following measures:

a) remittance, in order to cover the prejudices suffered, of the proceeds obtained from the unlawful deed;

b) destruction of the equipment's and means belonging to the offender that were solely or mainly intended for the perpetration of the unlawful deed;

c) removal from commercial circuit by seizure and destruction, of the illegally made copies;

d) dissemination of information referring to the court's decision, including the posting of the decision as well as the integral or partial publication of it in the mass media at the expense of the offender; under the same conditions the courts may order additional publicity measures adapted to the particular circumstances of the case, including an extensive publicity.

All these injunctions were exemplified in the case law presented before.

The blocking injunctions can be used and issued in the conditions and according to the above-mentioned procedure. Even that the law provides the measures ensuring that ISPs block access to copyright-infringing websites, in Romania blocking injunctions are used in an insignificant proportion, thus on-line and broadcast piracy remains a challenging copyright enforcement issue. The lack of the effective enforcement could be redressed by prioritising investigations and prosecution of significant IP cases, with a special focus on cases involving online piracy; providing to specialized police and local law enforcement with adequate resources, including necessary training, and instruct relevant enforcement authorities to prioritize IP cases; and awareness campaigns on the risks and damages done by online piracy.

Dynamic and de-indexing injunctions could be used as Romania implemented E-Commerce Directive and IPRED Directive. In fact, none of these injunctions' types were used in practice for online piracy. From the case-law presented before, results that the blocking and dynamic injunctions are the most used in practice regarding illegal online content.

Dynamic injunctions could be a powerful tool to fight against on-line piracy, especially for live sports events, since they allow rightsholders to require ISPs to block both primary domain name and IP address of piracy websites, but also any subsequent domains they shift to (proxy sites). In these cases, it can be distinguished between blocking dynamic injunctions and live injunctions. Specially for sports the dynamic and live injunctions should be extended for the period in which the competition/event takes place (e.g., the Olympic games, UEFA's EURO).

For these types of injunctions, it should be mentioned the recent developments which were described as innovative, adapting the legal tools to keep up with ever adapting digital pirates[21]. Thus, fighting the latest evolution of piracy involves two new tools: live blocking and dynamic injunctions. Live blocking entails requiring Internet service providers (ISPs) to block users' access to servers hosting infringing streams of live events (used in Ireland and the United Kingdom). Dynamic injunctions allow rightsholders to require ISPs to block both primary domain name and IP address of piracy websites, but also any subsequent domains they shift to (used in Australia[22], India[23], Singapore[24], and the United Kingdom[25]). As note by the EU Commission in its 2017 Guidance on certain aspects of Directive 2004/48/EC, dynamic blocking injunctions are: 'injunctions which can be issued for instance in cases in which materially the same website becomes available immediately after issuing the injunction with a different IP address or URL and which is drafted in a way that allows to also cover the new IP address or URL without the need for a new judicial procedure to obtain a new injunction'.

In August 2019, the Federal Court in Sydney[26] enacted Australia's first dynamic injunction, targeting a list of 35 torrent, streaming, and related proxy sites. It was also the first time that a rightsholder had directly targeted proxy sites due to a 2018 change in Australia's copyright law[27] that allowed both dynamic injunctions

[21] https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions - site accessed on 20 March 2021.

[22] https://torrentfreak.com/australian-parliament-passes-tough-new-anti-piracy-law-181128/ - site accessed on 20 March 2021.

[23] https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital - site accessed on 20 March 2021.

[24] https://www.todayonline.com/singapore/court-order-makes-it-easier-copyright-owners-curb-access-piracy-websites - site accessed on 20 March 2021.

[25] https://itif.org/publications/2018/12/03/using-dynamic-legal-injunctions-and-ai-fight-piracy-real-time-united-kingdom - site accessed on 20 March 2021.

[26] https://www2.computerworld.com.au/article/665704/foxtel-obtains-rolling-injunction-block-pirate-sites/ - site accessed on 20 March 2021.

[27] Copyright Amendment (Online Infringement) Bill 2018 –

and the targeting of sites that have a 'primary effect' of facilitating access to infringing content (along with more-explicit and central piracy sites). Dynamic orders are only possible when ISPs don't file an objection.

Denmark is a pioneer in terms of website blocking for copyright enforcement. In 2006[28], Denmark was the first country in the world to allow website blocking for copyright enforcement. During 2019, the Danish Rights Alliance[29] had 141 'pirate' sites blocked by local ISPs[30], which contributed to visits to pirate sites dropping by 40 percent in 2019 as compared to 2018[31].

In the latest development, in April 2019, the Court of Frederiksberg issued Denmark's first dynamic blocking injunction in allowing LaLiga (the Spanish football league) to get local ISPs to block access to 10 sites that infringe its copyrights by showing live matches[32]. Nine of the ten piracy sites listed in the complaint were ultimately deemed to be infringing the rights of the owners and generating revenue via advertising, and the tenth, Spain-based RojaDirecta (also targeted in Mexico), requested more time to respond to LaLiga's complaint, so the site will be dealt with at a later date. The Danish Rights Alliance would follow procedures set by the court in identifying and advising what new sites to add to the junction.

On September 29, 2020, Ireland's High Court granted a dynamic blocking injunction to UEFA's EURO 2020[33] (taking place in 2021 due to the COVID-19 pandemic)[34] and other matches taking place during the 2020/2021 football season. It's the first injunction UEFA has sought and received in Ireland, but it follows a similar 2019 injunction for the English Premier League[35] (which was extended in June 2020[36]). These follow similar injunctions UEFA received in courts in England and Wales[37]. As stated in UEFA's case in Ireland, dynamic injunctions for sporting events are critical as 'the real time nature of live sport means that the primary value of UEFA live match broadcasts is at the point in time when it is being broadcast'[38]. Furthermore, that 'by the end of the match, the streams will have served their purpose, so removal post-match would carry no or, at best, very limited benefit'[39].

The judgment in Ireland reiterates central facts about the use of website blocking for copyright enforcement: the ISP services are being used to infringe copyright, but the ISPs themselves are simply conduits, not infringers; dynamic orders prevent infringement in that they at least make it more difficult or discourage it; they do not impose unreasonable costs on ISPs; and they don't unnecessarily deprive Internet users of lawful access to content online. The judge noted that his decision is consistent with the case law of the Court of Justice of the European Union (CJEU) and, in particular, with the judgment of that court in Spiegel Online v. Beck (2019)[40], in that it strikes a fair balance between the respective rights and interests of rightsholders and of Internet users.

Beyond football, in 2018, Matchroom[41] - one of the world's leading boxing promoters - received a similar dynamic injunction in the United Kingdom[42]. Matchroom wanted to protect upcoming major boxing matches involving British professional boxer Anthony Joshua, which were broadcast by Sky on a standard subscription or pay-per-view basis. Matchroom provided evidence that it lost a significant amount of revenue as a high number of illegal streams were made

https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/ems/r6 - site accessed on 20 March 2021.

[28] https://arstechnica.com/information-technology/2006/10/8080/ - the Danish Courts ruled that an ISP must block access to the Russian music site AllofMP3.com. International Federation of the Phonographic Industry (IFPI) Denmark sued Tele2 (ISP) in Copenhagen City Court, asking the judge to force the ISP to cut off access to AllofMP3.com - site accessed on 20 March 2021.

[29] https://rettighedsalliancen.com/ - site accessed on 20 March 2021.

[30] https://torrentfreak.com/denmark-blocked-141-pirate-sites-in-2019-but-pirates-are-bypassing-the-system-200503/ - site accessed on 20 March 2021.

[31] *Idem*.

[32] https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions - site accessed on 20 March 2021.

[33] https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC488.html#_ftn6 - site accessed on 20 March 2021.

[34] https://www.uefa.com/uefaeuro-2020/event-guide/ - site accessed on 20 March 2021.

[35] https://www.bailii.org/ie/cases/IEHC/2019/H615.html - site accessed on 20 March 2021; The Football Association Premier League ltd. v Eircom ltd. t/a Eir & ors.

[36] https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC332.html - site accessed on 20 March 2021; Football Association Premier League Limited – Plaintiff and Eircom Limited Trading as EIR, Sky Ireland Limited, Sky Subscribers Services Limited, Virgin Media Ireland Limited, Vodafone Ireland Limited – Defendants.

[37] https://www.bailii.org/ew/cases/EWHC/Ch/2017/3414.html - site accessed on 20 March 2021; Between: Union des Associations Européennes de Football – Claimant - and British Telecommunications PLC, EE Limited, Plusnet PLC, Sky UK Limited, Talktalk Telecom Limited, Virgin Media Limited – Defendants.

[38] https://www.bailii.org/ie/cases/IEHC/2020/2020IEHC488.html#_ftn6 - site accessed on 20 March 2021.

[39] *Idem*.

[40] https://curia.europa.eu/juris/liste.jsf?num=C-516/17 C-516/17 - Spiegel Online - site accessed on 20 March 2021.

[41] https://matchroom.com/ - site accessed on 20 March 2021.

[42] https://www.bailii.org/ew/cases/EWHC/Ch/2018/2443.html - site accessed on 20 March 2021; Matchroom Boxing Limited and Matchroom Sport Limited – Claimants and British Telecommunications PLC, EE Limited, Plusnet PLC, Sky UK Limited, Talktalk Telecom Limited, Virgin Media Limited – Defendants.

available for his prior fights. Matchroom's dynamic injunction differs[43] from those given to UEFA. Given that boxing matches are irregular, the judge allowed blocking orders to be used in the seven days prior to a match and for a period/schedule of two years, thus the rightsholder needs to notify the ISPs at least four weeks in advance of a scheduled match.

Ever since its first dynamic injunction in April 2019[44], the Delhi High Court has become the focal point for rightsholders in India trying to better protect copyright online in India. In 2016 the Bombay High Court[45] took a more cautious approach in only allowing rightsholders to seek blocking injunctions against specific URLs and not entire websites unless they can demonstrate that the entire website contains infringing works. However, the Delhi High Court's detailed, well-reasoned, and comprehensive approach accounts for these and many other concerns in creating a legal and administrative framework for dynamic injunctions. As part of this, the court expressly endorsed the proportionality principle enunciated by courts in the EU and the UK.

On July 27, 2020, the Delhi High Court granted Disney a dynamic injunction against 118 piracy sites[46]. Also, in July 2020, the court granted a dynamic injunction for Snapdeal[47] in fighting trademark infringement, which is in itself an evolution in India in using dynamic injunctions for IP enforcement beyond copyright. As with prior cases, the court allowed the rightsholders to update the list of blocked websites by adding the names of mirror/redirect/alphanumeric websites which piracy operator's setup after they realized their primary sites are blocked. This is the most important part of the judgement as it substantially reduces the resources required for blocking every mirror infringing website. Similar to courts in Ireland, England, Wales, and the EU, the court consciously accounted for the rights of copyright holders in this way.

While India and the Delhi High Court have not yet allowed live blocking orders, they do allow the use of website blocking for sporting events, including pre-emptive "John Doe"[48] cases targeting known infringers. This is important as online viewing of sports content, especially cricket, has grown rapidly in India[49] due to increasing smartphone penetration and the falling cost of cell phone plans. The Indian Premier League (IPL)[50] - the massively popular cricket series - in 2017 saw a 62 percent growth rate of digital viewers. While a substantial number[51] of these viewers watched the IPL on legitimate online services such as Star India's Hotstar mobile streaming app and Time Internet's platform. Crickbuzz, many people resorted to unauthorized online streaming of live matches. For instance, at the end of the 2017 IPL season, it was discovered that more than 1,700 unique URLs were illegally broadcasting the IPL via 211 unique servers, 122 pirate streams, 51 hosting sites, and 23 infrastructure providers[52].

On September 23, 2020 the Delhi High Court granted Star India[53] - the broadcasters of the IPL - a blocking injunction against the operators of a known piracy service. The services are based outside of India and only became active during cricket matches. This follows rulings in 2014 and 2016 whereby the court ordered the complete blocking of websites involved in illegal streams of cricket matches and football tournaments (such as the World Cup)[54].

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[43]https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/its-a-knock-out-matchroom-scores-a-blocking-injunction-for-boxing-matches - site accessed on 20 March 2021.

[44] https://itif.org/publications/2019/05/29/india-and-website-blocking-courts-allow-dynamic-injunctions-fight-digital - site accessed on 20 March 2021.

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[46] https://smenews.org/2020/07/29/disney-obtains-new-dynamic-court-order-to-block-118-pirate-domains/ - site accessed on 20 March 2021. The action, filed by Disney Enterprises "and others", was heard via video-conferencing due to the coronavirus pandemic. Defendants include dozens of pirate sites, Internet service providers, the Department of Communications (DoT) and the Ministry of Electronics and Information Technology (MEITY). The list includes 37 'pirate' site defendants, none of whom were present to mount any kind of opposition. The sites were specialized in anime and cartoons, including the massively popular Nyaa.si, Horriblesubs, Kisscartoon/Kimcartoon, Wcostream/watchcartoononline, kissanime, gogoanime, and 9anime. Also, the plaintiffs were demanding that 11 domains/sub-domains to be blocked by ISPs (TorrentDownload and YourBitTorrent2), and finally, the application demanded that named proxy sites are also blocked by ISPs, including Unblockit.red and Proxyof.com.

[47] https://www.latestlaws.com/intellectual-property-news/delhi-high-court-orders-blocking-of-50-websites-owing-to-dynamic-injunction-in-snapdeal-pvt-ltd-v-snapdealluckydraws-org-in-ors/ - site accessed on 20 March 2021.

[48] https://www.lexology.com/library/detail.aspx?g=795b374a-88d6-4399-bdbd-e5e1f593ccf7 - site accessed on 20 March 2021.

[49] https://www.coursehero.com/file/32840785/ey-sports-newsreelpdf/ - site accessed on 20 March 2021. The sports sector in India has witnessed a number of recent developments, which have contributed to its significant growth. Although cricket continues to be the leading sport in the country, other sports have also gathered sizeable interest over the past few years.

[50] https://www.iplt20.com/ - site accessed on 20 March 2021.

[51] https://assets.kpmg/content/dam/kpmg/in/pdf/2016/09/the-business-of-sports.pdf - site accessed on 20 March 2021.

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[53] https://www.livelaw.in/news-updates/the-delhi-hc-grants-ad-interim-injunction-to-star-india-pvt-ltd-in-broadcasting-of-dream-11-ipl-2020-163420 - site accessed on 20 March 2021.

[54] https://economictimes.indiatimes.com/internet/delhi-hc-orders-blocking-of-73-rogue-websites-with-pirated-videos/articleshow/

In February 2019, the Mexican Institute of Industrial Property implemented the country's first dynamic preliminary injunction to the rightsholders of the Spanish football league "La Liga" to block the pirate website Rojadirecta[55]. The order was only for the duration of the season and only on the days when matches were broadcast.

In February 2020, the Madrid Commercial Court granted Spanish broadcaster Telefónica Audiovisual Digital[56] (which holds the rights to the national "La Liga" football competition) a dynamic blocking[57] injunction to block a list of 44 known piracy sites, which can be updated to add new entries. The injunction is valid until May 25, 2022, so will cover a total of three seasons.

In July 2020, Singaporean courts granted[58] a dynamic injunction to cover 15 flagrantly infringing online locations that included copyright protected content from the English Premier League, Discovery, BBC, La Liga, and TVB.

International jurisprudence has influenced Singapore in different ways. In the initial case, the Singapore High Court largely relied on the approach of English courts (in Twentieth Century Fox v. British Telecommunication and Cartier International v. British Sky Broadcasting). However, the Court expressly rejected the approach of the Federal Court of Australia (in Roadshow Films v. Telstra Corporation)[59] where it refused to allow dynamic blocking with judicial scrutiny. Also, contrary to the 'right balancing analysis' adopted by the Delhi High Court, the Singapore High Court in Disney Enterprises adopted a 'means/ends analysis'.

In December 2019, Sweden's Patent and Market Court issued the first ever dynamic injunction[60] in Sweden. ISPs are required to 'take reasonable steps to block customers' access to identified illegal file-sharing services, not only on the listed domain names and web addresses (subject to a separate traditional blocking injunction with immediate effect) but, for a period of three years, on domain names and websites 'whose sole purpose is to provide access to said illegal file-sharing services'. On June 29, 2020, the court confirmed and elaborated upon this precedent-setting case in establishing the use of dynamic injunctions for copyright enforcement in Sweden[61].

This follows a long-running appeals process that concerns a 2018 case where rightsholders (Disney, Universal Studios, Warner Bros, and several others) asked for an injunction to block infamous piracy sites such as The Pirate Bay, Dreamfilm, Nyafilmer, Fmovies, and several other related proxies and mirror sites. Similar to the High Court of England and Wales, the court made rightsholders responsible for informing the ISP about which domain names and URLs to block (the prerequisite being that these have the main purpose of providing unlawful access to any of the services in question). The court gave the ISPs three weeks to enact new blocking lists. ISPs bear the cost for enacting the blocking orders. However, the fact that it took 16 years for Sweden to block the Pirate Bay - which was founded in Sweden in 2003 - is indicative of how much more work is needed to reduce global digital piracy and how long it has taken website blocking to become accepted antipiracy tool[62].

3. Conclusions

The copyright and related rights injunctions are equitable remedies in a form of a Court order/decision that requires a party to do or refrain from doing specific acts that are infringing copyright and related rights. In the case that the party fails to comply to an injunction faces criminal, administrative or civil sanctions as presented for the Romanian copyright and related rights law.

The main reason of injunctions is to establish the *ante status quo*, which refers essentially to fairness and equity.

In the view of EU regulatory texts, in order to protect copyright and related rights the Courts could take provisional and precautionary measures, measures for preserving evidence, measures for claims, blocking and dynamic injunctions.

As presented in the mentioned case-law and international developments, blocking injunctions are an example of policy best practice in supporting creativity, copyright and related rights in the digital content[63].

53519547.cms - site accessed on 20 March 2021.

[55] https://www.worldipreview.com/contributed-article/dynamic-injunctions-in-the-digital-environment - site accessed on 20 March 2021.

[56] https://www.technadu.com/spanish-isps-block-pirate-sites-dynamically-updated-blocklist/93321/ - site accessed on 20 March 2021.

[57] https://cincodias.elpais.com/cincodias/2020/02/17/companias/1581968788_082002.html - site accessed on 20 March 2021.

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[63] https://itif.org/publications/2020/10/22/adaptive-antipiracy-tools-update-dynamic-and-live-blocking-injunctions - site accessed on 20 March 2021.

Also, more countries are recognising that websites blocking can be well suited to protect live events[64].

Blocking injunctions are imposing as normal forms in order to fight against online piracy, since the websites and the proxies are blocked.

The injunctions forms are evolving for properly adapt to the chancing forms of online piracy and modern digital piracy.

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PROTECTION OF NEW VARIETIES OF PLANTS

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Abstract

Joining Nature and Divinity, man has been working for tens of thousands of years not only to invent new plants, but also to improve plants, to discover develop and create new varieties of plants with high productivity, high energy value, resistant to disease, pests, low temperatures and drought. With results protected by a special law, a sui-generis law that deviates even from the golden rule of intellectual property, that of not protecting ideas and discoveries as they must belong to everyone and to no one at the same time.

Keywords: *plant, plant variety, new plant variety, variety patent, novelty, distinct character, uniformity, stability, name.*

1. Protection system for new plant varieties (conventional, Community, national)

In Part I of this article, entitled "Plants and human food" we showed that in regulating the protection of new plant varieties, the Church has a priority worth mentioning because it demonstrates a remarkable openness (of an institution always considered, but also wrong, in our opinion, hostile to science) towards this field[1]. Proof is an Edict of Papal States dated 1833 which proposed for the first time in the history of intellectual property law the recognition of an exclusive right upon achievements regarding the progress of agriculture under the reasoning that those who put their minds and industry in the service of natural products or of inventions for breeding or for the introduction to agricultural crops of new plant varieties or new cultivation techniques ***"it deserves that the fruits of their research and discovery to be guaranteed to the extent that the results reveal science".***

However, nothing significant was to happen in the 19th century in this field, despite the valuable research and important results obtained by researchers and breeders before and after 1833. However, the doctrine considers that the French Patent Law from 1844 made no difference between manufacturing industry and agriculture, the latter being seen, moreover as a branch of industry in its broadest sense. But in the absence of an explicit provision in French law of a possibility of patenting new varieties, French jurisprudence generally open to novelties, has been reluctant to recognize the validity of such patents, many applications being filed to protect new varieties of roses.[2]

2. Plant varieties in the Paris Convention for the Protection of Industrial Property

However, the issue of protection of new varieties[3] was also of concern to the international community, but not to a sufficient extent, as long as in art. 1 (3) of the Paris Convention of March 20th 1883 on the Protection of Industrial Property, provided that industrial property is to be understood in the broadest sense and ***'applies not only to the actual industry and trade, but also in the field of agricultural and extractive industries and all manufactured or natural products, such as: wines, grains, tobacco leaves, fruit, cattle, ores, mineral waters, beer, flowers, flour".***

Although insufficiently clear, the quoted text of the Convention does not exclude in our view "natural products" from the patent, and the enumeration in the text, which is exemplifying, not limiting, reinforces this conclusion. In fact, when in France in 1922, after the famous carnation process "Aline Bonard"[4] and which was followed by persistent demands of the French breeders to be granted exclusive rights over the varieties created by them, the issue of protection of new varieties of plants (of plant varieties), the solution adopted was that of protection as a right of industrial

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property, true, hybrid, because it was similar to the law of trademarks and the law of inventions. However, the proposed system proved to be unattractive, because in 8 years of activity of the special register created for it, only 22 plant varieties were registered. In the face of this (semi) failure, in 1928 a law was submitted and adopted in France which conferred to the author not a trademark right, but a right similar to that of inventor, as a "right of agricultural and horticultural property" the title of protection being a patent issued by the National Office of Agricultural and Horticultural Property.

3. Conventional law of protection of new plant varieties. UPOV Convention

On December 2, 1961, the International Convention for the Protection of New Varieties of Plants[5] was adopted in Paris, which created for those who joined it the International Union for the Protection of New Varieties of Plants – UPOV[6], an intergovernmental organization that currently have 77 members[7], including the European Union (but EU member states are individually members of UPOV) and the African Intellectual Property Organization - OAPI.

UPOV is headquartered in Geneva and without a relationship of subordination of UPOV to OMPI, based on a cooperation agreement, the latter actually exercises guardianship over UPOV, the Director General of OMPI being also Secretary General of UPOV[8]. The International Convention for the Protection of New Varieties of Plants is administered by UPOV and is often referred to as the UPOV Convention.

The purpose of the UPOV Convention is to ensure that the Member States of the Union recognize the rights of breeders (plant breeders), respectively an exclusive right of use on the basis of a set of defined rules to be introduced into the laws of Member States. In this regard, the UPOV Convention regulates a system of protection via intellectual property rights of plant varieties intended to encourage plant breeders to develop new plant varieties for the benefit of society and to increase investment in this field. The Convention is designed to promote industrially kind of agriculture and genetically uniform, an objective in line with the growth of international trade supported by the World Trade Organization.

Following the model already established in the founding conventions of international intellectual property law, the UPOV Convention establishes the rules of minimum protection (leaving Member States the opportunity to take into account national circumstances when regulating protection), conditions of protection, duration of rights and rights conferred / recognized to breeders, however without establishing a title of protection (patent or certificate of registration) although the rights recognized in favor of breeders (plant breeders) are similar to those conferred by patents. At the end of the term of protection, the varieties that have been protected pass into the public domain. To prevent abuse in the public interest protected varieties are subject to controls. It is not necessary to authorize the breeder to use the protected variety for research purposes, including its use to obtain other varieties.

Unsafe and unsatisfactory step in its original form, but important for regulating the protection of new plant varieties, the UPOV Convention was revised in 1972, 1978 and 1991, with changes aimed at a clearer delimitation of the object of protection (plant variety was defined), establishing the conditions of protection (four in number: novelty, distinctiveness, homogeneity, stability), consolidating the rights of breeders as well as eliminating the possible cumulation of protections.

Compared to other intellectual property conventions, the UPOV Convention does not seem very attractive since the number of states that have acceded to it is still low (USA, a pioneer in agricultural research but also in the protection of new varieties has joined the UPOV Convention with reservations), and criticism of it is not lacking, one of the most vehement opponents being India, a large country producing and consuming agricultural products and extremely attached to its agricultural traditions that are not in line with those of industrial and uniform agriculture.

Among the criticisms of the UPOV Convention are: affecting agriculture due to the fact that farmers are forbidden to use protected seeds or varieties, the impossibility of farmers complying with the rules of the Convention, the dependence of poor farmers on increasingly expensive factors of production, neglecting the interests of small farmers in favor of large agro-industrial complexes, the incompatibility of the Convention with other legal instruments such as the International Treaty on Plant Genetic Resources for Food and Agriculture (Plant Treaty), the Convention on Biological Diversity or its Nagoya Protocol and the Declaration adopted by the UN General Assembly in

[5] The Convention entered into force in 1968 and has been revised three times, but Member States which have previously acceded are not obliged to accede to the latest version. Romania acceded to this convention by Law no. 186 of October 27, 2000. Romania's contribution to the International Union for the Protection of New Varieties of Plants created by the Convention is paid by the Ministry of Agriculture.

[6] UPOV is the acronym for the French name: Union internationale pour la protection des obtentions végétales".

[7] https://www.upov.int/overview/en/upov.html.

[8] Daren Tang, Director General of the World Intellectual Property Organization is the Secretary General of UPOV and his predecessor, Mr. Francis Gurry was the Secretary General of UPOV.

2018 on the rights of peasants and other persons working in rural areas.

As the Convention establishing the World Trade Organization, which has as its Annex C, the Agreement on Intellectual Property Rights in Trade in 1994 has 164 members and 25 government observers, on the one hand it conditions the granting of the most-favored-nation clause to observing the intellectual property rights and on the other hand aims to integrate the UPOV Convention, which has only 77 members into the WTO system and that can only cause dissatisfaction and difficulties for non-members of the UPOV Convention who are members of the WTO.

The shortcomings of the UPOV Convention were also propagated into the national regulations, including those in Romania, which regulated for the first time the protection of new plant varieties by Decree no. 884/1967 on inventions, innovations and rationalizations and subsequently by Law no. 62/1974. The latter provided (in art. 14) that patents should also be granted for *"new varieties of plants, strains of bacteria and fungi, new breeds of animals and silkworms* ***regardless of the conditions under which they were made"***. The conditions of protection were not different from those of technological inventions, but they were unsuitable for inventions involving new plant varieties. Moreover, considering their specificity, the research, experimentation, testing and capitalization of inventions in this field was regulated by special law. The regulations adopted were in line with the 1961 Convention in its original form.

In accordance with the rules of the UPOV Convention in its revised form in 1991, Romania formulated for the first time in our law, special rules for the protection of "new plant varieties, hybrids and animal breeds" by Law no. 64/1991 on patents, introducing for patenting of new plant varieties conditions of novelty, distinctiveness, homogeneity and stability.

The Agreement on Trade-Related Intellectual Property Rights (TRIPs) is limited (in Article 27.3 (b)) to provide that are excluded from the patent under common law of inventions *"plants and animals other than micro-organisms as well as essentially biological processes for obtaining plants or animals other than non-biological and microbiological processes"* and that ***"Members shall provide for the protection of plant varieties by patents, by an efficient sui generis system or by a combination of these two means".***[9]

4. Protection of new plant varieties in the European Union

Extremely active in UPOV and concerned with the protection of new plant varieties to the highest degree, the European Union has created its own system of Community protection through Regulation (EC) no. 2100 of 27th of July 1994 establishing a Community plant variety right system (amended by Regulation No 15/2008 / EC), pursuant to which Regulation (EC) No 874/2009 of the Commission of 17th of September 2009 for establishing normative rules for the application of (EC) Regulation No 2100/94 of the Council on the procedure before the Community Plant Variety Office (recast) was adopted.

Regulation (EC) no. 2100/94 established a system for the protection of new plant varieties **as the sole and exclusive form of Community protection of industrial property of plant varieties**, this protection is granted in the proceedings before the body specially set up for that purpose. Protection shall be granted following the verification of compliance with the conditions of novelty, distinctiveness, homogeneity and stability, by a decision of the Office which shall also contain an official description of the variety.

This protection is uniform across the EU. The Office shall keep a register of applications submitted in order to receive protection which are open to public inspection and shall publish a bulletin with the information described in the register.

According to art. 92 of the Regulation, the variety which has been the subject of a Community protection can no longer be subject to national plant variety protection or a patent, any other right granted in an EU Member State being ineffective. In the event that the breeder obtained protection of his variety in a Member State of the Union before obtaining Community protection, the breeder may not invoke national protection as long as Community protection lasts.

We emphasize that according to art. 92 of the Regulation, the variety which has been the subject of Community protection can no longer be subject to national plant variety protection or a patent, any other right granted in an EU Member State being ineffective. In the event that the breeder obtained protection of his variety in a Member State of the Union before obtaining Community protection, the breeder may not invoke national protection as long as Community protection lasts. In other words, the Regulation prohibits concomitant Community and national protection and gives priority to Community protection.

[9] See also comments on the interpretation of art. 23 para. 3 lit. b) of TRIPS: "*In this sense, the Appellate Body* (n.n. - Appellate Body within the World Trade Organization) *showed that art. 23 para. 3 lit. b of TRIPS refers to the option of WTO members to protect new plant varieties either by patent or by sui generis rights, or, as these rights are not included in the title of any section, such an exception would not, according to the Commission interpretation and the provision of the Agreement be unnecessary.* " in "Disputes over intellectual property rights before the World Trade Organization (Part I)", *Romanian Journal of Intellectual Property Law* (RRDPI) no. 1/2019, pp. 69-96.

The Regulation established the Community Plant Variety Office - OCSP or CPVO, the English acronym for "The Community Plant Variety Office") or OCVV, the French acronym for L'Office communautaire des variétés végétales. This Office, which became operational on the 27th of April 1995 and is self-financing is based in Angers, France and has the status of an EU agency. It has 45 employees divided into three units: administrative, technical and legal, to which are added support services[10].

5. Lack of an international registration / patenting system for new plant varieties

Despite the importance to the world economy and the huge human interest in quality agricultural products at this time there is no international system for the protection of new plant varieties with states being able to resort to national protection and Member States of the European Union to Community protection provided for in Regulation (EC) No 2100/94.

The UPOV Convention and the UPOV itself do not enjoy the success that the great developed and agricultural powers would undoubtedly want. However, UPOV's work is notable. UPOV's main activities are to promote the protection of new plant varieties, to harmonize the laws of the Member States, to strengthen cooperation between States and to respect the rights of breeders and to provide legal and administrative assistance to the States and bodies concerned.

UPOV has adopted a set of general rules for the examination of new plant varieties in terms of novelty, distinctiveness, homogeneity and stability and specific guidelines for approximately 160 plant genera and species that are constantly updated.

Cooperation between states within UPOV is also important for the examination of plant varieties. It is based on conventions between states under which a Member State carries out tests on behalf of another or other States or by which a State accepts the results of tests carried out in other States as a basis for decisions to grant protection respectively rights of the breeder. Through this type of cooperation, states reduce the costs of protection procedures (which are also long-lasting), and breeders can obtain protection for new varieties in several countries at lower costs.

6. Regulation of the protection of new plant varieties in Romanian law

When Romania, following the model of the UPOV Convention of 1961, regulated for the first time the protection of new plant varieties (first, by Decree no. 884/1967 on inventions, innovations and rationalizations, then by Law no. 62/1974), the law provides that patents are also granted *for "new plant varieties, bacterial and fungal strains, new animal breeds and silkworms, **regardless of the conditions under which they were made"***, and the conditions of protection for true inventions and varieties of plants were identical (novelty, inventive step, industrial applicability), which obviously did not make sense because novelty and inventive step as defined in the common law of inventions are not applicable to new plant varieties.

After the April 1991 revision of the UPOV Convention, by Law no. 64/1991, on patents, Romania rethought its protection system in accordance with the UPOV Convention and took over the protection conditions for new plant varieties, respectively, novelty, distinctiveness, homogeneity and stability (which were included in the Regulation for the application of the Law of Inventions) and gave to a specialized body the task of verifying the fulfillment of the conditions for granting the variety patent, the actual granting of the patent remain under the attributions of OSIM.

By virtue of the obligations assumed by the Association Agreements with the European Communities and the Member States of Communities in 1994, Romania has adopted the European Union model for the protection of new plant varieties, adopted by Regulation (EC) no. No 2100 of 27 July 1994 establishing a Community plant variety system of protection (as amended by Regulation No 15/2008 / EC), which also established a separate Office for the processing of applications for protection and also complied with the Agreement on Trade-Related Intellectual Property since 1994 (TRIPs) adopting a sui generis protection system by means of a patent.

In this sense, by Law no. 255/1998 on the protection of new plant varieties, law which abrogated the provisions on the protection of new plant varieties in Law no. 64/1991 and by which (following its amendment by Law no. 204/2011), the competence to register and settle patent applications for new plant varieties was transferred from OSIM to the State Institute for Variety Testing and Registration (ISTIS), an institute established by Law no. 75/1995 on the production, quality control, marketing and use of seeds and propagating material, as well as the registration of agricultural plant varieties and which, previously performed the necessary technical examinations for patenting, OSIM having a more formal role for the issuance of patents.

[10] https://europa.eu/european-union/about-eu/agencies/cpvo_ro.

By Order no. 150 of July 17, 2012 of the Minister of Agriculture and Rural Development the Regulation for the application of Law no. 255/1998 on the protection of new plant varieties and by Order no. 2 of January 5, 2012 the costs for the examination procedures for granting the legal protection of the varieties, the issuance of the variety patent and the registration of the varieties names' were approved.

The regulation for the application of Law no. 255/1998, approved by Order no. 150/2012, in the bad tradition of the Romanian executive, adds copiously to the law defining "candidate variety", "derived essential variety", "similar variety", the requirements for the eligibility of the name, adds (in art. 17 letter e) to the revocation cases of the patent a reason for which the law (in art. 34 letter c) provides that the patent is annulled, reduces the "farmer's privilege" provided by art. 21 of the law, to the "small farmers" whom he does not even define, etc. However, if the law is deficient, it cannot be supplemented by the "implementing regulation", and the regulation cannot, in any case, contradict the law.

It is noted that at this date, in Romanian law, the **inventions in the field of biotechnology which** refer to ***"plants or animals (...) which are not limited to a certain variety of plants or a certain breed of animals",*** as well as to a *"microbiological process or another technical process or a product,* ***other than a plant variety or a breed of animals****, obtained by this process"* are patentable according to the common law of inventions (Law no. 64/1991) and obviously if the conditions of novelty, inventive step and industrial applicability (the latter understood in its broadest sense and which also includes agriculture) are met.

However, regarding the **new plant varieties**, they are protectable by a sui generis intellectual / industrial property law, the title of protection in our law being the patent for the variety and the protection conditions provided in the UPOV Convention and in Regulation no. 2100/94, respectively: novelty (but defined differently from the common law of inventions), distinctiveness, homogeneity and stability.

The difference between inventions in the field of plant-related biotechnologies and achievements in new varieties is given by the **level of creativity, which is higher in the case of inventions in the field of plant-related biotechnologies**, compared to that required and / or submitted for the creation of new plant varieties. The invention represents an important technical progress and of considerably greater economic interest in relation to the protected plant variety. An "invented" plant is an absolute novelty and results from an inventive step. A new variety of plant is an amelioration, an improvement of the qualities of an existing plant.

Examples: researchers at the Massachusetts Institute of Technology (MIT) are working to create a plant that produces light through its energy metabolism, the plants that shine will take the place of traditional lamps. This plant if made would be patentable by a patent[11]. A potato variety that has been improved and acquired increased qualities (higher productivity, resistance to frost and drought, taste, etc.) is a new variety of potato (plant) for which protection is provided by granting a patent for the variety.

In their current wording, Law no. 255/1998 and Law no. 64/1991 distinguish between plant varieties and animal breeds which are not patentable as inventions but are susceptible of protection by a sui-generis intellectual right conferred by the patent for varieties and plants and animals which are patentable under the common law of inventions. The differentiated legal treatment and the specific conditions under which the two categories of achievements can be protected lie in the means of obtaining them. Plant varieties and animal breeds (unprotected as inventions) are usually obtained by biological processes, based on human-directed sexual reproduction and observable in nature, while patentable plants or animals are obtained by genetic techniques and processes.

7. What are the similarities and differences between the patent and the variety patent?

The patent can be an effective mean of protection for certain technical achievements in the field of vineyards (vegetables), but does not offer a complete and satisfactory system of protection in the case of new varieties, plant varieties. In the absence of a specific protection system, adapted to their particularities, many achievements consisting of new varieties of plants, plant varieties, if not all, would remain unprotected. However, the activity and the material and human efforts made, the useful results obtained, the personal merit of the breeder and of the one who ensured the conditions for this justify the protection by an industrial property right, even if it does not fall within the conventional or traditionally accepted patterns. Moreover, we believe that the protection of new varieties, of plant varieties by intellectual property right is justified more than the protection within it of distinctive signs and especially of indicative ones and domain names.

There are similarities, but also differences, between patents for inventions for plants, protected as

[11] http://www.cunoastelumea.ro/plante-stralucitoare-care-ar-putea-inlocui-iluminatul-public-inventate-de-cei-de-la-mit/.

such by inventor's rights and patents for varieties, the first are given by the nature of the activity and the results obtained, the following by own characteristics of the two types of achievements. Thus,

(i) We note first that both the plant or animal patent and the variety patent confer intellectual property rights and the classification of the latter as a "sui-generis right" is not affecting the nature of the right. Moreover, this is the qualification given both by the UPOV Convention and by Regulation no. 2100/94, but also by Directive 2004/48 on the enforcement of intellectual property rights, by Regulation (EU) no. 608/2013 of the European Parliament and of the Council of 12 June 2013 on the enforcement of intellectual property rights by customs authorities and revoking Regulation (EC) No 1383/2003 of the Council, respectively, art. 2 para. (1) lit. h) and i), according to which ***"intellectual property right"*** means: *"a **Community protection upon a plant variety**, as provided for in Regulation (EC) No 2100/94 of the Council from 27th of July 1994 on establishing a system of Community plant variety protection" and, at the same time, "a **right of ownership over a plant variety** as provided for in national law'*. The fact that the conditions of protection differ or the authority designated to settle the applications and issuance of the title of protection or the duration and content of the rights does not change the nature of the right that rewards an intellectual activity with useful results for industry.

(ii) The conditions of protection differ significantly and this is due to the specificity of the two types of achievements and the level of creativity involved. In the case of plants and animals - inventions that can be protected under Law no. 64/1991, the conditions are novelty, inventive step, industrial applicability. In the case of new varieties, they are protected if they are new, distinct, homogeneous and stable. But the novelty of the common law of inventions and the novelty of plant varieties are not identical criteria. In common law, the novelty of the plant or animal invention is inferred from the comparison between the claimed invention and the state of the art on the date of filing or, as the case may be, on the date of the priority invoked. In the case of the plant variety, the novelty is of a commercial nature, because the commercialization of the variety before the filing of the patent application for the variety is destructive of the novelty.

(iii) The inventive step is a condition of protection only for the inventions of plants and / or animals patented under Law no. 64/1991 and this has in view the establishment of the non-evidence of the solution for the specialized person. The condition of the distinctive character of the variety that can be protected under Law no. 255/1998 is not equivalent to the condition of the inventive step, even if a certain resemblance can be made. The distinctive character presupposes that the new variety is different from other varieties known by at least one characteristic.

(iv) uniformity / homogeneity and stability are conditions of protection only for new plant varieties, not for plant or animal inventions.

(v) The issuance of the variety patent does not imply, as required in the case of plant or animal inventions (but also for other inventions in the field of technology) the disclosure of the process for obtaining it. The repeatability of the (culture) process is a condition of protection only for plant or animal inventions, not for plant varieties.

(vi) the scope of protection is different: while for plant or animal inventions the protection covers the production and placing on the market of processed and consumer products, in the case of plant varieties the protection is limited to the act of placing the propagating material on the market.

The conclusion that needs to be drawn from the comparison of plant and animal patents and variety patents is that our legislator has opted for a sui-generis protection of new varieties, and this is a solution in line with TRIPs that requires States to protect new varieties, but does not impose a method of protection, which can be achieved either by patent or by an efficient sui generis system or by a combination of these two means.

We remind you that the Community Office for Plant Varieties does not issue patents for varieties being limited pursuant to art. 62 of Regulation 2100/94 to render a decision containing an official description of the variety. But the name of the title of protection has no relevance to the protection granted and its scope.

8. Holder of the patent right for the variety: its breeder and / or successor in title

In our law, the one who creates a new plant variety is called a breeder, a name that is in accordance with the UPOV Convention and Regulation no. 2100/94. But in other legal systems it is called "obtainer"(obtenteur) in French law (art. L613-15-1 et seq. of CPI) or plant breeder in Canada, or simply inventor in the US.

The name of breeder given to the person who makes a new variety of plant seems to us more suggestive, more in line with what it actually does: it improves something (a species of plant, a breed of animal) that exists in a less advanced form than that obtained as a result of breeding.

The right to issue the patent for the variety belongs to the breeder, this being defined in the law (art. 2) as: (1) the person who **created or discovered and developed a new variety**; (2) the person who is the **employer** of the person who created or discovered and

developed the variety or who ordered the activity of creating new varieties, in accordance with the law or on the basis of a contract specifying that the right belongs to the limited partner; and (3) the successor in rights of the first two.

We note that in French law the right is recognized only in favor of the one who creates and **not the one who discovers and develops a plant variety** (art. L623-2 of the CPI), and the doctrine considers unfortunate the elimination from protection of discovered and developed varieties[12]. We believe, however, that the term "to create" also includes varieties that have been "discovered and developed." However, the doctrine does not rule out the possibility that a horticulturist may observe a natural variation of a known plant and that it may be of interest to be fixed and consequently protected.

In turn, "variety patent holder" is defined as the person holding the variety patent or his successor in title. The law admits and, consequently, regulates the co-authorship in the creation, discovery and development of the new variety (art. 10), the discovery of the variety by two or more persons and its development by another person, the breeder's right to associate third parties without any contribution to obtaining the variety as a patent applicant and holder, the rights of the employed breeder when these are not established by contract, respectively the right to a fair remuneration.

The conclusions to be drawn from these definitions are as follows:

a) The status of breeder does not necessarily involve inventive step in the classical sense of the concept and this may also be enjoyed by persons who have no contribution to the production of the variety. There is an important difference between the breeder and the inventor: the new variety (variety) is not a real invention, the variety is not created from scratch, from something that did not exist before.

b) In the common law of inventions, discoveries are excluded from protection, but in the case of plant varieties protection of the discovered variety is permitted. Provided, however, that it is also developed, a conclusion that emerges from the use of the copulative conjunction "and". In other words, the simple discovery if not followed by the development of the variety does not give the discoverer the quality of breeder, respectively does not entitle him to obtain protection on the discovered variety. We note that UPOV Convention too (art. 1) defines the breeder as the person who "created or discovered and developed a variety", similarly being designated also in art. 11 of Regulation 2100/94

c) Co-authorship is possible in the production of the variety in two forms: (i) creation together and (ii) discovery and development, but the breeder may also associate with persons without any contribution to the production of the variety in and on the occasion of capitalization. However, we believe that this right of association of non-contributing third parties to the production of the variety it applies solely to the independent breeder, the employed breeder not being able to do so since the right belongs to the employer or the limited partner;

d) In the case of varieties obtained from the position of employee (service breeder), the right belongs to the employer, but there is no prohibition by law that the contract provides otherwise.

e) If the right to the variety patent belongs to the employer, the breeder has the monetary rights provided for in the contract, or in the absence of provisions it is entitled to a fair remuneration. However, neither the law nor the implementing regulation do not contain criteria for determining this remuneration.

9. The object of patent protection for varieties

In order to be protected by a variety patent the achievement must: **(i)** represent such an achievement, i.e. **to be a new variety and (ii) to meet the conditions of protection established by law.**

The object of patent protection for varieties under Law no. 255/1998 is a new plant variety as defined by law. It seems to us suggestive of the object of protection and the notion of 'plant variety' (used in French law) because it is consistent with what is done by the breeder: a variety of a species that exists and continues to exist alongside the newly created one, the latter being nothing more than something (a group) that differs within a species by some morphological features or a category within the species. But both the UPOV Convention and Regulation (EC) no. 2100/94 and according to their model and our law also use to designate the object of protection the name "new plant variety" and we will comply with the above. However, we also comply considering that we admit that the name of "plant variety" could create issues when assessing the distinctive character of the variety, respectively that characteristic of the new variety that makes it different from the existing ones and which is a condition in order to obtain protection. Or the vegetal variety is an inferior

[12] Carine Bernault, Jean Pierre Clavier, *Dictionnaire de droit de la propriété intellectuelle*, 2e édition, Ellipses, 2015, p. 340. But other authors believe that the findings are also protectable. Frederic Pollaud-Dulian, *Propriété intellectuelle, La propriété industrielle*, Economica, 2011, p. 468.

category to the species[13], which also means that it is less important than the differentiation of variety.

The variety and the plant are different notions and we remind, for the purpose of this study, that the plant is a generic name given to autotrophic plant organisms, living organisms with a simpler organization than animals, which extract their food through roots and are characterized by the presence of chlorophyll and by the fact that the membrane of their cells consists of cellulose and in the case of higher plant species by the composition of root, stem and leaves. They grow naturally or cultivated and are useful to humans. The phases that a plant goes through from a seed to the formation of new seeds represents a developmental cycle. However, plants do not include bacteria, so the protection of new varieties does not include it, their protection can be obtained, where appropriate, by patent. **The variety** is a homogeneous group of plants that have certain common properties and characteristics (morphological, physiological, economic and ecological) that are genetically transmitted.

The law defines **the object of patent protection for varieties** as being ***"new plant varieties belonging to all plant genera and species***, including, inter alia, ***hybrids between genera and species"***. The object thus defined must not create any confusion: the protection concerns new varieties of plants regardless of the type to which they belong. According to the rules of classification of plant organisms (plant taxonomy[14]), **the genus** is a higher category to which the sub-genera and species[15] are subordinated. The species is a category subordinate to the genus that includes animals and plants with common features. The species is a subdivision in the biological classification made up of related organisms that have common characteristics and can interbreed with each other. Their grouping into species is based on physical similarities, but the most important criterion for association in case of a species is the ability to cross successfully, to mate with each other and give birth to viable offspring. Genetic changes occur in individuals that transmit such changes only within the species, therefore evolution is a process that can only take place within the species.

With reference to hybrids (popularly called mongrel in the case of animals, such as the mule and the hinny), we note that they are the result of crossing specimens (plant or animal) with different genetic traits of different species, genera or even families. Due to fundamental biological incompatibilities, hybrids can be sterile (the mule, the hinny), however hybrids that have the ability to multiply are valuable and can be the basis for the creation of new species of plants and animals with superior qualities to their predecessors. Hybridization can take place naturally or artificially.

We also note that over time, many varieties lose their valuable qualities, but also that for various interests (economic, to meet aesthetic needs, etc.) they must be adapted to different conditions than those in which they were created, so the process of their improvement is continuous.

The Romanian law for the protection of new varieties defines the variety by adopting a "hybrid" solution, taking from the corresponding definitions of the UPOV Convention and Regulation (EC) no. 2100/1994. The definitions sound purely technical and there are few comments on them. Thus, the variety is defined as the group of plants belonging to a botanical taxon of the lowest known rank, which may be: (1) defined by the expression of characters resulting from a particular genotype or a combination of genotypes; (2) distinct from any other group of plants by the expression of at least one of the aforementioned characters; and (3) considered as a unit with respect to its ability to reproduce as such.

We note, however, that our law, in accordance with the UPOV Convention, is more demanding, more restrictive in terms of the object of protection (since it expressly refers to plants) than the Regulation which refers to "vegetable assembly" and not strictly to plants. Or mushrooms, belonging to the fungal kingdom (the other two kingdoms being the Kingdom of Animalia and the Kingdom of Plantae), are considered more closely related to animals than to plants, so in our law is debatable the possibility of protection by law via variety patent.

10. The conditions for the grant of protection of new plant varieties

A plant variety may be patent protected for the new variety if the variety: is: (1) new, (2) distinct, (3) uniform) and (4) stable. The conditions currently established by the UPOV Convention and Regulation (EC) no. 2100/94 comply with the characteristics of this type of achievement, but they are not safe from criticism.

10.1. The condition for variety novelty

Novelty, an objective criterion in the common law of inventions is in the case of new plant varieties, a legal fiction. And this is because novelty is appreciated

[13] Frederic Pollaud-Dulian, *Propriété intellectuelle, La propriété industrielle*, Economica, 2011, p. 469.

[14] Word created by the combination of taxis = arrangement and nomos = rule used to describe the science that deals with the principles and rules of classification of organisms belonging to the plant kingdom.

[15] The classification system of living organisms comprises the following major systematic units: kingdom, branch, class, order, family, genus, species, variety.

not in relation to what exists as a precedent that could have a destructive effect of novelty (in the traditional sense for it on intellectual property), but in relation to commercial events that may have as an outcome its acknowledgement by the public.

The explanation of the solution lies in the variety characteristics and of the real object of protection: the propagating material and not the process of obtaining. The establishment of this condition is also justified by security reasons of legal relations: failure to submit a variety patent application in a timely manner is natural to result in the breeder being deprived of the possibility of acquiring an exclusive right when third parties cultivate and market reproductive material of the same variety without its consent.

Thus, according to our law, the variety is considered new if at the date of filing the patent application for the variety, the propagating material or vegetative multiplication or a crop product **has not been sold or handed over by the breeder or with his consent to third parties in purpose of exploitation of the variety** on the territory of Romania with more than 1 year or on the territory of other states with more than 4 years from the date of filing the patent application for the variety. In the case of trees, arbors, ornamental shrubs the term is 6 years counted since the submission of application.

The person who has to provide the relevant information on the previous exploitation of the variety is the applicant for the variety patent and such information must be mentioned in the patent application (art. 12), however ISTIS may also request the submission such information. If the variety was not new at the time of filing the patent application or the issuance of the patent was essentially based on information inconsistent with the reality that was provided by the applicant, the patent is revocable.

In the common law of inventions, disclosures made against the will of the inventor in circumstances which are characterized as an abuse are not destructive of novelty, but in the case of patents for varieties such an exemption is not formulated by law, so it could be, we believe, invoked only by taking into account the general principles of law.

a) However, there are non-destructive events and circumstances of novelty

b) Assignment of variety rights, where the variety has not been used prior to the assignment;

c) Production of propagating material by a third party under the control of the breeder by agreement between them.

d) Authorization of third-parties by the breeder to carry out a field or laboratory study, experiment or experimentations on a small sample of plants in order to evaluate the new variety;

e) Making available to a third party the propagating material or as material harvested as a result of its use for the purposes for which the law regulates the exhaustion of rights.

f) Making available as a result of the breeder's exposure of the variety to an officially recognized exhibition. We note here that the exhibition can be made without destructive effect in any official exhibition and not only in international exhibitions.

g) Making available to official bodies for the fulfillment of legal or contractual obligations:

h) Making available to a unit when between the two there are relations of subordination or common belonging to another unit.

We have mentioned earlier that the law allows the appropriation of the right by variety patent and variety discoveries. However, this solution conflicts with the Rio Convention on Biological Diversity of 1992, which by art. 8 states that "subject to the provisions of its national law, the (State Party) shall observe, preserve and maintain the knowledge, innovations and practices of indigenous and local communities which embody traditional ways of life which is of interest for the sustainable preservation and use of biological diversity and promoting their application on a larger scale with the agreement and participation of the depositaries of such knowledge, innovation and practice and encourages the equitable sharing of benefits arising from the use of such knowledge, innovation and practice".

10.2. The condition of the distinctive character of the variety

Distinctiveness is a condition for registering signs as trademarks for which it is their meaning to be. The trademark must serve to distinguish products and / or services of the same kind from competitors in a market and for this the sign must be distinctive likely to create in the consumer's perception the arbitrary relationship between sign and product. A similar function in the case of industrial designs fulfills novelty together with individual character. However, the distinctiveness in trademark law is different from the distinctive character of new plant varieties.

In the case of new plant varieties, the distinctive character is complementary to novelty just as the inventive step in the inventions law or the individual character in the case of industrial designs are complementary to the novelty of those types of creations. The connection between novelty and distinctiveness is made in the case of varieties through their notoriety.

The distinctive character of the variety presupposes that it is not enough that the variety has not become known to the public, it must also be different from the notoriously known varieties and its own

characteristics must make it differentiable. The difference is therefore given by the ability of the new variety to differentiate itself by one or more relevant characters (which can be accurately recognized, described and identified) resulting from a genotype or a combination of genotypes compared to any other notorious variety known at the time of filing the application for variety patent.

The condition of distinction is fulfilled if the variety for which protection is sought differs from the previous varieties already known (notoriously known) by an important, precise and slightly fluctuating character or by several characteristics whose combination is likely to confer the quality of new variety. Protection is granted only if the new variety shows a **clear** or **significant** difference from the notoriously known varieties.

The well-known varieties are: (i) the varieties protected in Romania, in the European Union and / or in other member states of the UPOV Convention; (ii) registered in the official catalog of varieties of cultivated plants in Romania intended for marketing or in similar registers and catalogs from other States, Contracting Parties to the Convention; (iii) for which there is a registered application for the protection of the variety or for its registration in a variety register in Romania, provided that the application leads to granting the protection or to the registration of variety; (iv) for which there is an application registered abroad for the granting of protection or for the registration of the variety, provided that the application leads to granting the protection or registration; (v) offered for sale or sold on the territory of Romania or of other states.

The condition thus formulated presumes that differentiation by one or more characters must be important and that only varieties which make a significant contribution to what exists can be protected. The character or characters which differentiate the variety from those notoriously known must be recognizable and identifiable and not fluctuating.

Varieties that are distinguished / differentiated from others by an insignificant aspect or by vague or unstable characteristics or by insignificant differences cannot be protected. But despite its importance this qualitative criterion is vague, inconsistent, relative, subjective and consequently susceptible to various interpretations. It is no coincidence that this criterion is a frequent source of rights disputes in the case of variety patents.

The notoriety of the variety in relation to which it is examined and its distinctive character may result from references, culture, marketing, submissions in official registers, presence in important collections or precise description in publications.

10.3. Condition of uniformity or homogeneity of the variety

Formulated either as a 'condition of uniformity' (in Law No 255/1998) or as a 'condition of homogeneity' (in the UPOV Convention and Regulation No 2100/94), it presupposes that there is uniformity or homogeneity where the most of the vegetable assembly (of the variety) has the common characteristics that define the species. Uniformity or homogeneity must ensure that all plants belonging to the same new species have a global identity.

The law requires that plants of the new variety to be uniform in all their characteristics. Homogeneity is appreciated only in terms of the essential characters and not all the characters of the variety. Some variations may occur, without compromising homogeneity, if these variations are simply the effect of the natural reproduction of the plants concerned. In other words, variations which may result from the particularities of propagation are allowed if the plants (vegetable assembly) remain sufficiently uniform in their relevant characteristics, including those used to examine distinctiveness and those used to describe the variety (by application for patent variety). According to Regulation 2100/94, homogeneity is assessed in the light of the characteristics used to describe the variety.

The control of homogeneity is carried out in practice on the basis of twenty plants, according to the UPOV directives, according to which a tolerance of 5% of individuals who do not have all the characteristics required to describe the variety is allowed. The characteristics of the controlled variety are the same as those taken into account for distinctiveness and stability.

Absolute uniformity / homogeneity cannot be claimed, which means that a margin of tolerance inherent in the case of Nature's intervention, must be accepted. But without sufficient uniformity / homogeneity, the variety would not be exploitable with satisfactory results and does not deserve to be protected.

10.4. Variety stability condition

Stability makes it possible to verify and determine whether the plants derived from the reproduction of the variety for which a variety patent is sought have the same characteristics as the original plants. The stability criterion is considered to be met when a plant is identical to its initial description at the end of each propagation cycle, respectively when the essential characteristics of the variety remain identical after its successive reproductions or multiplications or at the end of each propagation cycle.

In other words, the characteristics of the variety are perpetuated on the occasion of successive

multiplications, generation after generation. But here too, the impact of Nature justifies a dose of tolerance.

In practice, it is found that if the condition of homogeneity is met, the variety is generally considered stable. The UPOV Convention acknowledges that the latter criterion can be measured with less certainty than distinctiveness and novelty.

10.5. What is the sanction for non-compliance with the protection conditions?

According to art. 34 of Law no. 255/1998, ISTIS declares the annulment of the patent when it finds that at the date of the application for patent or, as the case may be, the a priori invoked, (i) the variety was not new, (ii) the variety was not distinct; (iii) the variety was not uniform and (iv) the variety was not stable.

Also, according to the same text, the variety patent may be declared null and void: (a) the person to whom the variety patent was granted was not entitled, unless there was a transfer of rights to the entitled person; and (b) The variety patent was based essentially on information and documents provided by the breeder. In particular, the latest case of patent annulment seems debatable to us.

10.6. Name of the variety for which protection is sought by variety patent

The name may or may not be a condition on the merits for the protection of new plant varieties.

It is not because it is not provided as one of the four conditions provided as such by art. 5 para. (1) of Law no. 255/1998. It is, because according to art. 5 para. (2) of the same law and which has the marginal name of "conditions for granting protection" stipulates that "the variety must bear a name, according to the provisions of art. 15 of the law", a similar resolution is provided in Regulation no. 2100/94 in art. 6. But the UPOV Convention (by art. 5) does not stipulate the name as a condition in order to receive protection, although it regulates it (distinctively).

We consider that the name of the variety, although necessary and important for the adopted protection system, does not represent, however, a condition on the merits because it is not provided in art. 34 of Law no. 255/1998, among the reasons for which the annulment of the variety patent may be ordered. If the name does not comply with the requirements of art. 15 of the law, ISTIS cancels the name, not the patent for the variety and will grant a hearing date to the holder of the patent for the variety in order to change the name.

The name must be a generic designation, enabling the new protected variety to be identified. In order to be registered, the name must make it possible to identify the variety in relation to any other variety and to avoid any risk of confusion with any other variety of the same botanical or neighboring species in all UPOV Member States. It must not be likely to mislead or confuse the origin, provenance, characters or value of the variety or the breeder as a person. It must not be contrary to morals and public order. It cannot be composed only of figures, unless this is an established practice for the designation of varieties. It must be really different from other names designating on the territory of any of the parts of the UPOV a pre-existing variety of the same plant species or of a neighboring species.

The name of the variety is submitted to ISTIS by the applicant together with the patent application, but the applicant can have ISTIS conduct a documentary search on the proposed name, provided the legal fee is paid and we believe, that if the name does not meet the requirements of the law ISTIS may ask the applicant to change it. We believe that the refusal to change it may be grounds for rejecting the application for protection, which would partially justify the classification of the name as a condition on the merits. However, we do not believe that such a solution can be reached by interpreting the law and that a proper amendment of the law would be necessary.

The compliant name is registered by ISTIS at the same time as granting the breeder title. UPOV Member States must verify that no rights relating to the designation registered as the variety name prevents the free use of the name in relation to the protected variety even after the expiry of the breeder's right. The name should be without prejudice to the earlier rights of third parties. If, by virtue of an earlier right, the use of a variety name is prohibited to a person who is obliged to use it, ISTIS must ask the breeder for another name for that variety.

Once the name of the variety is allowed, a variety may not be the subject of an application for a right of ownership in another State unless is the same name. Each national office is required to register the proposed name, unless it finds an inconvenience in connection with that name on its territory. In this case, the breeder may be required to propose another name. In order to ensure this compliance, the Offices should ensure that information on variety names is communicated to each other, mainly proposing, registering and deleting the names. Any Office may submit any comments on the registration of a name to the Office which communicated that name.

The variety patent designates the variety by a name which allows, without confusion and ambiguity, its identification in all States parties to UPOV. The name referred to in the patent shall become binding upon its publication for any commercial transaction even after the expiry of the term for the variety patent.

11. Instead of conclusions. Selection of relevant case law on the protection of new plant varieties

11.1. T-135/08 - Schniga v CPVO (Gala Schnitzer). The decision of the General Court dated 13 September 2010

On 18 January 1999, the Konsortium Südtiroler Baumschuler ('KSB'), the predecessor in title of the applicant, Schniga GmbH, filed an application for a Community plant variety right at the Community Plant Variety Office (CPVO), pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended.

The Community plant variety right was sought for the apple variety (Malus Mill) Gala Schnitzer.

On 5 May 2006, the interveners, Elaris SNC and Brookfield New Zealand Ltd, the licensee and holder respectively of the plant variety right relating to the Baigent reference variety, lodged with the CPVO, pursuant to Article 59 of Regulation No 2100/94, objections to the grant of a right for the Gala Schnitzer variety.

By decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, the committee responsible for deciding on objections to the grant of Community plant variety rights ('the committee') granted a Community plant variety right for the Gala Schnitzer variety and dismissed the objections.

By decision of 21 November 2007 ('the contested decision'), the Board of Appeal annulled the decision granting a Community plant variety right for the Gala Schnitzer variety and also the decisions dismissing the objections, and the Board of Appeal itself refused the application concerning the Gala Schnitzer variety. In particular, it found that Article 61(1)(b) of Regulation No 2100/94 did not allow the CPVO to authorise KSB to submit new material, since KSB had not complied with the request in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94, by which the CPVO had requested it to provide a phytosanitary certificate confirming that the material submitted was virus-free.

By the Decision dated the 13th of September 2010, the General Court allowed the appeal and annulled the contested decision, stating the reasons set out below.

Article 55(4) of Regulation No 2100/94 provides that the CPVO is to determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.

It is apparent from the contested decision that the Board of Appeal took the view that the discretion conferred on the CPVO by that provision did not allow it to authorise KSB to submit new material, in so far as the preconditions for refusing the application filed by KSB had been met. The Board of Appeal held that, due to the viral infection of the material submitted, of which KSB had informed the CPVO, KSB could never have submitted the phytosanitary certificate requested. It then noted that KSB had not provided the phytosanitary certificate requested and inferred that, by not providing that document, KSB had failed to comply with the requests in an individual case contained in the CPVO's letters of 26 January 1999 and 25 March 1999. In accordance with Article 61(1)(b) of Regulation No 2100/94, however, the CPVO was required to refuse the application concerning the Gala Schnitzer variety as soon as that failure to comply had been established.

That reasoning must be rejected, since it misconstrues the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

That discretion includes the right for the CPVO to define, should it deem it necessary, the requirements which it applies to the examination of an application for a Community plant variety right, on condition that the period within which the applicant for such a right must respond to the request in the individual case made to him has not expired.

In that connection, it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that, when it finds that the lack of precision which it has noted may be corrected, the CPVO has the power to continue with the examination of the application filed with it and is not required, in that situation, to refuse that application. Thus envisaged, that discretion makes it possible to avoid any pointless increase in the period between the filing of an application for a Community plant variety right and the decision on that application which would arise if the applicant were required to file a new application.

In addition, that discretion enables, first, the CPVO to satisfy itself that its requests in individual cases are clear and that the applicant alone is responsible for the fact that its actions fail to comply with those requests and, second, applicants to know their rights and obligations without ambiguity and to take steps accordingly, which is a requirement inherent in the principle of legal certainty (see, to that effect, Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17).

11.2. T-133/08, T-134/08, T-177/08 și T-242/09. Schräder v OCVV - Hansson (LEMON SYMPHONY). The decision of the General Court dated 18 September 2012

On 5 September 1996, the intervener, Mr Jørn Hansson, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right

pursuant to the regulation. That application was registered under number 1996/0984. The plant variety for which protection was thereby sought is the variety LEMON SYMPHONY, belonging to the species *Osteospermum ecklonis*.

By a decision of the CPVO of 6 April 1999, a Community plant variety right was granted for LEMON SYMPHONY and the official description of that variety was compiled by the Bundessortenamt in 1997 and reproduced in the Register of Community Plant Variety Rights.

On 26 November 2001, the applicant, Mr Ralf Schräder, applied to the CPVO for a Community plant variety right pursuant to the regulation. That application was registered under number 2001/1758. The plant variety for which the right was thereby sought was the variety SUMOST 01, belonging to the species *Osteospermum ecklonis*. That variety is grown and marketed by Jungpflanzen Grünewald GmbH ('Grünewald'), a company in which the applicant has a 5% shareholding.

On 26 October 2004, the applicant filed an application for cancellation of the Community plant variety right granted to LEMON SYMPHONY, pursuant to Article 21 of the regulation read in conjunction with Article 9 thereof, entitled 'Stability', on the ground that, since 2002 at least, that variety no longer corresponded to its official description entered in 1997 in the Register of Community Plant Variety Rights. In support of his application he submitted, essentially, that, in the examination of LEMON SYMPHONY carried out in 2001 on the basis of the TG/176/3 test guidelines, applicable since 2001, various characteristics of that variety had received different scores in comparison with the official description of that same variety dating from 1997. That demonstrated, he submitted, that the variety at issue lacked stability.

By decision of 19 February 2007 ('the refusal decision'), the CPVO upheld the objections raised by the intervener against the grant of a Community plant variety right to SUMOST 01 and refused the application for a Community plant variety right for that variety, essentially on the ground that that variety was not clearly distinguishable from LEMON SYMPHONY and that the conditions set out in Article 7 of the regulation had therefore not been met. The CPVO observed, inter alia, that it was apparent from the technical examination that SUMOST 01 differed from LEMON SYMPHONY only in one characteristic, namely the start of the flowering period, and in this by only one mark, and that that difference was too slight, in the case of the *Osteospermum* species varieties, to render it clearly distinct. Furthermore, the CPVO considered LEMON SYMPHONY to be stable.

On 11 April 2007, the applicant filed an application for annulment, pursuant to Article 20 of the regulation, of the Community plant variety right granted to LEMON SYMPHONY, essentially on the ground that that variety had never existed in the form reproduced in the official description entered in the Register of Community Plant Variety Rights in 1997.

The decisions issued by the OCSP were appealed to the Boards of Appeal, which dismissed the appeals.

Invested in applications for annulment of the decisions of the Boards of Appeal, the General Court allowed the actions in part. Here are some of the arguments put forward by the Court of First Instance.

Under Article 76 of the regulation, entitled 'Examination of the facts by the [CPVO] of its own motion', the infringement of which is claimed in the present case, the CPVO is to make investigations on the facts of its own motion in proceedings before it, 'to the extent that they come under the examination pursuant to Articles 54 and 55' of that regulation.

Under Article 54 of the regulation, the CPVO is to conduct a substantive examination of the application for a Community plant variety right. In that context, it is to examine, inter alia, whether the variety may be the object of a Community plant variety right pursuant to Article 5 and whether the variety is new pursuant to Article 10 of that regulation.

Under Article 55 of the regulation, where the CVPO has not discovered any impediment to the grant of a Community plant variety right on the basis of a preliminary examination, it is to arrange for the technical examination relating to compliance with the conditions laid down in Articles 7 to 9 (DUS criteria) to be carried out by the competent office or offices in at least one of the Member States (Examination Office or Offices).

It must also be noted at the outset that Article 76 of the regulation, relating to the examination of the facts by the CPVO of its own motion, is, in the strict sense, inapplicable to the proceedings before the Board of Appeal when adjudicating on an appeal against a decision of the CPVO which has refused to declare, on the application of a party, the nullity of a Community plant variety right, because such proceedings do not come within the scope of Articles 54 and 55 of the regulation.

In the course of such proceedings, it is not for the Board of Appeal to carry out the substantive examination provided for in Article 54 or the technical examination provided for in Article 55 of the regulation, or even to rule on the lawfulness of such an examination carried out by the CPVO in the context of an application for a Community plant variety right.

The task of the Board of Appeal is solely to rule, on the application of an interested party, on the lawfulness of a decision of the CPVO adopted under

Article 20(1)(a) of the regulation refusing to declare the Community plant variety right null and void on the ground that it has not been 'established' by that party that the conditions set out in Article 7 or in Article 10 of that regulation were not satisfied at the time when the right was granted.

Since annulment proceedings were initiated not by the CPVO of its own motion, but on the application of an interested party, Articles 76 and 81 of the regulation, read in conjunction with Article 20 thereof, thereby place the onus on that party to prove that the conditions for that declaration of nullity have been met.

As regards the applicant's other arguments, by which he criticises the Board of Appeal for not having responded to his criticisms as to the unreliability of the technical examination of LEMON SYMPHONY carried out in 1997, expressed in the light of the development of the technical description of that variety since 2001, these must be rejected as irrelevant since, first, it has already been accepted that that technical examination had in any event been carried out on appropriate plant material, namely the cuttings originally taken from the plants sent to the Bundessortenamt by the intervener, and that, secondly, the applicant has not identified any other plant variety from which LEMON SYMPHONY, even described with a 'semi-erect to horizontal' attitude of shoots, was not clearly distinguishable in 1997. That assessment is consistent with the principal arguments set out by the CPVO and the intervener in response to the second plea.

Accordingly, even if, as the applicant claims, the 1997 technical examination culminated in an incorrect finding as to the level of expression attributed in respect of the characteristic 'Attitude of shoots', and a level of expression different to that attributed in the Bundessortenamt's examination report of that year should have been attributed to LEMON SYMPHONY in respect of that characteristic from 1997 onwards, that would not have had any effect on the assessment of the distinctive character of that variety for the purpose of Article 7 of the regulation, since that assessment was not determined exclusively, if at all, by reference to that characteristic.

First, the General Court observes in this connection that the adapted 2006 description of LEMON SYMPONY differs from the original 1997 description only in respect of the single characteristic 'Attitude of shoots', the level of expression attributed to which was changed from 'erect' (see paragraph 12 above) to 'semi-erect to horizontal' (see paragraph 25 above).

Second, the General Court observes that the applicant has not yet proved that the effect of that amendment was that the DUS criteria had not been satisfied in 1997. It follows that, even if LEMON SYMPHONY had been described from the outset as having a level of expression 'semi-erect to horizontal' in respect of the characteristic 'Attitude of shoots', it would have obtained a Community plant variety right.

Admittedly, the applicant claimed, during the proceedings before the Board of Appeal, that, had the examination of SUMOST 01 been carried out using for the purposes of the comparative examination the initial description of LEMON SYMPHONY, those two varieties would have been considered to be clearly distinct (see contested decision A 007/2007, p. 2). However, that submission was expressly rejected by the Board of Appeal, which observed in the contested decision that '[t]he test procedure would not have taken a different course if the Office had not immediately adapted and registered the variety description…'. Moreover, the applicant did not specifically challenge that assessment in the present action.

In the course of the exercise of that review, it must nevertheless be stated that, contrary to what the applicant claims, the characteristic 'Attitude of shoots', the levels of expression of which run, according to the test guidelines, from 'erect' to 'drooping', through 'semi-erect' and 'horizontal' and the nuances between those terms, is not, except in extreme cases, an 'absolute' characteristic which can be determined in a thoroughly objective manner using only the measurement of the angle of inclination of the shoots, but a characteristic which, by reason of the specific nature of its expression, can, depending on the case, be the subject of a relative and comparative assessment between varieties of the same species, as the Bundessortenamt's document of 18 May 2005, attached as annex A 27 to the application in Case T-177/08, clearly shows.

According to the Bundessortenamt, the attribution to LEMON SYMPHONY in 1997 of the level of expression 'erect' in respect of the description of the characteristic 'Attitude of shoots' follows from the comparison of that variety with the reference varieties used in the growing trials and the finding that LEMON SYMPHONY was 'the most erect' of the varieties on which trials were performed that year. Subsequently, the increase in the number of varieties of the *Osteospermum ecklonis* species and the amendment of the test guidelines led the Bundessortenamt to propose an adaptation of that description to state the level of expression as 'semi-erect to horizontal'. However, LEMON SYMPHONY remained exactly the same between 1997 and 2005. There was no material amendment of the description affecting the identity of the variety, but merely an amendment of the terms originally chosen, which does not change the identity of the variety but merely enables it to be described more accurately, in particular by delimiting it in relation to other varieties of the species.

The General Court takes the view that those explanations are sufficiently detailed and persuasive to resist firmly the attempted challenge to them made by the applicant in his arguments.

Moreover, the photographs used both before the German civil courts and in the proceedings before the CPVO confirm, at least in the eyes of a lay observer, that the attitude of the shoots of LEMON SYMPHONY did not change appreciably between 1997 and 2005.

11.3. T-140/15 - Aurora v OCVV - SESVanderhave (M 02205). The Decision of the General Court dated 23 November 2017

On 29 November 2002, the intervener, SESVanderhave NV, applied to the Community Plant Variety Office (CPVO) for a Community plant variety right pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1). The Community plant variety right was sought for variety M 02205, a sugar beet variety of the species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll*.

The CPVO entrusted the Statens utsädeskontroll (Swedish Seed Testing and Certification Institute, Sweden) ('the Examination Office') with the responsibility of carrying out the technical examination of the candidate variety, in accordance with Article 55(1) of Regulation No 2100/94. The Examination Office was in charge, in particular, of examining whether the candidate variety was distinct from the most similar varieties whose existence was a matter of common knowledge on the date of application for a Community plant variety right ('the reference varieties') within the meaning of Article 7(1) of Regulation No 2100/94. In that respect, sugar beet varieties Dieck 3903 and KW 043 were considered to be most similar to the candidate variety.

On the basis of that report, on 18 April 2005, the CPVO granted the intervener the Community plant variety right applied for, under Registration No EU 15118, for variety M 02205. Annexed to that decision were the documents supplied by the Examination Office, including the variety description and the comparative distinctness report.

On 28 August 2012, the applicant lodged a request for nullity of the Community plant variety right granted to the intervener, pursuant to Article 20 of Regulation No 2100/94, on the ground that the successive corrections to the comparative distinctness report showed that variety M 02205 did not satisfy the 'distinctness' requirement for the purposes of Article 7(1) of the regulation. More particularly, in the statement of grounds of appeal before the CPVO, the applicant disputed the fact that, following the abovementioned corrections, the only distinguishing factor between variety M 02205 and variety KW 043 was the percentage variation relating to the state of expression of the 'germity' characteristic, namely 29% for M 02205 as against 94% for KW 043. According to the applicant, that meant that it was inappropriate to choose that characteristic for the purpose of a finding of distinctness of the candidate variety, given that, in accordance with the explanations in Annex 1 to the protocol adopted by the CPVO on 15 November 2001 in respect of the species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll* ('the Protocol of 15 November 2001'), applicable in the present case, the distinctness of a candidate variety can be justified under the 'germity' characteristic only with two notes difference between the note of the candidate variety and that of the reference variety — which was unquestionably not the case here.

By Decision NN 010 of 23 September 2013, the CPVO dismissed the applicant's request for nullity under Article 20(1)(a) of Regulation No 2100/94, on the ground that variety M 02205 was clearly distinct from the reference varieties, including KW 043. The CPVO explained that, at the time the final report was issued, the Examination Office was aware of the correct notes of expression for all the characteristics of the candidate variety and, therefore, the transcription errors in the comparative distinctness report were immaterial with regard to the finding of distinctness of that variety; furthermore, that fact had been confirmed by the Examination Office.

By Decision A 010/2013 of 26 November 2014 ('the contested decision'), the Board of Appeal dismissed the applicant's appeal as unfounded, holding, in particular, that the latter had overestimated the importance of the comparative distinctness report, whereas, in fact, that document merely contained additional information derived from the results of the comparative growing trials. Accordingly, the fact that the document was corrected three times did not result in the nullity of the Community plant variety right at issue.

By its Decision of 23 November 2017, the General Court upheld the appeal, essentially retaining the following arguments.

Under Article 20(1)(a) of Regulation No 2100/94, the CPVO must declare a Community plant variety right null and void if it is established that the conditions laid down in Articles 7 or 10 were not complied with at the time of the Community plant variety right. Moreover, under Article 7(1) of the regulation, 'a variety shall be deemed to be distinct if it is clearly distinguishable, by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.'

Furthermore, it must be pointed out that the Court has stated, in that regard, that the conditions relating, in particular, to distinctness are, under Article 6 of the regulation, a prerequisite for the grant of a Community plant variety right. Therefore, in the absence of those conditions, the right granted is unlawful, and it is in the public interest that it be declared null and void (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 52).

The Court has also ruled that the CPVO has a broad discretion concerning the declaration of nullity of a plant variety right for the purposes of Article 20 of Regulation No 2100/94. Therefore, only where there are serious doubts that the conditions laid down in Articles 7 or 10 of that regulation had been met on the date of the examination provided for under Articles 54 and 55 of that regulation can a re-examination of the protected variety by way of nullity proceedings under Article 20 of Regulation No 2100/94 be justified (see, to that effect, judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 56).

In that context, a third party seeking a declaration of nullity of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the plant variety right following the examination provided for in Articles 54 and 55 of that regulation (see, to that effect, judgment of 21 May 2015, *Schräder* v *CPVO* (C-546/12 P, EU:C:2015:332, paragraph 57).

It was thus for the applicant to adduce, in support of its request for nullity, evidence or facts of sufficient substance to raise serious doubts in the mind of the Board of Appeal as to the legality of the plant variety right granted in the present case.

Consequently, the Court must examine whether the elements adduced by the applicant before the Board of Appeal, in that regard, were sufficient to raise serious doubts in the mind of the Board of Appeal and if, accordingly, they could justify a re-examination of variety M 02205 by means of nullity proceedings based on Article 20(1)(a) of Regulation No 2100/94.

In order to answer that question, first of all, it is necessary to ascertain the requirements imposed by the legislation at issue concerning the drafting of the notes of expression on which the findings as to whether or not a plant variety is distinct must be based. Next, it is necessary to examine whether the arguments put forward by the applicant in that regard could raise serious doubts in the mind of the Board of Appeal. Lastly, the Court must consider whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts.

First, with regard to the requirements imposed by the legislation at issue, it must be noted that, under Article 56(2) of Regulation No 2100/94, the conduct of any technical examination is to be performed in accordance with test guidelines issued by the Administrative Council and any instructions given by the CPVO. In that regard, it must be pointed out that the broad discretion enjoyed by the CPVO in the exercise of its functions cannot allow it to avoid the technical rules that regulate the conduct of the technical examinations without breaching the duty of good administration and its obligations of care and impartiality. In addition, the binding nature of those rules, including for the CPVO, is confirmed by Article 56(2) of Regulation No 2100/94, which requires that the technical examinations are carried out in accordance with those roles (judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 79).

In that context, it must be observed that, in accordance with the abovementioned Article 56(2), the CPVO adopted the Protocol of 15 November 2001 with a view to establishing test guidelines governing the technical analysis and the conditions for registration of varieties coming within the sugar beet species *Beta vulgaris L. ssp. Vulgaris var. altissima Döll.* Under point III.2., headed ‘Material to be examined’, and point III.5., headed ‘Trial designs and growing conditions’, of the protocol, candidate varieties must be directly compared with reference varieties in growing trials to be carried out normally in at least two independent growing cycles. Moreover, in the contested decision, the Board of Appeal itself stressed the importance of compliance with that requirement, which, in its own words, is a condition precedent for the grant of a Community plant variety right (see paragraph 28 above).

It follows that the notes of expression in the comparative distinctness report, on the basis of which the distinctness of a candidate variety is established, have to correspond to the notes collected from comparative growing trials carried out in two independent growing cycles following the application for a Community plant variety right for the candidate variety.

Secondly, with regard to the arguments put forward by the applicant, the documents in the case file show that the applicant claimed, before the Board of Appeal, that the fact that the notes of expression given to variety KW 043 in the comparative distinctness report were identical to those in its official variety description supports the assumption that the notes were sourced from the official description and not from comparative growing trials carried out in 2003 and 2004, for the purpose of a Community plant variety right being granted for variety M 02205. Furthermore, by relying on concrete examples from other official variety descriptions, the applicant sought to show that the probability of recording the same notes for a sugar beet variety from year to year was very low.

In that regard, it must be observed that, as has been noted in paragraphs 18 and 19 above, although the applicant had requested, several times, access to the file concerning variety M 02205, including the results of the comparative growing trials of 2003 and 2004, the CPVO did not communicate those results to the applicant until 2 March 2015, that is to say, after the date of the Board of Appeal's decision. Therefore, the applicant was clearly not in a position to rely on evidence other than that produced by it before the CPVO bodies, namely the comparison between the data in the comparative distinctness report and that recorded in the official variety descriptions for M 02205 and KW 043 respectively as well as, by way of illustration, data taken from other official variety descriptions.

In addition, the applicant was fully entitled to rely before the Board of Appeal on the series of errors in the comparative distinctness report, mentioned in paragraphs 5 to 15 above, which gave rise to a succession of corrections of that report and could also raise serious doubts in the mind of the Board of Appeal, at the very least, as to the reliability of the notes of expression corresponding to the characteristics included in the comparative distinctness report. Moreover, as pointed out, in essence, by the applicant before the Board of Appeal, the fact that the corrections were late was liable to reinforce those doubts.

In the light of the foregoing, the Court must find that the applicant adduced, before the Board of Appeal, factual elements of sufficient substance to raise serious doubts as to whether the data used for reference variety KW 043 was sourced from its official variety description. The Board of Appeal was thus required to verify whether that contention was well founded and draw the appropriate conclusions for the applicant's action.

Moreover, it should be added that, in its replies to the written questions put by the Court, the CPVO recognised that the notes of expression relating to variety KW 043, as included in the last and penultimate versions of the comparative distinctness report, did not correspond to the data collected from the comparative growing trials of 2003 and 2004 but were sourced from the official variety description for KW 043.

Thirdly, with regard to whether the Board of Appeal duly fulfilled its obligations in the face of such serious doubts, in the first place, it is important to recall that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a margin of discretion in carrying out its functions (see judgment of 19 December 2012, *Brookfield New Zealand and Elaris* v *CPVOandSchniga*, C-534/10 P, EU:C:2012:813, paragraph 50 and the case-law cited). That discretion extends, inter alia, to verifying whether that variety has distinctive character for the purpose of Article 7(1) of Regulation No 2100/94 (see judgment of 8 June 2017, *Schniga* v *CPVO*, C-625/15 P, EU:C:2017:435, paragraph 46 and the case-law cited).

In the second place, the CPVO, as a body of the European Union, is subject to the principle of sound administration, in accordance with which it must examine carefully and impartially all the relevant particulars of an application for a Community plant variety right and gather all the factual and legal information necessary to exercise its discretion. It must furthermore ensure the proper conduct and effectiveness of proceedings which it sets in motion (see judgment of 8 June 2017, *Brookfield New Zealand and Elaris* v *CPVO and Schniga*, C-625/15 P, EU:C:2017:435, paragraph 47 and the case-law cited).

In the third place, it should be recalled that Article 76 of Regulation No 2100/94 provides that 'in proceedings before it [the CPVO] shall make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55.'

Lastly, the Court has held that, under Article 51 of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the CPVO (OJ 2009 L 251, p. 3), the provisions relating to proceedings before the CPVO apply *mutatis mutandis* to appeal proceedings (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46).

Thus, on the one hand, the principle of examination of the facts by the CPVO of its own motion also applies in proceedings before the Board of Appeal (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 46). On the other hand, the Board of Appeal is also bound by the principle of sound administration, pursuant to which it is required to examine carefully and impartially all the relevant factual and legal information in the case before it.

11.4. TUE. T-112/18 - Pink Lady America v. OCVV - WAAA (Cripps Pink)[16]. The decision of the General Court dated 24 September 2019

On 29 August 1995, the predecessor in title of the Western Australian Agriculture Authority ('the

[16] For a comment on this General Court of the European Union case: Ciprian Raul Romițan, "Plant varieties. Procedure for declaring nullity. Cripps Pink apple variety. News. Derogatory grace period. The notion of exploitation of the variety. Commercial evaluation. Evidence submitted late to the Board of Appeal. Evidence presented for the first time before the Tribunal", in the *Romanian Journal of Intellectual Property Law (RRDPI)* no. 2/2020, pp. 127-149.

WAAA' or 'the intervener'), the Department of Agriculture and Food Western Australia ('the Department'), filed an application for a Community plant variety right at the Community Plant Variety Office (CPVO) pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights.

The plant variety in respect of which the right was sought is 'Cripps Pink', a variety of apple belonging to the species *Malus Domestica Borkh*, developed by Mr John Cripps ('the breeder'), a researcher in the Plant Industries division of the Department, by crossing the Golden Delicious and Lady Williams varieties.

The application form for a Community plant variety right stated that the Cripps Pink apple trees were first marketed within the European Union in 1994 in France and first marketed outside the European Union, more specifically in Australia, in 1988. On 12 March 1996, the CPVO informed the representative of the Department that the Cripps Pink variety did not fulfil the novelty requirement under Article 10 of the Basic Regulation. In July 1996, the Department explained that 1988 should have been considered to be the date of the 'first plantings in Australia for experimental purposes'. The Department went on to state that the relevant date for the purposes of Article 10 of the Basic Regulation was July 1992, being the date when Cripps Pink apple trees were marketed in the United Kingdom under the trade name 'Pink Lady'. On 15 January 1997, the CPVO granted Community plant variety right No 1640 to the Cripps Pink variety.

On 26 June 2014, the applicant, Pink Lady America LLC ('the applicant' or 'PLA'), lodged an application for nullity in relation to the Cripps Pink Community plant variety right under Article 20 of the Basic Regulation, arguing that the Community plant variety right at issue did not fulfil the novelty conditions laid down in Article 10 of that regulation. On 19 September 2016, by Decision No NN 17, the CPVO dismissed the applicant's nullity application. The Decision was upheld by the Board of Appeal of the CPVO.

By the Decision dated the 24th of September 2019, the General Court dismissed the action against the decision of the Board of Appeal of the CPVO, citing, in essence, the following grounds.

The relevant date for the purposes of the combined application of Articles 10 and 116 of the Basic Regulation is therefore 1 September 1994, the date of publication of the Basic Regulation in the *Official Journal.*

The effect of Article 116 of the Basic Regulation is to extend the grace period laid down in Article 10(1)(a) of the regulation from 1 year before the application for protection to four, or 6 years in the case of trees, before the date of entry into force of the Basic Regulation. The relevant date in this case was therefore 1 September 1988 for sales and disposals within the European Union.

As regards the grace period for sales and disposals outside the territory of the European Union, as set out in Article 10(1)(b) of the Basic Regulation, that provision is not affected by Article 116 of the regulation.

In the present case, the documents in the case establish that the application for Community plant variety rights was made by the intervener's predecessor in law on 29 August 1995. Therefore, it was filed within 1 year of the entry into force of the Basic Regulation.

Concerning the burden of proof in nullity proceedings, The General Court recalled that an applicant seeking a declaration of nullity in respect of a Community plant variety right must adduce evidence and facts of sufficient substance to give rise to serious doubts as to the legality of the plant variety right granted following the examination provided for in Articles 54 and 55 of that regulation (judgment of 21 May 2015, *Schräder* v *CPVO*, C-546/12 P, EU:C:2015:332, paragraph 57 and judgment of 23 November 2017, *Aurora* v *CPVO — SESVanderhave (M 02205)*, T-140/15, EU:T:2017:830, paragraph 58). It was thus for the applicant to put forward, in support of its nullity application, evidence or facts of sufficient substance to raise serious doubts on the part of the CPVO regarding the legality of the plant variety right granted in the present case.

Regarding the assessment of the novelty requirement in the light of sales or disposals made outside the European Union, The General Court specified that a disposal for the purposes of testing of the variety which does not amount to sale or disposal to third parties for purposes of exploitation of the variety does not negate novelty for the purposes of Article 10 of the Basic Regulation (judgment of 11 April 2019, *Kiku* v *CPVO — Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie (Pinova)*, T-765/17, not published, under appeal, EU:T:2019:244, paragraph 74).

It follows from this case-law that the concept of 'exploitation' of the variety within the meaning of Article 10(1) of the Basic Regulation relates to exploitation for profit, as further demonstrated by the provisions of the Basic Regulation relating to contractual exploitation rights, but this concept excludes commercial trials aimed at assessing varieties under commercial conditions across a range of soil types and different farming systems to determine their value to customers.

Further, as the intervener explained during the hearing before the Board of Appeal, the purpose of the 'commercial trials' in this case was to assess varieties under commercial conditions across a range of soil

types and different farming systems to determine their value for customers. The trials thus enabled the performance of the variety in question to be monitored under much more representative field conditions, the full crop cycle to be assessed, and, finally, producers to receive more performance data.

These statements by the intervener are corroborated by the breeder's statutory declaration of 6 August 2015 and also by the rebuttal statutory declaration of Mr Geoffrey Godley, Agricultural Advisor to the Department, of 13 January 2015. It is apparent from the breeder's statement of 6 August 2015 that the purpose of distributing the Cripps Pink variety to nurseries and orchardists 'was to see how the trees performed in a non-research station environment'. Mr Godley's statement also indicates that he acknowledges having participated, at the material time, in the 'commercial evaluation' activities, which consisted of collecting information from growers 'on yield, harvest, storage, packing, shipping and consumer reaction to the variety apples.'

Finally, it should be noted that according to the explanations provided during the hearing before the Board of Appeal by the CPVO Technical Expert on Apples, commercial evaluation is a common practice in apple selection. The expert explained that apple selection takes place in two stages: a first stage which consists of carrying out research to test and select varieties, and a second stage which consists of assessing the commercial use of apple trees.

In those circumstances, the Board of Appeal correctly concluded that commercial evaluation did not amount to commercial exploitation and that, accordingly, sales or disposals made for testing purposes before the grace period were circumstances that did not negate novelty.

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A FUZZY MULTI-CRITERIA DECISION-MAKING MODEL FOR PROJECT SELECTION

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Abstract

In the contemporary world any activity is involuntarily and often decisively influenced by two phenomena: globalization and sustainable development. Each of them gives a special complexity and uncertainty to the business environment. While globalization requires an organization to adapt to new markets and new cultures, sustainable development outlines the need to respect and support the sustainability of these cultures, by attaching particular importance to socio-economic and ecological issues.

Our paper presents the analysis of the main theoretical and empirical approaches outlined in relevant literature and by practitioners, highlights the methods used in project evaluation and selection, and proposes a hybrid model based on interdependent elements specific to project management, mathematical optimization and sustainability. The approach presented in the paper is based on a Fuzzy Multiple Criteria Group Decision Making model that allows the inclusion of complexity and uncertainty in the evaluation and selection of projects, in order to obtain a high level of performance, during the contemporary economic and social conditions. The model proposed for the optimal project portfolio selection involves a methodology composed of two decision-making methods: fuzzy AHP for determining the relative importance of the criteria considered within the evaluation model and fuzzy TOPSIS for objective, structured and analytical prioritization of the portfolio projects.

Keywords: *decision-making, project management, selection methods, multicriteria, fuzzy sets*.

1. Introduction

With a recent history, of only a few decades, project management has quickly become one of the most used concepts in the development of more and more activities. Their proper implementation within contemporary organizations supports their successful development. The complexity and the high degree of uncertainty that characterizes today the activity of any company, can represent sources of important opportunities, associating the business with project orientation. The attempt to achieve the objectives without adequate planning, organization and monitoring, is certainly materialized in a result that emphasizes failure, unsustainable consumption of resources and diminished chances for a successful future. The simple application of routine project management techniques determines the change of the entire vision and culture of an organization, of the staff involved, the organization, the quality, efficiency and effectiveness of the activity carried out.

Impressive or small projects, complex or low-complexity projects, educational, business or social projects, all involve investment. Investments have their source in the achievements (or failures) of the past, they are built in the present, but they always aim at the future (Românu 2005). Financial resources, personnel, material resources, time, are invested to fulfill the purpose of the project and obtain the desired results. Projects represent a unique set of interrelated objectives, activities and resources in order to achieve a predetermined goal. Project Management Institute proposes the following definition of the project: "A temporary effort made to create a unique product or service" (PMI 2008).

The rapid change of the global environment, technological development and competitive intensity are elements that influence project management in order to constantly redefine how budgets are set or how resources are allocated, response time, quality and characteristics of designed products.

In this sense, one of the great importance decision categories for the performance of an organization involves identifying the optimal portfolio of implemented projects, through the evaluation and selection of the variants that are expected to meet the objectives set in the most efficient way known and analyzed.

The selection of the optimal portfolio implies the evaluation of the projects and the choice of the variants implementation that contribute in the most adequate way to the fulfillment of the organizational objectives (Mantel et al. 2011). Before financing a project, the level of performance that can be supported by the implementation of that variant must be evaluated. Whether it is proposed by a person within the organization, or it is the wish of a client, or it requires

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more or less formal approvals, the committee appointed to select the optimal option for a project must ensure that it meets certain conditions.

Thus, special attention must be paid to the issue of subjectivity and decision-making freedom (Damodaran et al. 2005). People think differently, they have different education, culture and principles. That is why the evaluation process must lead to a decision that is as objective as possible. In this regard, in order to support the work of management, in order to optimize the investment decision in a project or a portfolio of projects, I consider it to be necessary the use of appropriate mathematical tools to manage the uncertainty and subjectivity in evaluation.

2. Project selection methods

Planning and developing activities, designing the structure and culture of an organization, providing early responses to environmental events, choosing a technology for products and services, defining a strategy to maximize the value of knowledge and skills of staff to achieve performance, are elements which involve making decisions. Any activity carried out in the organization involves decisions, even if they differ in complexity and importance. The organization can be considered a real decision-making machine. At all levels and in any department, people make decisions constantly, and their degree of optimality significantly determines the level of value created by the organization.

Through the decision-making process, problems are answered, searching and selecting a solution and the mode of action that creates value for the organization and implicitly for its stakeholders. Whether it's choosing the best resources, finding the best way to interact with customers, or adopting the best position in front of a competitor, management must decide.

Strategy, objectives, and why not, the entire contemporary organizational activity, are elements increasingly fulfilled through project management. The multitude and diversity of projects carried out in a society have even determined the development of a new type of organization, the project-oriented organization.

Given the large number of projects and implementation options available, taking into account the simultaneity of development and the interdependencies between them within the organization, a high-performance evaluation is required in order to determine the optimal portfolio.

Project evaluation and selection is a decision-making issue of strategic importance, which forms the basis for studies conducted by many researchers for over 50 years.

The key challenges of project portfolio management include a sensitivity analysis of its interdependencies, traceability, simplicity, supporting quantitative and qualitative data, project quantity, trade-offs, group decision making and the mutual links between portfolio levels (Danesh et al. 2018).

Characterized by multiple criteria, contradictory and often difficult to measure (Liesio et al. 2007), the process requires to pay special attention from the decision maker in order to establishing the most effective alternative in terms of the various aspects considered (Mavrotas et al. 2008). The permanent interest for this subject is also reflected in the variety of methods existing in literature (Heidenberger and Stummer 1999). Hundreds of models and methodologies for project evaluation and selection are grouped into: scoring, classification, mathematical programming, fuzzy logic and AHP (Badri et al. 2001); non-numerical (the sacred cow, operational / competitive need, potential benefits) and numerical (financial evaluation, financial options, opportunity cost, scoring) (Meredith and Mantel, 2010); scoring, ad-hoc, comparative, economic, portfolio, mathematical optimization and simulation (Tavana et al. 2013). One of the most comprehensive classifications is the one made by Iamratanakul (2008), which summarizes the entire relevant literature of project selection methods in: ad-hoc, options, cognitive analysis, mathematical programming, benefit measurement.

2.1. Ad-hoc methods

Ad-hoc methods are the simplest and involve a minimum of effort in decision making.

"The Sacred Cow". Sometimes shareholders or business owners suggest a potential product or service that the organization could offer to customers. In most cases, practice demonstrates that regardless of the selection process and results, the proposed project is approved, becoming a "holy cow", whose technical, economic or any other feasibility must be demonstrated. Even if it seems irrational, such practices are often encountered in practice. Total ignorance of employees, their knowledge and experience in favor of supporting their own idea is often the source of failure in business. This type of "evaluation" of an investment idea disregards the need and special value given by the management and employees support in the successful development of the project (Green 1995). The method highlights that type of "not so" in the evaluation. It is desirable to try the correct approach to the business idea and the proper evaluation of the projects carried out, in order to eliminate waste and adopt a sustainable management.

Operational/competitive necessity. Most times, within organizations, projects are selected due to the need to support the continuity of the business processes or to keep the business within the limits of competitiveness. This category of "mandated" projects must be selected for further use of facilities. In an environment characterized by uncertainty and change, both opportunities and threats are becoming more common. The argument regarding the need for operation, involves the selection of projects in order to avoid or counter threats, which emphasizes the fact that it is not the management that dictated the

implementation but the external environment, the competitiveness imprinted by it. However, a project that supports the performance of a contemporary organization aims, mainly, to capitalize on opportunities or create them by implementing projects that involve new technologies, innovation and sustainability.

Compared to the first selection model, this one, although it also involves the implementation of an imposed idea (this time by maintaining the level of competitiveness or avoiding the risk of business failure and not by the owner's desire), can still be subject to an objective evaluation, regarding the selection of the most efficient realization variation model available.

2.2. Financial options

Opportunity cost. A more recent approach to project selection, includes within the evaluation process a type of financial analysis, which recognizes the value of the organization's positioning in order to capitalize on future opportunities. The financial options specific principles are used as working grounds, in order to capitalize on future investment opportunities. The concept of financial option (Xie 2009) expresses the acquisition by an organization or person of the right to act in a certain direction, without requiring the mandatory exercise of that right. For example, when purchasing a stock option, the holder is given the right to buy a number of shares at a certain price within a specified period of time. Thus, if the market price of those shares becomes higher than the specific price of the option within the specified time frame, the entity holding the option may exercise its right, thus gaining from the price difference. However, at an inverse relationship between the market price and the option price, the holder may choose not to exercise his right to buy the share. Thus, if the market price of those shares becomes higher than the specific price of the option within the specified time frame, the entity holding the option may exercise its right, thus gaining from the price difference. However, at an inverse relationship between the market price and the option price, the holder may choose not to exercise his right to buy the share.

In the field of projects, options represent the response modalities planification to various likely future states that may be transmitted by the environment. If the event occurs, then one of the options provided will be used, if not, they will be waived.

In an environment of uncertainty and rapid change, identifying the right options is of high importance. If none of the options appear, the cost of determining them is useless. The time, money and resources spent in order to substantiate the options can only be quantified in terms of waste. We believe that options are one of the main methods of responding to potential risks, but their success depends to a large extent on quantifying the elements that can determine the triggering events for implementing the option. The main weakness of this method derives from considerations related to uncertainty. However, uncertainty is taken into account in methods that use fuzzy variables. In order to fulfill the purpose of optimizing the investment decision and implicitly the process of evaluation and selection of projects, forecasts and plans can be made in order to determine the evolution of influencing factors and to establish their ranges of variation and response strategies.

In addition to taking into account the value of future opportunities and threats, in relevant literature (ACCA 2011) the analysis of the cost of giving up the project is also presented, method based on elements characteristic to the concept called "opportunity cost". For example, if a decision has to be made in order to choose an investment with two competing projects at its disposal (choosing one of them involves giving up the other) and the rate of return for the first project is 15%, the choice to invest in -the second will have an opportunity cost of 15%, represented by the lost opportunity cost. If the profitability of the number two project is higher than 15%, it will be selected against the choice of the first project. The decision is based on a basic economic principle, which aims to minimize costs. Choosing the right time to make an investment can also be supported by similar principles. Given a project to implement a new technology in an organization, the value of the investment made differs considerably over time. Mantel et al. (2011) argue that the passage of time reduces the level of uncertainty involved in a project, whether we refer to technological or commercial elements. "The value of making the investment now may be higher than the value of making it later." From a mathematical and economic point of view, an investment made today is more expensive than if we make it in a future period. That is why some specialists recommend placing large sums in the last years of implementation for the investment staggering. But delaying the adoption of new technologies can cost more than an increase in inflation or the discount rate. However, there are situations when the simple maximization or minimization of the values of some indicators does not reflect the real performance of the project. Projects that predict negative cash flows are sometimes approved, these decisions not necessarily reflecting mistakes, but the existence of elements considered by evaluators much more important than profit positivity: acquiring knowledge about a new technology, implementing innovative elements that can support the organization's competitiveness, obtaining the necessary parts to continue the business, the possibility to bring in the future new contracts or profitable investments, improving the competitiveness of the organization, expanding a range of products or a business field.

2.3. Measuring benefits

Benefit-based methods involve an additional dose of effort on the part of decision-makers to establish the selection criteria and evaluate the portfolio accordingly.

In cost-benefit analyzes, the classification of projects involves comparing the expected effects with the efforts required to achieve them.

Potential benefits. Another situation an organization may face, in terms of establishing the optimal portfolio, is the situation characterized by the existence of a whole list of potential projects, each of which involves different ideas, objectives, benefits and costs. Under such conditions, the evaluation and selection process is much more complex and difficult than in the case of the models presented above. For selection, commissions are often set up, with each of its members responsible for ordering a number of potential projects and providing the resulting ranking in support of the selection decision. The element that implies a substantial dose of uncertainty is the freedom to choose the criteria used, each evaluator judging based to his own beliefs; thus, while some of them focus on technical specifications, others consider the relationship with the organization's strategy or the degree of compliance with environmental standards to be particularly important.

In order to be able to quantify the results, the proposal of certain criteria by each member of the commission must be followed by the establishment of a common list, based on which to continue the individual evaluation and the desired classification. According to the Q-sort method (Helin and Souder 1974), first of all the projects must be divided into three categories (good, medium and poor) according to the established criteria. If there are more than 7-8 projects in a category, the group must be divided into two subgroups, for example good plus and good minus. Subdivision continues until no class consists of more than 7-8 elements. The next stage is the one in which each subcategory must be presented in the form of a ranking, and to complete the individual evaluation, the subcategories are ordered according to the rank already established. The global ranking is established by calculating the composite rank of each project, depending on the serial number assigned by each evaluator.

2.4. Mathematical programming

Mathematical programming optimizes the fulfillment of an objective function of maximizing or minimizing some effects, under the conditions imposed by the identified constraints (Romero and Rehman 1989). The options/scenarios and the simulation allow to estimate the relationship between efforts and effects and the analysis of the evolution of some categories of benefits when the influencing factors change; presumed change, expected by the decision maker or randomly generated. Among the linear programming methods found in the selection of projects we can identify the linear programming, purpose programming, dynamic programming, stochastic programming, but also the use of fuzzy sets.

3. The proposed FMCGDM model

Organizational performance is conditioned by permanent investments in consecutive and simultaneous projects, which are often also competing (Ghasemzadeh et al. 1999). Thus, managers must solve a complex decision-making situation, in order to allocate limited resources to the multitude of projects with a superior contribution to meeting the organization's objectives (Cheng and Li 2005, Medaglia et al. 2007). Making wrong decisions when selecting projects involves two negative consequences: on the one hand resources are consumed for the implementation of inappropriate projects, and on the other hand the organization loses the potential benefits of allocating resources to appropriate projects (Martino 1995). Thus, the optimization of the investment decision and choosing the correct project portfolio guarantees efficiency considering the level of the developing organization, effectiveness and therefore performance, profitability and capitalization of the efforts of the stakeholders involved.

The analysis of the specialty literature shows that most evaluations are based on cost-benefit analysis, mathematical programming or simulation that is limited exclusively to economic and financial indicators, monetary, thus neglecting the difficult to capitalize effects in monetary terms. Moreover, many of them are strictly based on the opinion of the evaluator, not allowing the participation of other stakeholders or groups of specialists (Sieber and Braunschweig 2005). Many topics in the practice of project portfolio management have been studied in qualitative settings, with selected case companies and portfolios as the source of data. However, also questionnaire-based hypothetic-deductive studies have been carried out (Martinsuo 2013). Project portfolio management is a process for and between people, and for and between organizations, besides its service to strategy and products within one organization. Despite the quite obvious linkages between, e.g., project selection and managers' interaction, or project portfolios and project offices, the behavioral and organizational viewpoints have received far too little attention and may well explain some of the problems in achieving PPM success (e.g. Elonen and Artto 2003, Engwall and Jerbrant 2003, Zika-Viktorsson et al. 2006). If previous frameworks have portrayed project portfolio management as a systemic solution to goals and environments that are assumed as static, future research could explore the behavioral and organizational viewpoints that embrace the dynamic and complex nature of practice and context (Geraldi 2008).

Organizing a personal event, writing a book, reorganizing a company or building a bridge over the Danube, are significantly different projects, which still have common characteristics in terms of uniqueness, specificity and necessity. Another element common to many projects is multidisciplinarity (Mantel et al. 2011), reflected in the need to involve the knowledge

and experience of people with different specializations. Multidisciplinarity implies a high degree of complexity of the projects, through the existing correlations between the component elements, but especially through the success dependence on the performance of the relationship between the know-how possessors necessary for obtaining the expected results. These explanations emphasize once again the importance of the staff, more precisely of the ways to capitalizing their knowledge in the relationships developed between the team members and between them and the other categories of the social environment of a project. For this reason, we consider it particularly important to take into account, for a successful evaluation, the elements related to the complexity of teamwork, team management, conflicts and resistance to change.

In terms of this paper, the decision regarding the selection of projects must not include strictly financial elements, but also indicators based on the interdependence of dimensions and principles of sustainable development. Project multicriteria management thus involves the use of advanced scoring methods (DePiante and Jensen 1999, Coldrick et al. 2005), multi-attribute (Duarte and Reis 2006), which quantifies the opinion of several decision makers (Carazo et al. 2010, Khalili -Damghani and Sadi-Nezhad 2013).

Scoring based methods. In order to overcome the main disadvantage of financial evaluation methods (one-dimensional focus) and to improve the methodology used by adding more criteria in the analysis, scoring-based methods have been developed. The simplest form of evaluation based on grading, the unweighted factorial method 0-1, uses in the evaluation a list of criteria of significant interest to management, criteria that reflect the purpose and objectives of the organization. The analyzed projects receive from the selection committee 1 if the criterion is met or 0 if it cannot be met by the evaluated project variant. The selection depends on maximizing the number of points accumulated.

Although it seems easy to adopt, due to its characteristic simplicity, the method has many disadvantages: it does not take into account the importance of each criterion and the level of compatibility of a project with the intended objective. However, these deficiencies are corrected by the weighted average mean, based on a number n of evaluation criteria and on estimates of the weight of the relative importance of each of them w_j, the sum of the weights of the j criteria being usually 1. Some specialists recommend limiting the computations only the criteria that reflect important factors and not including those marginal criteria of the investment decision (considered to have an importance of 2-3%), resulting thus in n <8 factors with weights greater than 10-15%, which involves reducing the significance of low-weight criteria.

The level of importance and the weighted mean of each factor reflect the difficulty of implementing weighted scoring in project evaluation. For their selection, it is possible to use the direct transformation into criteria of some organizational objectives and indicators or to determine the importance of specific factors of the projects evaluated through individual methods (which involve substantiating the necessary elements based on a particular subjective opinion), and/or methods group. One of the most sophisticated versions of scoring methods is the AHP (Analytic Hierarchy Process) method.

Within the pages of this paper, the notion of group and the multidisciplinarity involvement in all phases of a project are considered of particular importance. In a world dominated by specialists, managers can not only rely on their own beliefs in the decision-making process, but must take into account, in order to optimize the decisions taken, the knowledge and experience of the staff they work with, their work "summing up" to create environment conducive to group performance. Mission, strategy, purpose, objectives and activities, all these elements are based on and for employees, but important is the value printed by them to the organization.

The second element included in the calculation of the score of the evaluated projects is the score s_{ij} (usually a scale from 1 to 5 is used), which reflects the degree of fulfillment of each criterion j by project i. For each project, it is weighted the score sij with the level of importance w_j, resulting by summing its final grade. The projects with the highest score are selected, or, under the conditions of setting a constraint, the projects with the highest score from those that exceed the required factor.

The calculation formula used is:

$$S_i = \sum_{j=1}^{n} s_{ij} \cdot w_j$$

where:

S_i = project i total score

s_{ij} = the grade received by project i for criterion j

w_j = weight, importance of criterion j

A disadvantage identified in the use of this method concerns the subjectivity of notation; for different evaluators, the excellent grade can have various meanings. Criteria such as correlation with organizational objectives, compliance with ethical principles or ease of implementation and acceptance by employees, are subject to a high degree of subjectivity in the evaluation. It is therefore desirable to include quantifiable elements among the criteria, but also the concrete way of quantification.

However, we consider that modeling and mathematization are the most suitable elements to combat subjectivity, and therefore the proposed model uses fuzzy variables both for modeling multicriteria and

for modeling the process of optimal projects evaluation and selection.

Projects' selection process includes complex decision variables. Thus, there is a need to solve selection problems by an integrated approach, considering that a single technique is not adequate to address this issue (Vinodh, Prasanna, and Hari Prakash 2014). Therefore, based on the literature review, fuzzy AHP and fuzzy TOPSIS have been used by several researchers for various applications. However, the use of fuzzy AHP-TOPSIS portfolio management of projects is found to be scant (Mohammed 2021).

Optimizing the project portfolio selection decision in the current context involves correlating the society complexity and uncertainty, the environment, the organization, the project, decision makers and specialists. It implies thus a multicriteria, multidimensional approach, and the involvement of groups of specialists to validate the model and give special importance to the projects business environment.

Under these conditions, the approach proposed in this paper for the evaluation and selection of projects is based on a group decision model, multicriteria, with fuzzy variables (eng. FMCGDM - Fuzzy Multiple Criteria Group Decision Making), whose development required modeling the decision multicriteria, within the current context, by applying the fuzzy AHP method and modeling the evaluation process and optimal projects selection considering the uncertainty of the environment, through the TOPSIS method with vague variables. The detailed presentation of each applied method shall be included in future works.

4. Conclusions

The permanent change of the economic environment and the complexity of the business world are reflected, but it is also the effect of the emergence of managerial ideas and values (Clarke and Clegg 2000). The emergence of new paradigms in management and their evolution is increasing in speed; by paradigm understanding a model of thinking, a "constellation of concepts, values, perceptions and practices that form the vision of the reality of a community and dictates the way it is organized" (Kuhn 1970).

In terms of project management, their selection has evolved from static evaluation methods that use cost analysis or linear programming with real or integer numbers, to much more flexible methods such as fuzzy multi-attribute. The classical, quantitative decision criteria based on discounted cash flows and purely financial indicators such as net present value (NPV) or internal rate of return (Brigham 1975, Boer 1999, Copeland et al., 2000) are no longer sufficient to correctly reflect the image imposed by the current economic environment. Qualitative and difficult-to-measure indicators, which quantify the impact of the project on the environment and society, give the investment decision an additional degree of difficulty. The recognition of the need to use models composed of subjective, qualitative indicators is highlighted by the methods adopted by many authors in their work. By introducing the theory of multi-attribute utility (Moselhi and Deb 1993, Dozzi et al. 1996, Fayek 1998), the Gray method (Chua and Li 2000), TOPSIS (Chua et al. 2000), ELECTREII (Wong et al. 2000) they include in the evaluation and selection of projects criteria such as profit, cost, social benefits, risk, but also other factors considered relevant by the decision maker.

The analytical hierarchy process (AHP) suggested by Thomas Saaty and used for the first time in selecting the Cascio projects (1995), is also a mathematical method of substantiation of the decision, which covers both quantitative and qualitative aspects from the decision-making process. The method reduces complex decisions to a series of pairwise comparisons and then synthesizes the results, giving the author the opportunity to measure the influence of a multi-criteria system of indicators. In order to properly manage the interdependencies between the indicators included in the decision model, some authors (Cheng and Li 2005) work with a variant of the method that consists of a process of analytical network process (ANP).

However, the use of multi-attribute analysis (Molenaar and Songer 1998), although they report the project evaluation to a large number of indicators, does not capture the appearance of multiple constraints (limited resources, strategic, political constraints) (Mavrotas et al. 2006). Therefore, in order to establish the project portfolio, the list of selection methods shall be filled up with the methods specific to multi-objective programming. To this end, some authors apply the goal programming method (Lee and Kim 2001, Wainwright et al. 2003), undertaking the responsibility to establish in collaboration with decision makers the levels of aspiration for the objectives considered, based on their preferences, experience accumulated, or linear programming. The construction of a useful synthesis function that allows all objectives integration, weighted according to the importance given to them by the decision maker, is the choice of other authors (Ghasemzadeh et al. 1999, Medaglia et al. 2008). And other authors choose to minimize the distance to the ideal point (Klapka and Pinos 2002), or to implement metaheuristic algorithms such as Scatter Search Procedure for Multiobjective Optimization (SSPMO) (Carazo et al. 2010) to solve the problem of multiple objectives involved in determining the most efficient project portfolios.

In order to have a complete picture of the investment project selection methodology, we must also consider the proposals for managing an element present in all activities of the contemporary world, difficult to quantify, but extremely important: uncertainty. Shakhsi-Niaei et al. (2011) considers the constraints of the environment and the uncertainty of the inputs of the selection problems through a model composed of three methods (PROMETHEE -

Preference Ranking Organization Method for Enrichment Evaluations, Monte Carlo simulation and mathematical programming).

In another approach, Machacha and Bhattacharya (2000) emphasizes that most classical methods of project selection ignore the behavior of the people involved and the differences in managers culture and experience, and support the use of fuzzy logic in managing uncertain data. Expressions by fuzzy units are not as rigid and complicated as mathematical algorithms and allow the selection of projects in an uncertain environment reducing the risk of projects. Moon and Kang (1999), Hsueh and Yan (2011), Khalili-Damghani and Sadi-Nezhad (2013) apply multicriteria fuzzy evaluation models to choose the most suitable projects. Studies such as those of Liu (2008), Guo and Tanaka (2001), Leon et al. (2003), Lertworasirikul et al. (2003), Kao and Liu (2000) introduce fuzzy logic into the relatively new DEA methodology, in order to quantify the inaccuracy of its specific inputs and outputs.

Concluding on the existing methodology mentioned in the specialty literature and in practice, specific to the evaluation and selection of projects/project portfolios, we can emphasize the outline of a mature theoretical and methodological tools, based on numerous researches and proposals.

Multicriteria decision models, such as AHP or TOPSIS, are among the most appreciated and used in various fields of activity, but for their successful implementation there will always be questions in terms of establishing the criteria and their corresponding weights within the created interdependencies system of (Saghaei and Didehkhani 2011).

Thus, the support model of the decision to select the optimal portfolio of projects proposed by this paper is based on a methodology composed of two methods: fuzzy AHP to determine the relative importance of the criteria considered in the evaluation model and fuzzy TOPSIS for objective, structured and analytical prioritization of the portfolio projects.

Nonetheless, it remains a permanent challenge to identify the optimal set of techniques and methods for project evaluation and selection, and it is amplified by the need for permanent adaptation to the context imposed by the current business environment.

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AGENT-BASED COLLABORATIVE PLATFORM FOR COORDINATING CONCURRENT NEGOTIATION ACTIVITIES

Adina-Georgeta CREȚAN*

Abstract

Maintaining the sustainability of an organization on the market and their performance in a competitive market is very difficult to achieve. In this dynamic environment, organizations decide to cooperate, becoming partners in a virtual enterprise. In order to work efficiently, the partners must collaborate and coordinate their negotiation activities.

This paper proposes an agent-based collaborative platform for coordinating concurrent negotiations among organizations acting in the same industrial market. The underlying complexity is to model the dynamic environment where multi-attribute and multi-participant negotiations are racing over a set of heterogeneous resources.

Keywords: *Automated negotiation, Collaborative activities, Multi-agent system, Dynamic environment, Collaborative platform.*

1. Introduction

To be able to perform, enterprises need to exchange information, whether this exchange is internal (among departments of the enterprise), external (between the enterprise or part of it and an external party), or both. Enterprise Interoperability (EI) is thus defined as the ability of an enterprise to seamlessly exchange information in all the above cases, ensuring the understanding of the exchanged information in the same way by all the involved parties[1]. Large enterprises accomplish this by setting market standards and leading their supply chain to comply with these standards. Small and Medium Enterprises (SMEs) usually don't have the empowerment to do so, and are therefore more sensible to the oscillations of the environment that involves them, which leads them to the need to constantly change to interoperate with their surrounding ecosystem. Sustainable EI (SEI) is thus defined as the ability of maintaining and enduring interoperability along the enterprise systems and applications' life cycle. Achieving a SEI in this context requires a continuous maintenance and iterative effort to adapt to new conditions and partners, and a constant check of the status and maintaining existing interoperability[2].

Given this general context, the objective of the present paper is to develop a conceptual framework and the associated informational infrastructure that are necessary to facilitate the collaboration activities and, in particular, the negotiations among independent organizations that participate in a Network Enterprises.

The concept of "Virtual Enterprise (VE)" or "Network of Enterprises" has emerged to identify the situation when several independent companies decided to collaborate and establish a virtual organization with the goal of increasing their profits. Camarinha-Matos[3] defines the concept of VE as follows: "A *Virtual Enterprise (VE)* is a temporary alliance of enterprises that come together to share skills and resources in order to better respond to business opportunities and whose cooperation is supported by computer networks".

In this paper the negotiation we want to model involves several participants negotiating for a negotiation object described by several interdependent attributes and each agent manages its own information regarding the strategy used, in order to achieve the proposed objective. Thus, in order to conduct one or more negotiations, in an effective manner, taking into account all dimensions of negotiations, coordination mechanisms with well-defined functionalities are needed.

The negotiation process was exemplified by scenarios tight together by a virtual alliance of the autonomous gas stations. Typically, these are competing companies. However, to satisfy the demands that go beyond the vicinity of a single gas station and to better accommodate the market requirements, they must enter in an alliance and must cooperate to achieve common tasks. The manager of a gas station wants to have a complete decision-making power over the administration of his contracts, resources, budget and clients. At the same time, the manager attempts to cooperate with other gas stations to accomplish the global task at hand only through a minimal exchange of information. This exchange is minimal in the sense that

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[1] M.-S. Li, R. Cabral, G. Doumeingts, and K. Popplewell, "Enterprise Interoperability Research Roadmap," no. July. European Commision - CORDIS, p. 45, 2006.

[2] R. Jardim-Goncalves, A. Grilo, C. Agostinho, F. Lampathaki, and Y. Charalabidis, "Systematisation of Interoperability Body of Knowledge: the foundation for Enterprise Interoperability as a science," Enterprise Information Systems, vol. 6, no. 3, pp. 1-26, 2012.

[3] Camarinha-Matos L.M. and Afsarmanesh H.,(2004), Collaborative Networked Organizations, Kluwer Academic Publisher Boston

the manager is in charge and has the ability to select the information exchanged.

Section 2 presents the theoretical background. In Section 3 we are describing the collaborative platform for coordinating concurrent negotiation activities[4]. In Section 4 we define the Coordination Components that manage different negotiations that may take place simultaneously. In Sections 5 we present the collaborative approach and the proposed solution, and, finally, Section 6 concludes this paper.

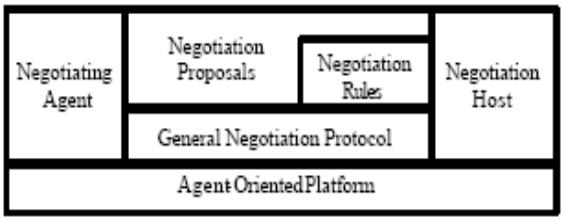

Fig. 1. The architecture of a negotiation framework

2. Theoretical Background

2.1. Generic coordination of negotiations

HP Laboratories (Hewlett-Packard) has found that the automation of the negotiation mechanism between multiple agents is not enough. The negotiation protocol, which indicates the transmission of messages, may set the coordination constraints on the possible actions of each party and on the completion of the negotiation. But, the protocols do not specify the constraints related to the content of the messages or the time of negotiation. So, starting from the finding that the negotiation protocol is insufficient for coordinating interactions in a negotiation, a generic framework dedicated to automatic negotiation in a centralized environment was proposed[5]. This framework is generic insofar as it does not take into account the structure of the object of negotiation, the characteristics of the participants involved or their negotiation strategies. The system coordinates messages by abstracting content or the specific characteristics of the sender or receiver. Another feature of this negotiation framework is that it proposes a separation between the decision process, implemented by the negotiation strategies established locally and autonomously by each participant, and the coordination process, implemented by public rules shared by all participants in the negotiation. This separation allows a flexible description of the protocol and coordination rules used for the implementation of a negotiation.

The architecture of a framework is structured on several layers (see Fig.1). The Agent Oriented Platform (AOP) bottom layer offers basic services such as: communication between agents or negotiation lifecycle management. Above the PDO layer are:

(i) General Negotiation Protocol (GNP);
(ii) taxonomy of negotiating rules;
(iii) language for defining negotiating rules;
(iv) language for expressing negotiating offers.

The general negotiation protocol is composed of coordination rules that indicate when an agent can send a message and what message it can send.

In this type of negotiation process, agents can have two roles which, according to our approach, are the following: participating agent (negotiating agent) and mediating agent (negotiation host). To negotiate, participants send their offers to a common space (local negotiation), which is controlled by a mediator. This negotiation space is a blackboard on which each agent - participant or mediator - can write. However, only the mediator has full visibility into the information. Its role is to create and enforce the rules of coordination that may impose constraints on the execution of the negotiation protocol, on the validation of offers, on the completion of the negotiation and, of course, on the communication between the participants. So, the negotiation process is modeled as a centralized market in which the mediating agent has the role of coordinating all ongoing negotiations. Depending on the types of rules, the role of the mediating agent is broken down into several sub-roles attached to a taxonomy of declarative rules that can be used to capture a wide variety of negotiation mechanisms. These sub-roles and the types of rules attached are as follows:

- Gatekeeper: establishes the rules for the admission of participants in the negotiation;
- Proposal validator: manages the validity rules that stipulate that each offer must be in accordance with a negotiation format and sets the constraints on the attributes of the negotiated objects and their values;
- Enforcer protocol: establishes several types of rules for fulfilling the negotiation protocol: signaling rules - specifies when a participant can send an offer; improvement rules - specifies which new offers can be sent; withdrawal rules - specifies when the offers can be withdrawn and what is the policy on the expiration period of the offers;
- Agreement maker: establishes several types of rules, especially for updating the status of participants and the information to which each participant has access. These rules are: update rules - specify how the

[4] Cretan, A., Coutinho, C., Bratu, B., and Jardim-Goncalves, R., NEGOSEIO: A Framework for Negotiations toward Sustainable Enterprise Interoperability. Annual Reviews in Control, 36(2): 291–299, Elsevier, ISSN 1367-5788, 2012, http://dx.doi.org/10.1016/j.arcontrol.2012.09.010.

[5] Bartolini, C., Preist, C., and Jennings, N., "A generic software framework for automated negotiation", Technical Report HPL-2002-2, HP Laboratories Bristol.

negotiation parameters change under the influence of certain events; visibility rules - specify which participants can access a certain offer; display rules - specifies whether certain information (a new offer or a new agreement) is visible to a participant and how this information will be shared between participants;

- Information updater: establishes the rules for accepting an agreement; this set of rules determines which agreements should be concluded given a set of offers of which at least two are compatible;
- Negotiation terminator: sets the rules for the life cycle of the negotiation process, indicating when the negotiation should stop.

The mediating agent, with his role and sub-roles, behaves like a system of cooperative agents that communicates with the help of a blackboard. From the participants' point of view, these agents are seen as a single mediating agent coordinating the negotiation. This centralization of the coordination process leads to the non-existence of a distribution of control over the interactions between the participating agents and the mediating agent. Each agent participating in a negotiation sends offers to the mediating agent and it is the one who, using the set of coordination rules as filters, decides if the offer is valid and who can access this offer. Thus, in the proposed system, the coordination process not only manages the dependencies between the initial and final state of negotiation, but also the dependencies between the intermediate states of negotiation. In other words, the mediating agent is able to check the constraints for each offer sent. These constraints aim to synchronize communication in negotiations. Although all the submitted offers are available at the level of the mediating agent, he cannot fix the dependencies on the values of these offers without having any information about the purpose and strategies of the different participating agents. In conclusion, the system allows modeling and coordination of n-type negotiations to n participants as a lot of one-to-one type negotiations, but always having the mediating agent as one of the participants. This approach has advantages in terms of optimizing the coordination of interactions, but limits the autonomy and power of the participating agents through the various rules imposed and managed by the mediating agent.

2.2. Interaction Oriented Programming

In order to implement a multi-agent system, with autonomous agents that can interact with each other, not only the application-specific aspects must be coordinated, but also the aspects related to the agents' behavior and the possible interactions between them. The IOP (Interaction Oriented Programming) approach achieves this type of coordination based on the communication protocol or on the organizational characteristics of the system. These means are rigid and can sometimes limit the autonomy of the agent. In order for the agents to maintain their autonomy, Singh proposed separating the coordination of a multi-agent system into a separate service[6]. Singh's approach to coordinating agent autonomy is structured on two levels. First, at the programming level, where agents may be implemented differently and their internal details may be unavailable. And, secondly, at the level of the agent's behavior, where the agents act autonomously and can perform certain specific actions.

Coordination refers to the actions that the agent performs externally and which are considered as potentially significant for the coordination service. These actions are called events and can be of four types:

- flexible: events that show that the agent is willing to delay the action or withdraw it;
- inevitable: events that show that the agent is only willing to delay the action;
- immediate: events that show that the agent does not want to delay or withdraw the action;
- triggerable: events that show that the agent can execute the action but only at the request of the system.

An agent's events are then organized into a framework (skeleton) to provide a simple model of agent-level coordination. Each event was associated with a "guard" that expresses the conditions in the system for which the exemption must be executed. The expressed conditions fix the constraints on the eventual execution of the event and of other events on which it depends in order to be executed. Figure 2 shows how the coordination service interacts with the agencies. Agents inform the coordination service about immediate events and request permission for unavoidable and flexible events. The coordination service grants or does not grant permissions on flexible events, delays unavoidable events or triggers triggerable events depending on the "guards" associated with them.

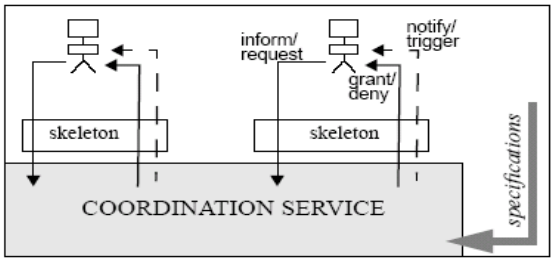

Fig. 2. I.O.P. - Interaction between the coordination service and agents

For effective coordination between events performed by multiple agents, the approach proposed by Singh requires that the following characteristics be met:

a) the dependencies between actions (events) are known from the beginning of the system implementation;

[6] Singh., M. P., "Interaction-Oriented Programming: Concepts, Theories, and Results on Commitment Protocols". In AI 2006: Advances in Artificial Intelligence, LNAI 4304, pp. 5–6, 2006.

b) the agents communicate with each other, exchanging relevant information on the execution of their actions.

So, the approach proposes a generic coordination service that is implemented in a distributed way between the component agents of the system, as well as the execution of a single workflow that describes the actions necessary to fulfill a single task. Each agent can be seen as an entity that encompasses part of the coordination service and makes decisions about the execution of events based on local information.

In conclusion, we chose to present this system in the end because Singh demonstrates a clear separation between agent-modeled decision-making processes and coordination processes modeled by an outside service. This feature is similar to one of our goals. In Singh's approach, the coordination service is interested in synchronizing interactions between agents without taking into account any information about the content of messages or the purpose of the conversation between agents. Assuming the particular case where conversations between agents refer to negotiation, the only dependencies that the service can manage are the dependencies between the execution of different actions (i.e., sending offers) that make up a negotiation to ensure a coherent flow of conversation.

Depending on the different dimensions of the negotiation process, we can see that the type of strategic coordination is directly influenced by several factors such as: participants and their role, time, object of negotiation and negotiation protocol. Also, given that this type of coordination is implemented in the decision-making process, strategic coordination is therefore strongly influenced by the negotiation strategy. Strategic coordination fixes the dependencies between the initial and final states of negotiation, between the objects of negotiation or between the attributes that describe these objects. Regarding the generic coordination, it does not take into account, at the level of the negotiation process, only the events related to the management of the interactions between activities, actions or messages. Neither the objects of the negotiations nor the participants in the negotiations are taken into account. So, in general, generic coordination is not influenced by any of the dimensions of the negotiation process.

In the different coordination systems presented, we can observe that no coordination is proposed between the intermediate phases of negotiation in order to dynamically correct the proposals made during the negotiations. This limitation may result from the fact that, in a generic coordination, the necessary data are unavailable. In the case of a strategic coordination, although the necessary data are available, the coordination through a decision process is not the optimal solution for the implementation of the management of the types of dependencies. In other words, strategic approaches that try to take into account dynamic data are hit by the fact that every change that occurs on the data, involves a restart of the decision process, because the decision process is based on history. Certain features of the presented systems meet our objectives, but our problem is much more complex due to the fact that we want to coordinate actions (negotiations) that are performed by competing agents to perform not only a certain task, but several different tasks. An additional aspect is given by the fact that the dependencies to be managed refer to the values of the attributes of the proposals changed during the negotiations. Thus, in addition to coordinating the initial and final states of the negotiations, we will also coordinate the intermediate states, verifying and modifying the content of the messages exchanged during the negotiations.

3. Collaborative Platform

Our approach in terms of coordination of negotiations is structured on two models:

- strategic coordination managed at the agent level;
- generic coordination managed at the middleware level.

This approach (multi-agent and middleware) allows the development of a multi-agent system based on a distributed and competing architecture. Aspects related to the synchronization of the negotiation process are left to the middleware.

In the context of this approach, we break down the negotiation process into three distinct processes:

i) coordination process;
ii) decision process;
iii) communication process.

This structuring of the negotiation process is justified by its complexity, involving multiple dimensions and different mechanisms.

The implementation of a negotiation presupposes the existence of a well-structured coordination mechanism or process. In this sense, we call the *coordination process*, the process that has a global vision on the negotiation, in order to manage the parallelism and dependence between the actions executed in a complex negotiation. Thus, we will approach the negotiation as a process that preserves the autonomy of the participants - each of them manages their own negotiations and their own information (description of tasks, contracts, partners, etc.). In addition, two important aspects of the negotiation process need to be highlighted:

i) for a single task, one participant is involved in several bilateral negotiations - one for each participant interested in contracting the task;

ii) at the same time, the same participant is engaged in other bilateral negotiations on other different tasks. So, the coordination process is the process that manages, for each participant, three important aspects: 1) coordinating the different proposals received in a bilateral negotiation (one to one) for modeling a multi-phase negotiation on a multi-attribute negotiation object;

2) coordinating several bilateral negotiations to model a multi-participant negotiation;

3) coordination of several negotiations in which the participant is engaged.

The aim of this paper is to propose basic mechanisms for coordinating negotiations. These represent mechanisms for interfacing between the generic communication process and the decision process in order to implement negotiation schemes that manage the simultaneous evolution of several negotiations. These coordination mechanisms must maintain the coherence of the agent's decisions in terms of actions that can be executed (initiating or finalizing a negotiation) and proposals that can be sent. This coherence must also be guaranteed both locally (for a single negotiation) and globally (for all negotiations in which a participant is involved).

The main objective of this software infrastructure is to support collaborating activities in virtual enterprises. In VE partners are autonomous companies with the same object of activity, geographically distributed.

Taking into consideration, the constraints imposed by the autonomy of participants within VE, the only way to share information and resources is the negotiation process.

Figure 3 shows the architecture of the collaborative system:

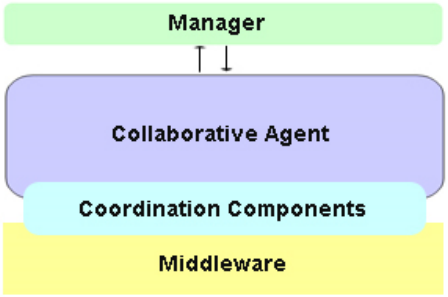

Fig. 3 The architecture of the collaborative system

This infrastructure is structured in four main layers: Manager, Collaborative Agent, Coordination Components and Middleware. A first layer is dedicated to the Manager of each organization of the alliance. A second layer is dedicated to the Collaborative Agent who assists its gas station manager at a global level (negotiations with different participants on different jobs) and at a specific level (negotiation on the same job with different participants) by coordinating itself with the Collaborative Agents of the other partners through the fourth layer, Middleware[7]. The third layer, Coordination Components, manages the coordination constraints among different negotiations which take place simultaneously.

- The initialization step allows to define what has to be negotiated (Negotiation Object) and how (Negotiation Framework)[8]. A selection of negotiation participants can be made using history on passed negotiation, available locally or provided by the negotiation infrastructure (Zhang and Lesser, 2002). A Collaborative Agent aims at managing the negotiations in which its own gas station is involved (e.g., as initiator or participant) with different partners of the alliance.
- Each negotiation is organized in three main steps: initialization; refinement of the job under negotiation and closing[9].
- In the refinement step, participants exchange proposals on the negotiation object trying to satisfy their constraints (Barbuceanu and Wai-Kau, 2003). The manager may participate in the definition and evolution of negotiation frameworks and objects (Keeny and Raiffa, 1976). Decisions are taken by the manager, assisted by his Collaborative Agent (Bui and Kowalczyk, 2003). For each negotiation, a Collaborative Agent manages one or more negotiation objects, one framework and the negotiation status. A manager can specify some global parameters: duration; maximum number of messages to be exchanged; maximum number of candidates to be considered in the negotiation and involved in the contract; tactics; protocols for the Collaborative Agent interactions with the manager and with the other Collaborative Agents (Faratin, 2000).

4. Coordination Components

In order to handle the complex types of negotiation scenarios, we propose the negotiation components[10]: *Subcontracting* (resp. *Contracting*) for subcontracting jobs by exchanging proposals among participants known from the beginning.

These components are able to evaluate the received proposals and, further, if these are valid, the components will be able to reply with new proposals constructed based on their particular coordination constraints[11].

The novelty degree of this software architecture resides in the fact that it is structured on four levels, each level approaching a particular aspect of the negotiation process. Thus, as opposed to classical architectures which achieve only a limited coordination

[7] Bamford J.D., Gomes-Casseres B., and Robinson M.S., Mastering Alliance Strategy: A Comprehensive Guide to Design, Management and Organization. San Francisco: Jossey-Bass, 2003.

[8] Smith R., and Davis R., Framework for cooperation in distributed problem solving. IEEE Transactions on Systems, Man and Cybernetics, SMC-11, 1981.

[9] Sycara K., Problem restructuring in negotiation, in Management Science, 37(10), 1991.

[10] Cretan A., Coutinho C., Bratu B. and Jardim-Goncalves R., A Framework for Sustainable Interoperability of Negotiation Processes. In INCOM'12 14th IFAC Symposium on Information Control Problems in Manufacturing, 2011.

[11] Vercouter, L., A distributed approach to design open multi-agent system. In 2nd Int. Workshop Engineering Societies in the Agents' World (ESAW), 2000.

of proposal exchanges which take place during the same negotiation, the proposed architecture allows approaching complex cases of negotiation coordination. This aspect has been accomplished through the introduction of coordination components level, which allows administrating all simultaneous negotiations in which an alliance partner can be involved.

The coordination components have two main functions such as: i) they mediate the transition between the negotiation image at the Collaboration Agent level and the image at the Middleware level; ii) they allow implementing various types of appropriate behavior in particular cases of negotiation. Thus, we can say that each component corresponding to a particular negotiation type.

Following the descriptions of this infrastructure we can state that we developed a framework to describe a negotiation among the participants to a virtual enterprise. To achieve a generic coordination framework, nonselective and flexible, we found necessary to first develop the structure of the negotiation process that helps us to describe the negotiation in order to establish the general environment where the participants may negotiate. In the next sub-sections we will describe the *Subcontracting* and *Contracting* components.

4.1. Subcontracting Component

The *Subcontracting* component is the main component of a negotiation. The automatic negotiation process is initiated by creating an instance of this component starting from the initial negotiation object. Further, this component must build the negotiation graph by following the negotiation requirements (i.e., assessment and creation of proposals and coordination rules). The component meets these requirements by manipulating the Xplore primitives [14].

Besides these functionalities, the *Subcontracting* component has to interpret and check the negotiation constraints, which are set up in the following two data structures: *Negotiation Object* and *Negotiation Framework.*

The information provided by the structure of the Negotiation Object on the possible values of the attributes to be negotiated allow easily the *Subcontracting* component to check whether the proposals received concern the attributes negotiated in the current negotiation and if they are associated to the values of the intervals specified.

For example, assuming that the Negotiation Object requires that the price should be (*cost <= 10k)*, the *Subcontracting* component can stop the continuation of the negotiation in the phases associated to the white nodes where the proposals are outside the interval.

Also, by using the *partner* coordination attribute, the *Subcontracting* component can make known to the other components the participants imposed by the Negotiation Object or whether other components instantiate this attribute. In this regard, the *Subcontracting* component can easily check if the associated value confirms the constraints imposed by the Manager.

At middleware level, the *Subcontracting* component has also the function of administrating the transactional aspect of the negotiation. This component is seen like a *coordinator* and has the role to conclude an agreement among the component instances participating in the same negotiation.

Another *Subcontracting* component functionality is to interpret and execute the tactics specified in the Negotiation Framework structure by connecting a combination of different instances of the other components.

Thus, the *Subcontracting* component as well as the *Contracting* component described below are those connecting the aspects specified at the Negotiation Agent level and their implementation at the coordination components level.

4.2. Contracting Component

The *Contracting* component manages the negotiation from the organization side deciding to accept a task proposed in the collaborative networked environment, with some functionalities similar to those of the *Subcontracting* component.

The differences come from the fact that this component does not have a complete picture on the negotiation and that, at the beginning of the negotiation, it has no information about what is negotiated or about the constraints of its Manager.

Therefore, looking to the differences, we can say at first that the image of the *Contracting* component on the negotiation graph is limited to the data referring only to its direct negotiation with the *Subcontracting* component or with another component negotiating for the organization having initiated the negotiation.

Secondly, unlike the *Subcontracting* component, which, from the beginning, has constraints specified by the Manager within the data structures of the *Negotiation Object* and the *Negotiation Framework*, the *Contracting* component has a close interaction with its own Manager on the new aspects required in the negotiation.

Thus, depending on attributes required by the negotiation initiator the *Contracting* component is able to progressively build the data structures describing the Manager's preferences on the negotiation object and on the negotiation process.

5. Collaborative Approach

In the proposed scenario, a conflict occurs in a network of enterprises, threatening to jeopardize the interoperability of the entire system. The first step consists in identifying the Enterprise Interoperability issue. The following steps refer to analyse the problem, evaluate possible solutions and select the optimal solution. The proposed solution for conflict resolution

is reaching a mutual agreement through negotiation. The benefit of this approach is the possibility to reach a much more stable solution, unanimously accepted, in a shorter period of time.

The design and coordination of the negotiation process must take into consideration:

- Timing (the time for the negotiation process will be pre-set);
- The set of participants to the negotiation process (which can be involved simultaneous in one or more bilateral negotiations);
- The set of simultaneous negotiations on the same negotiation object, which must follow a set of coordination policies/ rules;
- The set of coordination policies established by a certain participant and focused on a series of bilateral negotiations[12];
- Strategy/decision algorithm responsible for proposals creation;
- The common ontology, consisting of a set of definitions of the attributes used in negotiation.

The negotiation process begins when one of the enterprises initiate a negotiation proposal towards another enterprise, on a chosen negotiation object. We name this enterprise the Initiating Enterprise (E1). This enterprise also selects the negotiation partners and sets the negotiation conditions (for example sets the timing for the negotiation) (Schumacher, 2001). The negotiation partners are represented by all enterprises on which the proposed change has an impact. We assume this information is available to E1 (if not, the first step would consist in a simple negotiation in which all enterprises are invited to participate at the negotiation of the identified solution. The enterprises which are impacted will accept the negotiation) (Kraus, 2001).

After the selection of invited enterprises (E2 … En), E1 starts bilateral negotiations with each guest enterprise by sending of a first proposal. For all these bilateral negotiations, E1 sets a series of coordination policies/rules (setting the conditions for the mechanism of creation and acceptance of proposals) and a negotiation object/framework (NO/NF), setting the limits of solutions acceptable for E1. Similarly, invited enterprises set their own series of coordination policies and a negotiation object/framework for the ongoing negotiation.

After the first offer sent by E1, each invited enterprise has the possibility to accept, reject or send a counter offer. On each offer sent, participating enterprises, from E1 to E2 ... En follow the same algorithm.

The algorithm is shown below: Pseudocode representation of the negotiation process

Inputs: Enterprises *E1...En; NO(Negotiation Object); NF(Negotiation Framework)*

Outputs: The possible state of a negotiation: *success, failure*

```
BEGIN
on receive start from E1{
    send initial offer to partner;
}
on receive offer from partner{
    evaluate offer;
    if(conditions set by the NO/NF are not met){
            offer is rejected;
            if(time allows it){
                    send new offer to partner;
            }else{
                    failure;
            }end if;
    }else{
            send offer to another partner;
    }end if;
    if(receive an accepted offer){
            if(offer is accepted in all bilateral negotiations){
                    success;
            }else{
                    if(time allows it){
                            send new offer to partner;
                    }else{
                            failure;
                    }end if;
            }end if;
    if(receive a rejected offer){
            if(offer is active in other bilateral negotiations){
                    failure in all negotiations;
            }end if;
    }end if;
}
END
```

6. Conclusions

This paper proposes a collaborative e-platform for sustainable interoperability by modeling and managing of parallel and concurrent negotiations, which aims to open the market to broader discovery of opportunities and partnerships, to allow formalization and negotiation knowledge to be passed to future negotiations and to properly document negotiation decisions and responsibilities. The negotiation activities typically fail because they are often based on tacit knowledge and these activities are poorly described and modeled. Also, as negotiations occur in a dynamic environment, many external potential interested parties are not aware of them and do not subscribe them. This makes negotiations reach poorer results or fail by disagreement or exhaustion. The integration of formal procedures for modeling, storing and documenting the negotiation activities allows an optimized analysis of the alternative solutions and by

[12] Ossowski S., Coordination in Artificial Agent Societies. Social Structure and its Implications for Autonomus Problem-Solving Agents, No. 1202, LNAI, Springer Verlag, 1999.

adding the analysis of lessons-learned on past activities leads to maximized negotiation results, stronger negotiation capabilities and relationships.

Currently, interoperability among the involved parties in a negotiation is often not reached or maintained due to failure in adapting to new requirements, parties or conditions. The use of an adaptive platform as proposed will result in a seamless, sustainable interoperability which favours its maintenance across time; the ability to reach and interoperate with more parties leads to more business opportunities and to stronger and healthier interactions.

The sequence of this research will comprise the completion of this negotiation framework with the contract management process and a possible renegotiation mechanism.

With respect to the framework middleware, future research shall include handling issues regarding the security and resilience of the stored negotiation data in the cloud, and managing privacy aspects as the negotiating parties should be able to seamlessly interoperate but still to maintain their data free from prying eyes; also, several issues need to be solved from non-disclosure of participating parties to secure access to the negotiation process.

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EARNINGS AND FAIR VALUE ACCOUNTING

Valentin Gabriel CRISTEA*

Abstract

Fair value measurements are on the Romanian Commercial Bank earnings at June 30, 2019. We focus on the relationship between fair value measurements and predictability as a measure of earnings quality. The data collected are from the Romanian Commercial Bank annual reports at June 30, 2019. The persistence, predictability, accruals quality, earnings smoothing and value relevance are the most important measures of earnings quality. Earnings quality and the quality of accounting information are in direct relation. The usefulness of fair value information is explored directly by inspecting its predictive power with respect to future cash flows and future earnings.

Keywords: *earnings quality, earnings predictability, commercial bank, fair value accounting, financial statements, historical cost.*

1. Introduction

Johnson et al.[1] stated in 1995 that financial failure was not reported and thus was ignored on the condition that these securities were still being held, yet according to Johnson profits could be reported for securities rising values. Then, the controversial use of FVM, he establishes a direct connection between Enron's collapse, the GFC, and improper FVM practices. Secondly, the current pricing strategy for audit as an industry response to the abuse of external audit arrangements. Based on the comprehensive literature review, Johnson arrives at two earlier main findings. For this reason, FVA in the early 1990s was put forward as a remedy, so that losses as well as profits could be accounted for in a timely and honest way.

There was no noticeable change in these requirements when they began in 1993 until after the GFC in 2008-2009. Other fair value standards, also comprising mixed forms of measurement, soon followed FAS 115, for example FAS 123: Accounting for Stock-Based Compensation (FASB, 1993), and FAS 133: Accounting for Derivative Instruments and Hedging Activities (FASB, 1998). The standards represented efforts to prepare fair values through the profit statement in specific scenarios. In 1998, IAS 39 was established by the IASB. At that time, IASB standards were referred to as International Accounting Standards (IAS). Subsequently, FAS 115 was equivalent to IAS 39: Financial Instruments: Recognition and Measurement, (IAS Plus 2019). In fact, IAS 39 and FAS 115 were similar in adopting a mixed approach (both fair value and historical cost models).

Heaton et al.[2] established in 2010 that regulators noted the rise of financial instruments and wanted a method with which to measure those financial assets that were being rapidly traded fairly. Then we noted the FAS 115: Accounting for Certain Investments in Debt and Equity Securities (FASB, 1993).

Schultz and Hollister remarked in 2003 that following pressure by conservative banks, the standard only needed some investments, in other words, those proposed to be sold in the short-term and those prepared using fair value through the profit statement.

Chen, Lo, Tsang & Zhang, in 2013, established that earnings quality is used as an indicator of dividends, as these dividends are important things that are taken into account when making investment decisions.

Sodan said in 2015 that the fair value approach is also one of the approaches that was born to cover the shortcomings of applying the historical cost approach. This approach shows users of financial statements the right information to make the right decisions, because that information becomes more relevant when we apply fair value.

1.1. Earnings and fair value

After Sodan (2015), his concept of valuation was adopted, as he mentioned that exposure to fair value accounting is measured using global or net income approaches. In other words, changes in fair values are reported as gains and losses on net or other global income.

Thus, we deduced that the effect of gains (losses) on fair value through other comprehensive income and net income on predictability as a measure of the quality of gains. Muller, Riedl & Sellhorn, in 2008, analysed the historical cost principle, which led them to look for a new accounting alternative to keep up with the economic conditions characterized by Asian Economic and Financial Review, 2020, 10 (12): 1466-1479 1468,

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[1] Johnson, E. N., Walker, K. B., & Westergaard, E. (1995). Supplier concentration and pricing of audit services in New Zealand. Auditing, 14(2), 74.

[2] Heaton, J. C., Lucas, D., & McDonald, R. L. (2010). Is mark-to-market accounting destabilizing? Analysis and implications for policy. Journal of Monetary Economics, 57(1), 64-75. https://doi.org/10.1016/j.jmoneco.2009.11.005.

which cause strong fluctuations, changes in purchasing power, create instability and lead to inflation or depression. It is undeniable that the concept of fair value has projected traditional accounting theory to new horizons and brought a comprehensive innovation in the structure of financial statements and their implications. This has been an effect of the evolution of accounting theory in recent years, which have matured and been implemented in international fair value accounting standards and was introduced at the beginning of the third millennium, in 2001 (Sodan, 2015). When a company uses the fair value method, it generates higher income due to the difference between the fair value and the carrying amount, which is recognized as part of the gain and loss on the application of fair value. Thus, using the cost model, the value of net income or loss is distorted only by depreciation expenses (Wahyuni, Soepriyanto, Avianti and Naulibasa, 2019).

2. The fair value of financial assets and liabilities at Romanian Commercial Bank

Romanian Commercial Bank was established in 1990, when it took over the commercial operations of the National Bank of Romania.

Fair value is the price that would have been collected for the sale of an asset or paid for the transfer of a debt in a regulated transaction between market participants at the valuation date. The fair value is best highlighted by a price dictated by the market, if it exists. The value adjustments due to changes in credit risk is included in the fair value of derivatives and is intangible both on December 31, 2018 and on December 31, 2019.

Level 1 in the fair value hierarchy

The fair value of financial instruments allocated on level 1 of the fair value hierarchy is determined on the basis of the prices quoted on the active markets related to identical financial assets and liabilities. In particular, the measured fair value can be classified as entry level 1 if the transactions take place with a high frequency, volume and consistency of pricing continuously. This will be used as a fair value and in this case no valuation model is needed.

These include derivative financial instruments traded on the stock exchange (futures contracts, options), shares, government securities, as well as other bonds and funds, which are traded on highly liquid and active markets.

Level 2 in the fair value hierarchy

If a market quotation is used for valuation, but due to limited liquidity, the market does not qualify as active (information derived from available market liquidity indicators), the instrument is classified as level 2. If there are no market prices available, fair value is measured using valuation models based on observable market data. If all input data significant in the valuation model are observable, the instrument is classified as level 2 in the fair value hierarchy. For valuations for level 2, yield curves, credit margins and implicit volatilities are usually used as market parameters.

Level 2 includes financial instruments on the OTC market, less liquid shares, bonds and funds, as well as own issues. If the "spread" is not observable, it must be tested if the unobservable input parameter is significant. An unobservable input parameter for securities with theoretical prices is considered significant if the effect of unobservable inflows on the fair value of that guarantee is greater than 2%.

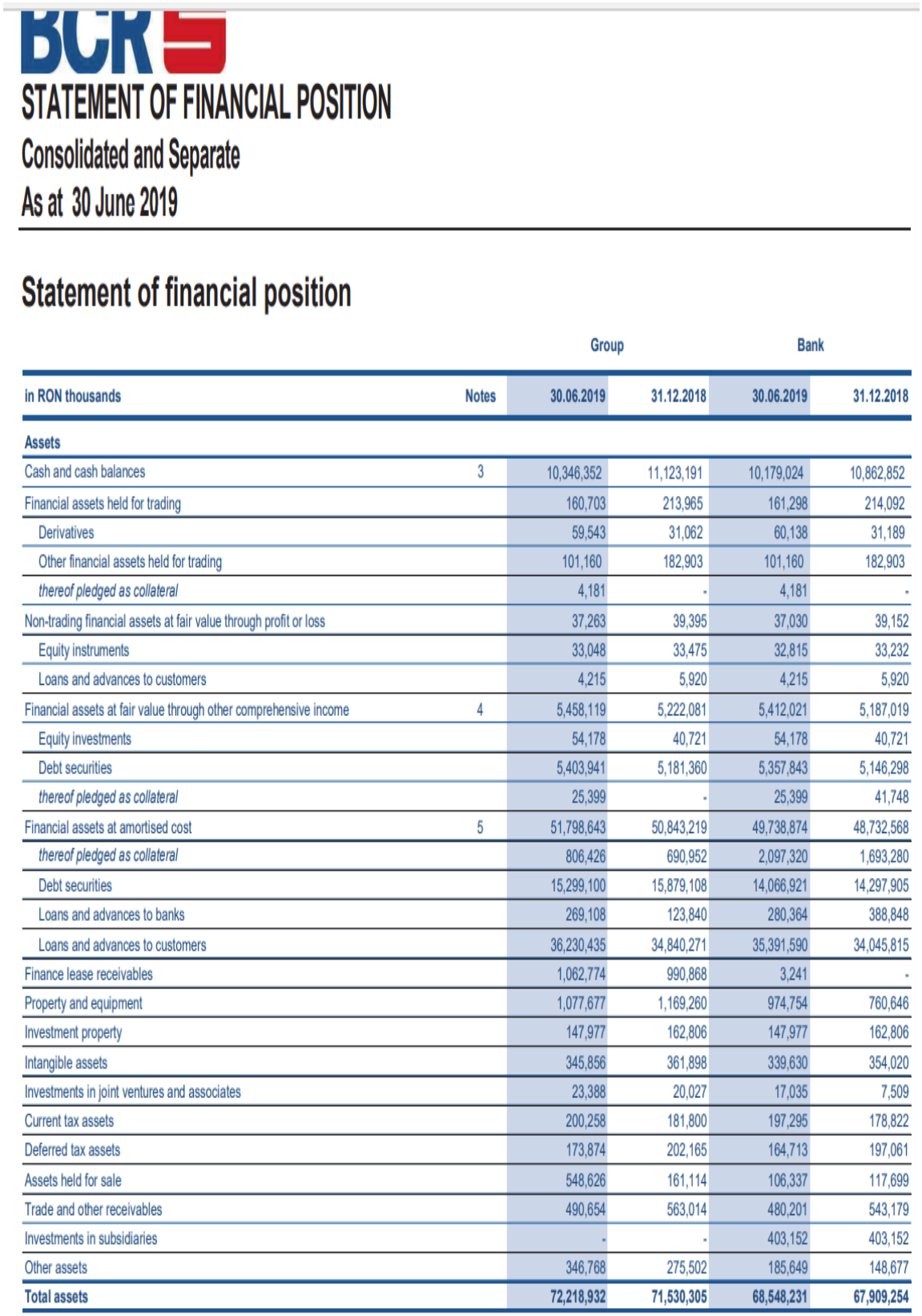
Level 3 in the fair value hierarchy

In some cases, fair value cannot be determined either on the basis of quoted market prices with sufficient frequency or on the basis of valuation models that take into account only observable market data. In these cases the individual evaluation parameters, unobservable on the market, are estimated based on reasonable assumptions. If significant strength data are not observable or the price quotation used is not frequently updated, the instrument is ranked level 3 in the fair value hierarchy. For level 3, the assessments take into account, in addition to observable parameters, credit margins derived from internal historical estimates for the probability of default (PD) and loss in case of default (LGD) which are used as unobservable parameters.

Financial instruments measured at amortized cost in the statement of financial position whose fair value is presented in the following notes.

The following table shows the fair value and the fair value hierarchy for financial assets whose fair value is presented in the notes to the financial statements at June 30th, 2019:

Figure 1. Statement of financial position



STATEMENT OF FINANCIAL POSITION

Consolidated and Separate

As at 30 June 2019

Statement of financial position

		Group		Bank	
in RON thousands	Notes	30.06.2019	31.12.2018	30.06.2019	31.12.2018
Assets					
Cash and cash balances	3	10,346,352	11,123,191	10,179,024	10,862,852
Financial assets held for trading		160,703	213,965	161,298	214,092
Derivatives		59,543	31,062	60,138	31,189
Other financial assets held for trading		101,160	182,903	101,160	182,903
thereof pledged as collateral		4,181	-	4,181	-
Non-trading financial assets at fair value through profit or loss		37,263	39,395	37,030	39,152
Equity instruments		33,048	33,475	32,815	33,232
Loans and advances to customers		4,215	5,920	4,215	5,920
Financial assets at fair value through other comprehensive income	4	5,458,119	5,222,081	5,412,021	5,187,019
Equity investments		54,178	40,721	54,178	40,721
Debt securities		5,403,941	5,181,360	5,357,843	5,146,298
thereof pledged as collateral		25,399	-	25,399	41,748
Financial assets at amortised cost	5	51,798,643	50,843,219	49,738,874	48,732,568
thereof pledged as collateral		806,426	690,952	2,097,320	1,693,280
Debt securities		15,299,100	15,879,108	14,066,921	14,297,905
Loans and advances to banks		269,108	123,840	280,364	388,848
Loans and advances to customers		36,230,435	34,840,271	35,391,590	34,045,815
Finance lease receivables		1,062,774	990,868	3,241	-
Property and equipment		1,077,677	1,169,260	974,754	760,646
Investment property		147,977	162,806	147,977	162,806
Intangible assets		345,856	361,898	339,630	354,020
Investments in joint ventures and associates		23,388	20,027	17,035	7,509
Current tax assets		200,258	181,800	197,295	178,822
Deferred tax assets		173,874	202,165	164,713	197,061
Assets held for sale		548,626	161,114	106,337	117,699
Trade and other receivables		490,654	563,014	480,201	543,179
Investments in subsidiaries		-	-	403,152	403,152
Other assets		346,768	275,502	185,649	148,677
Total assets		**72,218,932**	**71,530,305**	**68,548,231**	**67,909,254**

		Group		Bank	
in RON thousands		30.06.2019	31.12.2018	30.06.2019	31.12.2018
Liabilities and Equity					
Financial liabilities held for trading		83,128	32,988	83,128	32,988
Derivatives		83,128	32,988	83,128	32,988
Financial liabilities measured at amortised cost		61,890,320	61,618,808	58,881,083	58,326,984
Deposits from banks	6	5,294,492	5,578,080	4,562,358	4,791,204
Deposits from customers	7	55,427,344	55,098,959	53,150,871	52,593,690
Debt securities in issue	8	269,613	349,153	269,613	349,153
Other financial liabilities		898,871	592,616	898,241	592,937
Finance lease liabilities		249,912	-	245,567	-
Provisions	9	1,753,037	1,151,688	1,400,326	1,120,255
Current tax liabilities		4,051	97,782	-	97,110
Deferred tax liabilities		6,791	-	-	-
Liabilities associated with assets held for sale		35,499	15,438	-	-
Other liabilities		319,411	246,887	248,902	193,842
Total equity		**7,876,783**	**8,366,714**	**7,689,225**	**8,138,075**
Share capital		2,952,565	2,952,565	2,952,565	2,952,565
Retained earnings		3,255,783	3,766,482	3,051,869	3,525,615
Other reserves		1,668,435	1,647,667	1,684,791	1,659,895
attributable to non-controlling interest		52	46	-	-
attributable to owners of the parent		7,876,731	8,366,668	-	-
Total liabilities and equity		**72,218,932**	**71,530,305**	**68,548,231**	**67,909,254**

Source: https://cdn0.erstegroup.com/content/dam/ro/bcr/www_bcr_ro/EN/Investors/Financial-reports/2019/Financial_statements_June_30th_2019.pdf.

Figure 2. Statement of financial position (continued)

The fair values of loans and advances granted to customers and credit institutions have been calculated by discounting future cash flows taking into account the effect of interest and credit margin. The impact of the interest rate is based on movements in market interest rates, while credit margins are determined by the probability of default (PD) used for the internal risk calculation. For the calculation of fair value, loans and advances were grouped into homogeneous portfolios, based on rating methods, rating class, maturity and client's country of residence.

The fair value of amortized cost financial assets is either taken directly from the market or determined by directly observable input parameters (i.e. yield curves).

The fair value of the securities issued and of the financial debts valued at amortized cost, is based on prices quoted in the active market of some similar tools. If these are not available and other observable input parameters are used (e.g. quoted prices in inactive markets) the classification will be Level 2.

The fair value of deposits and other financial liabilities measured at amortized cost is estimated taking into account the market interest rate and credit margins; they qualify on Level 3.

20.2. Financial instruments measured at fair value in the statement of financial position

Group

in RON thousands	Quoted market prices in active markets Level 1		Marked to model based on observable market data Level 2		Marked to model based on non-observable inputs Level 3		Total	
Assets	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**
Financial assets - held for trading	**101,160**	**178,095**	**57,355**	**33,738**	**2,188**	**2,132**	**160,703**	**213,965**
Derivatives	-	-	57,355	28,930	2,188	2,132	59,543	31,062
Other financial assets held for trading	101,160	178,095		4,808	-	-	101,160	182,903
Non-trading financial assets at fair value through profit or loss	-	**2,400**	**2,548**	-	**34,715**	**36,995**	**37,263**	**39,395**
Equity instruments		2,400	2,548	-	30,500	31,075	33,048	33,475
Loans and advances	-	-	-	-	4,215	5,920	4,215	5,920
Financial assets at fair value through other comprehensive income	**5,350,969**	**5,031,042**	**45,627**	**144,301**	**61,523**	**46,738**	**5,458,119**	**5,222,081**
Equity instruments	-	-	-	-	54,178	40,721	54,178	40,721
Debt securities	5,350,969	5,031,042	45,627	144,301	7,345	6,017	5,403,941	5,181,360
Total assets	**5,452,129**	**5,211,537**	**105,530**	**178,039**	**98,426**	**85,865**	**5,656,085**	**5,475,441**
Liabilities								
Financial liabilities - held for trading	-	-	83,128	32,988	-	-	83,128	32,988
Derivatives	-	-	83,128	32,988	-	-	83,128	32,988
Total liabilities	-	-	**83,128**	**32,988**	-	-	**83,128**	**32,988**

Bank

in RON thousands	Quoted market prices in active markets Level 1		Marked to model based on observable market data Level 2		Marked to model based on non-observable inputs Level 3		Total	
Assets	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**	**30.06.2019**	**31.12.2018**
Financial assets - held for trading	**101,160**	**178,095**	**57,950**	**33,864**	**2,188**	**2,133**	**161,298**	**214,092**
Derivatives	-	-	57,950	29,056	2,188	2,133	60,138	31,189
Other financial assets held for trading	101,160	178,095		4,808	-	-	101,160	182,903
Non-trading financial assets at fair value through profit or loss	-	**2,400**	**2,549**	-	**34,481**	**36,752**	**37,030**	**39,152**
Equity instruments		2,400	2,549	-	30,266	30,832	32,815	33,232
Loans and advances		-	-	-	4,215	5,920	4,215	5,920
Financial assets at fair value through other comprehensive income	**5,350,969**	**5,031,042**	-	**109,239**	**61,052**	**46,738**	**5,412,021**	**5,187,019**
Equity instruments	-	-	-	-	54,178	40,721	54,178	40,721
Debt securities	5,350,969	5,031,042	-	109,239	6,874	6,017	5,357,843	5,146,298
Total assets	**5,452,129**	**5,211,537**	**60,499**	**143,103**	**97,721**	**85,623**	**5,610,349**	**5,440,263**
Liabilities								
Financial liabilities - held for trading	-	-	83,128	32,988	-	-	83,128	32,988
Derivatives	-	-	83,128	32,988	-	-	83,128	32,988
Total liabilities	-	-	**83,128**	**32,988**	-	-	**83,128**	**32,988**

Figure 3. Financial instruments measured at fair value in the statement of financial position

Source: https://cdn0.erstegroup.com/content/dam/ro/bcr/www_bcr_ro/EN/Investors/Financial-reports/2019/Financial_statements_June_30th_2019.pdf.

Financial assets held for trading increased during 2019, largely due to investments in bonds representing 91% of the total position.

Financial assets that are not held for trading and that are measured at fair value through profit or loss include:

Loans and advances granted to customers classified at fair value through profit or loss in accordance with IFRS 9 due failure to meet the conditions necessary to pass the SPPI test (excluding payment of principal and interest). Fair value calculation methodology of these assets correspond to the current base value technique in which the cash flows of the assets are discounted at full rate, including credit risk, market risk and cost components.

Credit risk is incorporated in the assessment of cash flows to reaches the expected cash flows, accounting for the customer's probability of default. These cash flows are then adjusted with discount rate.

Equity instruments, especially minority investments classified as level 3 instruments for which the fair value is determined on the basis of internal evaluation. Among the most common methods of valuing minority interests are:

- Quoted price on active markets,
- Expert opinion or recent trading value, Discounted cash flow method / dividend discount model,
- Adjusted net asset value,
- Simplified income approach.

Investments in VISA INC preference shares for which the fair value is calculated based on internal valuations and are classified by level 3.

Financial assets measured at fair value through other comprehensive income include:

Debt securities issued by the Ministry of Public Finance that are actively traded being classified as level 1 and 2.

A corporate bond having the theoretically established price, classified as level 3.

Valuation of level 3 financial assets

The volume of level 3 financial assets can be allocated in the following two categories:

The market values of derivative financial instruments when the credit rating adjustment (CVA) has a significant impact and is calculate based on unobservable parameters (internal estimates of PD and LGD);

Less liquid bonds, shares and funds that are not listed on an active market in which valuation models with parameters were used unobservable (e.g. credit margins) or broker quotes cannot be allocated to level 1 or 2.

The unobservable parameters in the CVA calculation are: the probability of default (PD ñ Probability of Default) and the loss in case of non-refund (LGD ñ Loss Given Default). Non-repayment probabilities are the result of internal estimates in the context of the development of rating models and are used in the assessment of credit risk, including CVA.

Each counterparty, depending on the rating received, is associated with a probability of default. The LGD parameter for the CVA calculation has the value of 60%.

As of December 31, 2019, the fair value of the preferred shares in VISA Inc. was based on reasonable assumptions and estimates and were classified on level 3.

The sale of shares is limited to certain conditions that may restrict the conversion of preferred shares into shares of VISA Inc. tradable.

Due to these restrictive conditions and to reflect the potential price volatility of VISA Inc. Class A common shares and the limited liquidity of the preferred shares, the fair value of the preferred shares was capped compared to the VISA common shares Class A Inc. based on assumptions.

The price of the Class C preferred shares was determined on the basis of the conversion ratio of 1: 13,952 and on the basis of two additional adjustment margins: a margin of 12.65% to take into account the uncertainty related to the market price taking into account low liquidity of class C shares; and a margin of 17.5% to reflect the risk of the conversion factor.

Figure 4. Movement of level 3 financial assets held at fair value:

Movements in Level 3 of financial instruments carried at fair value

Group

in RON thousands		Gain/loss in profit or loss	Gain/loss in other comprehen sive income	Sales	Currency translation	
Assets	**01.01.2019**	**-**	**-**	**-**	**-**	**30.06.2019**
Financial assets - held for trading	2,133	55	-	-	-	2,188
Derivatives	2,133	55	-	-	-	2,188
Non-trading financial assets at fair value through profit or loss	36,995	(2,280)	-	-	-	34,715
Equity instruments	31,075	(575)	-	-		30,500
Loans and advances	5,920	(1,705)	-	-	-	4,215
Financial assets at fair value through other comprehensive income	46,738	-	14,785	-	-	61,523
Equity instruments	40,721	-	13,457	-	-	54,178
Debt securities	6,017	-	1,328	-	-	7,345
Total assets	**85,866**	**(2,225)**	**14,785**	**-**	**-**	**98,426**

Group

in RON thousands		Gain/loss in profit or loss	Gain/loss in other comprehen sive income	Sales	Currency translation	
Assets	**01.01.2018**					**30.06.2018**
Financial assets - held for trading	2,875	(281)	-	-	-	2,594
Derivatives	2,875	(281)	-	-	-	2,594
Non-trading financial assets at fair value through profit or loss	39,118	2,060	-	(3,628)	10	37,560
Equity instruments	18,509	2,480	-	-	10	20,999
Loans and advances	20,609	(420)	-	(3,628)	-	16,561
Financial assets at fair value through other comprehensive income	33,846	-	6,748	-	-	40,594
Equity instruments	33,846	-	6,748	-	-	40,594
Total assets	**75,839**	**1,779**	**6,748**	**(3,628)**	**10**	**80,748**

Source: https://cdn0.erstegroup.com/content/dam/ro/bcr/www_bcr_ro/EN/Investors/Financial-reports/2019/Financial_statements_June_30th_2019.pdf

Figure 5. The table below shows the fair value of financial assets and liabilities at June 30th, 2019:

Notes to Financial Statements
Consolidated and Separate
As at 30 June 2019

20. Fair value of financial assets and liabilities (*continued*)

20.1. Financial instruments whose fair value is disclosed in the notes (*continued*)

30.06.2019

in RON thousands	Group					Bank				
	Carrying amount	Fair value	Fair value hierarhy			Carrying amount	Fair value	Fair value hierarhy		
			Level 1	Level 2	Level 3			Level 1	Level 2	Level 3
Assets										
Cash and cash balances	10,346,352	10,346,352	10,346,352	-	-	10,179,024	10,179,024	10,179,024	-	-
Financial assets at amortised cost	51,798,643	53,959,376	14,875,682	306,344	38,777,349	49,738,874	51,917,709	13,711,837	262,582	37,943,290
Loans and advances to banks	269,108	271,236	-	-	271,236	280,364	282,492	-	-	282,492
Loans and advances to customers	36,230,435	38,460,824	-	-	38,460,824	35,391,590	37,628,037	-	-	37,628,037
Debt securities	15,299,100	15,227,316	14,875,682	306,344	45,290	14,066,921	14,007,180	13,711,837	262,582	32,761
Finance lease receivables	1,062,774	1,062,680	-	-	1,062,680	3,241	3,241	-	-	3,241
Trade and other receivables	493,065	515,924	-	-	515,924	477,790	500,706	-	-	500,706
Liabilities										
Financial liabilities measured at amortised cost	61,890,320	61,646,348	-	279,822	61,366,526	58,881,083	58,647,643	-	279,822	58,367,821
Deposits from banks	5,294,492	5,324,754	-	-	5,324,754	4,562,358	4,603,196	-	-	4,603,196
Deposits from customers	55,427,344	55,142,904	-	-	55,142,904	53,150,871	52,866,384	-	-	52,866,384
Debt securities in issue	269,613	279,822	-	279,822	-	269,613	279,822	-	279,822	-
Other financial liabilities	898,871	898,868	-	-	898,868	898,241	898,241	-	-	898,241

Source: https://cdn0.erstegroup.com/content/dam/ro/bcr/www_bcr_ro/EN/Investors/Financial-reports/2019/Financial_statements_June_30th_2019.pdf.

Figure 6. The table below shows the statement of cash flows at June 30th, 2019:

Source: https://cdn0.erstegroup.com/content/dam/ro/bcr/www_bcr_ro/EN/Investors/Financial-reports/2019/Financial_statements_June_30th_2019.pdf.

Statement of cash flows

	Group		Bank	
in RON thousands	30.06.2019	30.06.2018	30.06.2019	30.06.2018
Net result for the period	**(20,843)**	**697,001**	**11,350**	**656,885**
Non-cash adjustments for items in net profit/(loss) for the year				
Depreciation, amortisation of assets	125,444	91,778	100,637	64,231
Allocation to and release of impairment of loans	38,758	(39,935)	304,938	(50,443)
Gains/(losses) from the sale of tangible and intangible assets	20,602	(10,829)	18,105	(9,749)
Other provisions	601,350	(52,618)	280,071	(38,883)
Impairment tangible and intangible assets	13,220	(3,193)	-	7
Interest income reiceived from investing activities	(332,240)	(328,289)	(309,479)	(299,839)
Interest expense paid for financing activities	(29,682)	82,006	(29,682)	75,068
Dividend income from investing activities	-	-	(13,464)	(7,953)
Other adjustments	(63,501)	(39,104)	(68,869)	(41,499)
Changes in assets and liabilities from operating activities after adjustment for non-cash components				
Financial assets - held for trading	81,743	(107,829)	81,743	(107,832)
Non-trading financial assets at fair value through profit or loss	-	25,847	-	25,869
Financial assets at fair value through other comprehensive income	(205,466)	-	(195,037)	-
Financial assets at amortised cost	-	-	-	-
Loans and advances to banks	(145,268)	912,021	(169,470)	909,288
Loans and advances to customers	(1,430,879)	(1,530,728)	(1,310,610)	(1,395,383)
Other assets from operating activities	(68,855)	(6,918)	(36,947)	(46,146)
Financial liabilities - held for trading	-	514	-	514
Deposits from banks	(264,192)	(561,805)	(93,586)	(685,062)
Deposits from customers	328,385	(13,050)	557,181	113,625
Other financial liabilities	260,076	15,932	275,382	5,000
Other liabilities from operating activities	72,531	(12,893)	55,060	4,004
Cash flow from operating activities	**(1,018,819)**	**(882,092)**	**(542,678)**	**(828,298)**
Proceeds of disposal	-	-	-	-
Financial assets - held to maturity	-	-	-	-
Financial assets at fair value through other comprehensive income	(727)	305,373	(727)	305,373
Property and equipment, intangible assets and investment properties	49,758	46,971	49,757	30,816
Acquisition of	-	-	-	-
Financial assets - held to maturity	-	-	-	-
Debt securities at amortised cost	582,939	(564,412)	223,629	(519,862)
Financial assets at fair value through other comprehensive income	-	(5,835)	-	-
Property and equipment, intangible assets and investment properties	(177,990)	(140,395)	(66,538)	(55,570)
Contribution to increase in share capital of subsidiaries	-	-	-	(30,000)
Interest received from investing activities	332,223	679,425	309,479	630,067
Dividends received from investing activities	-	-	13,464	7,953
Cash flow from investing activities	**786,203**	**321,127**	**529,065**	**368,776**
Dividends paid to equity holders of the parent	(484,630)	(213,476)	(484,630)	(213,476)
Dividends paid to non-controlling interests	(466)	(14,587)	(466)	(14,587)
Debt securities issued	(91,061)	(90,661)	(91,061)	(90,661)
Inflows from other financing activities	364,106	326,277	-	-
Outflows from other financing activities	(285,525)	(816,169)	(56,917)	(641,284)
Interest expense paid for financing activities	(46,647)	(84,286)	(37,140)	(77,724)
Other financing activities	(23,033)	(32,300)	(13,526)	(25,746)
Subordinated loans	(23,614)	(51,978)	(23,614)	(51,978)
Cash flow from financing activities	**(544,223)**	**(892,902)**	**(670,214)**	**(1,037,732)**
Cash and cash equivalents at beginning of period	**11,123,191**	**11,367,313**	**10,862,852**	**11,244,649**
Cash flow from operating activities	(1,018,819)	(882,092)	(542,678)	(828,299)
Cash flow from investing activities	786,203	321,127	529,065	368,777
Cash flow from financing activities	(544,223)	(892,902)	(670,214)	(1,037,732)
Cash and cash equivalents at end of period	**10,346,352**	**9,913,446**	**10,179,024**	**9,747,395**

Real estate investments are systematically valued at fair value. Assets held for sale are valued at fair value when their carrying amount is depreciated below fair value less costs to sell.

The fair value of non-financial assets is determined by experts with relevant and recognized professional qualifications.

For non-financial assets held by the BCR Group, the valuation is made mainly using the comparative method and the investment method.

The assessment is made on the basis of the comparison and analysis of comparable investments and rental transactions, including information on demand in the area, in which the respective property is located. The characteristics of similar transactions are then applied to the asset to be valued, taking into account the size, location, contractual terms and other relevant factors. These valuations are presented in Level 3 of the fair value hierarchy.

For each reviewed stream of research, the paper establishes the theoretical underpinning and discusses its application supported by the context. The content analysis using NVivo software was employed to analyze existing research and available published information.

Earnings quality and the quality of accounting information are in direct relation. The usefulness of fair value information is explored directly by inspecting its predictive power with respect to future cash flows and future earnings..

They seek to anticipate the continuity of corporate earnings in the coming periods, while financial analysts point to financial statements as the primary source on which to analyze information and make rational decisions (Schipper and Vincent, 2003). For example, Barth., Beaver & Landsman, pointed out in 2001 that earnings are, of course, valued as indirect indicators for assessing the quality of accounting standards, as there is a direct relationship between the quality of earnings and the quality of accounting information.

There are different measures of income quality, the most well-known measures are persistence, predictability, quality of accumulations, income smoothing and relevance of value.

Predictability refers to the well-known fact that income is of higher quality and is more beneficial for predicting future income. It is noted that the predictive power of profits is affected by the time series of earnings and the fluctuation of business operations, the economic environment and the accounting system used by companies.

Sodan, in 2015, stated that the initial assumption of the value relevance of research at fair value is that fair value information predicts future cash flows. Therefore, instead of measuring the correlation between fair value estimates and market prices or returns, the usefulness of fair value information is, of course, examined directly by analyzing its predictive power in terms of future cash flows and future revenues. Thus, fair value estimates are given by the present value of expected future cash flows, so if fair values are reliable measures of asset values, changes in fair values (i.e. unrealized gains and losses on fair value) should be reflected in future performance changes. (Barth, 1994).

Otherwise, if the fair value estimates are not reliable, then the correlation with future performance measures will not be taken into account. Among the most important accounting tasks is to choose the correct valuation method for valuing assets and liabilities.

This task has been shown by many scientists, such as McDonough & Shakespeare, 2015, who are determined that the financial position and results of economic activities represented in balance sheets and profit and loss statements depend not only on current reality but also on estimation methods. and calculation of reported indicators.

The concept of fair value emerged in the nineteenth and early twentieth centuries, but recently there has been much research and controversy among researchers calling for its cessation due to misuse and manipulation of accounting numbers at preparation of financial reports.

Abuse of fair value reached a peak during the twenties of the last century in many industrialized countries where prosperity and inflation have encouraged the development of optimistic repercussions of values, and many of them have returned to a significant decline due to the global recession (Thomason, 2017). Between 2006 and 2007, new accounting statements were issued that expanded the scope of fair value accounting, which led to a discussion that extended beyond the accounting profession to the rest of the business community.

Although fair value accounting is not a new concept or a new accounting practice, new data requirements coupled with the recent credit crunch that started in 2007 have caused many companies and users of financial data to question whether current fair value accounting practices should continue. Therefore, it is important to make a decision to resolve this difference because many companies that use fair value accounting have to record their assets and liabilities in difficult circumstances, such as the market crash, which makes the financial statements of these companies appear much worse than they really are. Since the purpose of financial statements is to clarify the financial condition of the company and its activities during the financial year and allow users of financial data to forecast future cash flows of the company, when the market collapses and the values of assets and liabilities appear below their actual value, this leads to distortion of the financial position of the company and it appears unable to achieve its intended goals (McDonough & Shakespeare, 2015).

In the retail banking activity, BCR granted new loans in local currency for individuals and micro-enterprises of over 7.8 billion lei (1.7 billion euros) in

2019, mainly due to mortgages, personal loans and those intended microenterprises. New loans for micro-enterprises increased by 31.5% in 2019 compared to the previous year, due to higher financing granted within the Start-Up Nation program. Unsecured loans increased by 3.4% compared to the previous year, due to the activity of personal loans and increasing the number of credit cards and overdrafts.

Regarding the corporate banking activity, BCR (bank only) approved new corporate loans amounting to 7.4 billion lei (1.6 billion) in 2019. The stock of financing granted to the SME sector (incl. BCR Leasing subsidiary) increased by 12.3% compared to past, reaching the value of 6.1 billion lei (1.3 billion euros) as of December 31, 2019, as a result of a higher concentration on new business and on the development of the leasing sector. The real estate segment increased significantly by 34.3% compared to
last year, as a result of new office and commercial space construction projects funded in the last year.

The total number of customers increased to 3.3 million at the end of last year, compared to 3.1 million in 2018.

If the fair values of financial assets and financial liabilities recorded in the balance sheet cannot be obtained from the active markets, they are determined using a wide range of assessment techniques that include the use of mathematical models. The values entered in these models are taken from existing markets when possible, but when this is not possible, a certain type of reasoning is needed to set fair values. Presentations on valuation models, fair value hierarchy, fair value of financial instruments and analysis sensitivity for Level 3 financial instruments are described in Note 43 “Fair value of financial assets and liabilities”.

The impairment loss model is a reasoning model because it requires the assessment of a significant increase in risk credit and measurement of expected credit losses without detailed instructions. Regarding the significant increase in credit risk, the group established specific evaluation rules consisting of qualitative information and quantitative thresholds.

Another area of complexity concerns establishing groups of similar assets when credit risk impairment must be assessed collectively before specific information is available individually.

Assessing expected credit losses involves complex models based on statistical data non-reimbursement probabilities and loss rates in case of non-payment, on extrapolation of information in case of insufficient observations, on estimates individuals of future cash flows and probabilities of different scenarios, including prospective information. In addition, the lifespan of instruments must be modeled in terms of the possibilities of early repayment and the behavior of credit facilities revolving.

Debt securities are measured at fair value through other comprehensive income (FVOCI) if their cash flows are compliant with the SPPI and are held within a business model whose objective is achieved both by collecting contractual cash flows, as well as by selling assets. In the balance sheet, they are included as "Debt securities" under the line "Financial assets valued at fair value through other comprehensive income ".

Interest income from these assets is calculated using the effective interest rate method and is included in the line "Net interest income" in the statement of profit or loss account. Impairment gains or losses are recognized in the income statement "Net impairment loss on financial instruments".

As a result, the impact of the recognized valuation in profit or loss is the same as for financial assets valued at amortized cost.

The difference between the fair value at which the assets are recognized in the balance sheet and the amortized cost component is recognized as accumulated OCI in equity, in the line "Fair value reserve" in the event of changes in equity. The change for that period is recorded as OCI in the statement of comprehensive income in the line "Debt instruments measured at fair value through other comprehensive income global ".

Financial assets whose contractual cash flows are not considered SPPIs are automatically measured at fair value through profit or loss ("FVPL"). In the Group's activity, it refers to certain loans granted to clients, equity instruments and securities debt.

Another way of valuing the FVPL refers to the financial assets that are part of the residual business models, i.e. they are not even kept for the collection of contractual cash flows or not kept for the collection of flows or for their sale. In general, it is expected that these financial assets be sold before maturity or are valued from the perspective of business performance at fair value.

In the balance sheet, the debt instruments valued at FVPL are presented as "Financial assets held for trading", under the line "Other assets held for trading. "Financial assets are measured at fair value through profit or loss either because their cash flows contractual funds are not SPPIs, either because they are held as part of residual business models that are other than those held for trading.

In the situation of the profit or loss account, the effects produced by the financial assets valued at FVPL are divided into interest income or income from dividends and gains or losses on fair value. Dividend income related to equity instruments is presented in the line "Dividend income".

Fair value gains or losses are calculated excluding interest or dividend income and also include trading costs and issue fees. These are reported in the line "Net trading income" for assets financial assets held for trading and in the line "Gains / losses on financial instruments not intended for the measured trading mandatory at fair value through profit or loss "in the case of financial assets not intended for trading and are valued at FVPL.

Derivative financial instruments are used by the Group to manage exposures to interest rates, foreign currencies and other risks related to the market price. The derivative instruments used by the Group mainly include interest rate swaps, futures contracts, contracts forward, interest rate options, currency swaps and currency options, as well as credit risk swaps.

Derivative financial instruments are recorded at fair value (the price including the interest component) in the statement of financial position.

Derivatives are recorded as assets if their fair value is positive and as liabilities if their fair value is negative.

Derivatives held for trading are those that are not designated as hedging instruments against risks for hedge accounting. These are presented in the line "Derivative financial instruments" under the category "Financial assets / Financial liabilities held for trading ". This item presents all types of derivative instruments that do not cover risks, regardless of their internal classification, both the derivatives held in the trading book and those held in the "banking book" portfolio.

Changes in the fair value (interest-free price) of derivative financial instruments held for trading are recorded in the profit or loss account in the position "Net trading income". Interest income / expenses related to both held for trading used for economic hedging, as well as hedging derivatives against risk are presented in the account profit or loss in the item "Other similar income" or "Other similar expenses" as "Net interest income".

The BCR Group continued to improve the ICAAP framework. It includes as its main pillar the ICAAP process (The internal evaluation process of capital adequacy to risks) required under Pillar 2 of the Basel Accord.

The ICAAP framework is a holistic risk management tool, designed to support the management of the BCR Group in the management of portfolios at risk as well as the potential for capital hedging, in order to ensure at all times the appropriate capital, able to reflect the nature and size of the Banks' risk portfolio and to support the business strategies and risk of these.

A key component of the ICAAP framework is the proper valuation of the Group's capital using economic capital measures. Within ICAAP,

The group identifies and measures risks and ensures that there is sufficient capital in relation to the risk profile. The process also ensures that they are use and develop appropriate risk management systems.

3. Conclusions

First, the paper concludes that the persistence, predictability, accruals quality, earnings smoothing and value relevance are the most important measures of earnings quality. Earnings quality and relation. The usefulness of fair value information is explored directly by inspecting its predictive power with respect to future cash flows and future earnings.

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EARNINGS QUALITY BASED ON FAIR VALUE ACCOUNTING

Valentin Gabriel CRISTEA*

Abstract

Fair value measurements are on the Transilvania Bank Group earnings from December 31, 2017 to December 31, 2018. We search on the correlation between fair value measurements and earnings quality. As the fair value is an independent variable, the earnings quality is a dependent variable. The data collected are from the Transilvania Bank Group annual reports between December 31, 2017 and December 31, 2018. The predictability, accruals quality, earnings smoothing and value relevance are the most important measures of earnings quality. Earnings quality and the quality of accounting information are in direct relation. The impact of fair value accounting on earnings quality is significant. With the adoption of fair values, earnings predictability at Transilvania Bank Group became quite high due to the variability of income. This thing alters the quality of the earnings and thus affects the choices that stakeholders can make.

Keywords: *earnings quality, earnings predictability, bank, fair value accounting, financial statements.*

1. Introduction

Barth, Beaver and Landsman[1] considered, in 2001, that revenue is, of course, considered an indirect indicator for assessing the quality of accounting standards, as it shows a direct relationship between the quality of revenue and the quality of accounting information.

Sodan, in 2015, showed that fair value information predicts future cash flows and is the current assumption of the value relevance of research at fair value. Therefore, the usefulness of fair value information is, of course, studied directly by analyzing its predictive power in terms of future cash flows and future earnings. So Barth, in 1994, said that fair value measurements are given by the present value of expected future cash flows, so if fair values are reliable measures of asset values, changes in fair values (i.e. unrealized gains and losses at fair value) would it must be reflected in future performance changes.

Thus, if the fair value estimates are not reliable, then the correlation with future performance measures will not be taken into account. Among the most important accounting tasks is the choice of the correct valuation method for valuing assets and liabilities.

Then, it is not necessary to measure the correlation between fair value estimates and market prices or yields.

Many scientists such as McDonough and Shakespeare, in 2015, confirmed that the financial position and results of economic activities represented in the balance sheets and profit and loss statements depend on the current reality and the methods of estimating and calculating the reported indicators.

The concept of fair value emerged in the nineteenth and early twentieth centuries, but recently there has been much research and controversy among researchers calling for its cessation due to misuse and manipulation. accounting numbers when preparing financial statements.

Thomason, in 2017, showed that fair value abuse peaked in the 1920s in many developed countries where prosperity and inflation fueled the development of over-optimism of values, and many of them declined steadily due to the global recession. Between 2006 and 2007, new accounting situations were developed that broadened the scope of fair value accounting, leading to a discussion that extended beyond the accounting profession to the rest of the business community.

The predictability, accruals quality, earnings smoothing and value relevance are the most important measures of earnings quality. Earnings quality and the quality of accounting information are in direct relation. The impact of fair value accounting on earnings quality is significant.

1.1. Earnings quality based on fair value accounting

Although IAS 39 and FAS 115 were similar in adopting a mixed approach (both fair value and historical cost models), Sodan[2] thought, in 2015, that information becomes more relevant with the application of fair value, this approach providing users financial statements with appropriate information to make the right decisions. Then, the fair value approach has emerged to cover the shortcomings resulting from the application of the

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historical cost approach. Schipper and Vincent, in 2003, predicted the continuity of corporate earnings in the coming periods, as long as financial analysts believe that financial statements as the main source on which they rely for information analysis and rational decision making. Chen, Lo, Tsang and Zhang, in 2013, noted that the quality of earnings is an indicator of dividends, because these dividends were important things indispensable in making investment decisions. Barth, Beaver and Landsman, in 2001, considered that earnings are valued, of course, as indirect indicators for assessing the quality of accounting standards, because there is a direct relationship between the quality of earnings and the quality of accounting information. Persistence, predictability, accruals quality, earnings smoothing and value relevance are various measures of earnings quality. Predictability tells us the idea that earnings are of higher quality and are more beneficial for predicting future earnings. Then it noted that the predictive power of profits is affected by the time series of earnings and the fluctuation of business operations, the economic environment and the accounting system used by companies. Sodan, in 2015, observed that the initial assumption of the value relevance of the research at fair value was that fair value information may predict future cash flows. We estimate the correlation between fair value estimates and market prices or returns, then the usefulness of fair value information is, of course, directly observed by analyzing its predictive power in terms of future cash flows and future earnings. Barth stated in 1994 that fair value estimates mean the present value of expected future cash flows, so if fair values are reliable measures of asset values, changes in fair values (i.e. unrealized gains and losses in fair value) must be reflected in changes in fair value future performance.

2. Earnings at Transilvania S.A. Bank

Transilvania S.A. Bank ("Parent Company", "BT") is a joint stock company registered in Romania. The Bank started its activity as a banking company in 1993, being authorized by the National Bank of Romania (“BNR”, “Central Bank”) to carry out activities in the banking field. The bank started in 1994 and its services relate to banking for legal entities and individuals.

The individual and consolidated financial statements have been prepared on the basis of the historical cost convention, except for financial assets recognized at fair value through profit or loss, financial assets at fair value through other comprehensive income and revaluation property, plant and equipment and real estate investments, except those for which the fair value cannot be credibly established.

(i) Foreign currency transactions

Transactions denominated in foreign currency are recorded in lei at the official exchange rate of the settlement date of the transaction. Exchange differences resulting from the conclusion of these transactions expressed in foreign currency are highlighted in the statement of profit or loss at the date of transactions using exchange rate from this date.

Monetary assets and liabilities recorded in foreign currencies at the date of preparation of the consolidated statement and the individual financial position items are expressed in the functional currency at the exchange rate on that day.

The conversion differences are presented in the result of the exercise.

Non-monetary assets and liabilities that are measured at historical cost in foreign currency are recorded in the functional currency at the exchange rate on the date of the transaction. Non-monetary assets and liabilities denominated in foreign currency that are measured at fair value are translated into the currency at the exchange rate on the date on which the fair value was determined.

The conversion differences are presented in the result of the exercise.

(ii) Conversion of operations into foreign currency

Results and financial position of operations conducted in a currency other than the currency and the Group's presentation currency are converted into this functional currency as follows:

- the assets and liabilities, both monetary and non-monetary, of this entity have been converted to the closing rate at the date of the consolidated and individual statement of financial position;
- the income and expenditure items of these operations were transformed at the average exchange rate, as an estimate for exchange rates related to transaction data;
- all the resulting differences were classified as other elements of the overall result up to when the investment is transferred.

In accordance with IAS 29 and IAS 21, the financial statements of an enterprise whose functional currency is the currency of a hyperinflationary economy should be presented in terms of purchasing power currency of the currency at the date of preparation of the consolidated and individual statement of financial position, I.e. non-monetary items are restated by applying the general price index from the date acquisition or contribution.

IAS 29 stipulates that an economy is considered hyperinflationary if, among other factors, the cumulative inflation index exceeds 100% over a period of three years. The continuous decrease of the inflation rate and other factors related to the characteristics of the economic environment in Romania indicates that the economy whose functional currency has been adopted by the Group

of ceased to be hyperinflationary, with effect on financial periods starting January 1, 2004.

Therefore, the provisions of IAS 29 have not been adopted in the preparation of the financial statements consolidated and individual. Thus, the values expressed in the current unit of measurement on December 31, 2003 are treated as the basis for the carrying amounts reported in these consolidated financial statements and individual and do not represent valued values, replacement cost, or any other measure of value current assets or prices at which the transactions would take place at this time.

2.1. The fair value of financial assets and liabilities

Fair value is the price that would have been collected for the sale of an asset or paid for the transfer of a debt in a regulated transaction between market participants at the valuation date. The fair value is best highlighted by a price dictated by the market, if it exists.

The Group and the Bank measure the fair value of financial instruments using one of the following ranking methods:

- Level 1 in the fair value hierarchy

The fair value of financial assets and liabilities allocated to Level 1 of the fair value hierarchy is determined on the basis of quoted prices on active markets related to financial assets and liabilities identical. The price quotations used are regularly and immediately available on active markets / indices exchange and prices that represent current and regular market transactions according to the principle of market price.

- Level 2 in the fair value hierarchy

The fair value of the financial assets and liabilities allocated to level 2 is determined using valuation models based on observable market data when there are no market prices available.

For level 2 valuations, they are usually used as observable market parameters interest rates and yield curves observable at commonly quoted intervals, default credit and volatility.

- Level 3 in the fair value hierarchy

The fair value of the financial assets and liabilities allocated to level 3 is determined using data which are not based on observable market information (unobservable input data which must reflect the assumptions that market participants would use in setting the price an asset or a liability, including risk assumptions).

The objective of valuation techniques is to determine the fair value, which should reflect the price that would be obtained following a transaction under normal market conditions for the financial instrument, on preparation of consolidated financial statements.

The availability of observable data and models in the market reduces the need for estimates and management judgments and the uncertainty associated with determining fair value.

Data availability and observable patterns in the market depends on the products in the market and is inclined to change on the basis of specific events and general conditions in the financial market.

The fair value of financial instruments that are not traded in an active market are determined using evaluation techniques with market observable data.

Leadership uses judgment to select the valuation method and issue assumptions based mainly on existing market conditions at the date of preparation of the consolidated statement of financial position.

i) Hierarchical analysis of the fair value of financial instruments held at fair value at level 1 of the fair value hierarchy, the Group and the Bank classified in the asset category: instruments of equity and debt instruments held at fair value through profit or loss and loss, liabilities classified as assets measured at fair value through other comprehensive income globally (before January 1, 2018 classified as available-for-sale assets), except bonds issued by City Halls.

At level 2 of the fair value hierarchy, the Group and the Bank classified in the asset category: instruments derivatives held at fair value through profit or loss, bonds classified as assets measured at fair value through other comprehensive (income before January 1, 2018 classified as available-for-sale assets) issued by City Halls and in the debt category: derivatives classified as financial liabilities held for trading at level 3 of the fair value hierarchy, the Bank and the Group classified in the asset category: instruments equity, property, plant and equipment and real estate investments.

As of January 1, 2018, the Group and the Bank have classified financial assets and liabilities in the following categories:

- Financial assets at fair value through profit or loss (FVPL);
- Financial assets at fair value through other comprehensive income (FVOCI);
- Financial assets at amortized cost.

The Group and the Bank recognize all financial assets and liabilities at the date of trading. Date

trading date is the date on which the Group and the Bank commit to buy or sell an asset.

After initial recognition, a financial asset is classified as measured at amortized cost, only if two conditions are met simultaneously:

- the asset is held within a business model whose objective is to keep the assets to collect contractual cash flows;
- the contractual terms of the financial asset give rise, at specified dates, to cash flows representing only principal and interest payments.

Financial assets classified as measured at fair value through other comprehensive income are those

financial assets that are held both for the collection of cash flows and for their sale.

Financial assets that do not meet the cash flow criteria (SPPI test) must be valued at fair value (e.g. derivatives or units background). The embedded derivatives are no longer separated from the host financial assets, but will be valued as a whole with the non-derivative financial instrument in terms of compliance with the conditions cash flow collection.

Investments in equity instruments are always measured at fair value. However, management may make an irrevocable choice to present changes in fair value other elements of the overall result, provided that the instrument is not held for trading.

Therefore, if one chooses to measure equity instruments at fair value through other comprehensive income, then these financial instruments will not represent monetary items, and the cumulative gain or loss, including the related foreign exchange component, will be transferred to the equity of the entity at the time of derecognition instrument.

If the equity instrument is held for trading, changes in fair value are presented in profit or loss.

Financial liabilities are classified after initial measurement at amortized cost, except when they are measured at fair value through profit or loss (financial liabilities derivative instruments). The embedded derivatives are separated from the host contract in the case of financial liabilities.

As of January 1, 2018, the Group and the Bank measure the equity instruments obligatorily measured at fair value through profit or loss. They were included in this category shares held in VISA Inc.

Gains and losses on investments in equity instruments measured at fair value through profit or loss are included in the line “Gains on financial instruments at fair value through profit or loss” in the statement of profit or loss.

Investments in equity instruments, for which the Group and the Bank do not express an intention to maximize cash flows through sale or these financial assets are not included in the trading book, have been classified as financial assets valued at fair value through profit or loss. and loss. In this case, the Group and the Bank have made an irrevocable choice to present changes in fair values in the comprehensive income, and the gains or losses on these instruments will be transferred directly to the Group's equity, without recycling these items in profit or loss.

Government bonds, bonds issued by town halls and other financial and non-financial companies were classified at fair value through other elements of the overall result, taking into account the criteria of the SPPI test and the inclusion in the business model of collecting contractual cash flows and selling of assets. As of January 1, 2018, the Group and the Bank recognized a provision for expected credit losses related to these assets measured at fair value through other comprehensive income. This provision is recognized in other comprehensive income and will not reduce the carrying amount of the financial asset.

The obligations issued by credit institutions and other financial institutions that meet the criteria of the SPPI test and the inclusion in the business model of collecting contractual cash flows were classified at amortized cost.

As of January 1, 2018, the Group and the Bank recognized adjustments of depreciation related to the class of financial assets valued at amortized cost.

Mutual funds held in mutual funds are measured at fair value through profit or loss.

They are treated as debt instruments, do not meet the criteria for collecting cash flows and do not fall within the trading portfolio of the Group and the Bank. Therefore, they were included in the category of financial assets valued at fair value.

In the individual statement of financial position, equity instruments representing investments in associates and subsidiaries continue to be measured at cost in accordance with IAS 27 "Individual financial statements".

Derivative financial instruments are measured at fair value through profit or loss.

Impairment under IFRS 9 is based on anticipated losses and requires early recognition of expected future losses. IFRS 9 eliminates profit or loss volatility caused by changes in credit risk related to liabilities designated at fair value. Specifically, gains due to credit risk impairment will no longer be recognized in the income statement.

The calculation of expected losses shall use, at the reporting date, the effective interest rate established at the initial recognition or an approximation thereof. If a financial asset has a variable interest rate, the expected loss on credit must be determined using the current effective interest rate. For financial assets acquired or issued impaired as a result of credit risk, the expected credit losses must be determined using the credit-adjusted effective interest rate set at the initial recognition.

In some circumstances, renegotiating or changing the contractual cash flows of financial assets leads recognition of existing financial assets. If it significantly changes the contractual conditions on the background of commercial renegotiations, both at the client's request and at the Bank's initiative, the derecognition of the existing financial asset and the subsequent recognition of the modified financial asset takes place, the modified financial asset being considered "new" financial asset.

In 2018, the average annual inflation stood at 4.6% (4.1% on the EU harmonized index of consumer prices), the highest in 2011.

However, inflation slowed in the last quarter of 2018, re-entering the Central Bank's target range (1.5% - 3.5%).

The acceleration of inflationary pressures coupled with the accumulation of challenges in the sphere of domestic macroeconomic balance determined the National Bank of Romania (BNR) to increase the reference interest rate from 1.75% to 2.50% in the first half of 2018.

In April 2015, the Bank took control of Volksbank Romania S.A. ("VBRO"), recognizing in the individual and consolidated financial statements the acquisition gain in the amount of 1,650,600 thousand lei as following the business combination in accordance with IFRS 3.

At level 2 of the fair value hierarchy, the Bank and the Group classified in the category of assets that are not held at fair value: investments in banks less securities classified in the category loans and receivables (which do not have an active market), loans, advances and receivables from financial leasing contracts granted to customers, and in the category of debts: deposits from banks and customers.

At level 3 of the fair value hierarchy, the Bank and the Group classified in the category of assets: financial assets valued at amortized cost - debt instruments and other financial assets, and in the category of debt: loans from banks and other financial institutions, subordinated debt and other liabilities financial.

Schultz and Hollister observed in 2003 that, under pressure from conservative banks, the standard required only certain investments, then some of them proposed to be sold in the short term and others prepared using fair value through profit or loss. The standards represented efforts to determine fair values through the profit statement in specific scenarios. In 1998, IASB got IAS 39. At that time, IASB standards were referred to as International Accounting Standards (IAS). Then, FAS 115 was equivalent to IAS 39: Financial Instruments: Recognition and Measurement, (IAS Plus 2019). If fair value measurements are not reliable, then the correlation with future performance measures will not be significant. In 2015, Sodan adopted the concept of measurement, according to which exposure to fair value accounting is measured using global or net income approaches. Then, changes in fair values are reported as gains and losses on net or other global income. In other words, we studied the effect of fair value gains (losses) on other global income and net income on predictability as a measure of the quality of gains. Muller, Riedl and Sellhorn, in 2008, referred to ongoing variations, which cause changes in purchasing power, create instability and can lead to inflation or depression. The concept of fair value has moved traditional accounting theory to new horizons and made a comprehensive change in the structure of financial statements and their implications. Sodan noted in 2015 that this was a result of the evolution of accounting theory in the years that developed and were implemented in international fair value accounting standards and was practiced at the beginning of the third millennium, in 2001. Using the model fair value, the company can obtain a higher income depending on the difference between the fair value and the book value, which is recognized as part of the gain and loss on the application of fair value. Wahyuni, Soepriyanto, Avianti and Naulibasa concluded in 2019 that using the cost model, the value of net income or loss is affected only by depreciation expenses. Among the accounting tasks is the choice of the appropriate valuation method for valuing assets and liabilities. Scientists have confirmed this. Scientists, such as McDonough and Shakespeare, in 2015, admitted that the financial position and results of economic activities represented in the balance sheets and profit and loss statements depend on the current reality and the methods of estimating and calculating the reported indicators. Forecast the company's future cash flows when the market collapses and assets and liabilities appear below. Their real value, this leads to a distortion of the company's financial position and seems unable to achieve the proposed objectives.

3. Conclusions

The predictability, accruals quality, earnings smoothing and value relevance are the most important measures of earnings quality. Earnings quality and the quality of accounting information are in direct relation. The impact of fair value accounting on earnings quality is significant. With the adoption of fair values, earnings predictability at Transilvania Bank Group became quite high due to the variability of income. This thing alters the quality of the earnings and thus affects the choices that stakeholders can make. Consolidated and individual statement of profit or loss and others elements of the overall result is represented in Table 1 below.

Table 1. Transilvania Bank S.A.
Consolidated and individual statement of profit or loss and others elements of the overall result for the financial year ended 31 December

Banking Group

		Banking Group		**Bank**	
	Note	2018	2017	2018	2017
		Thousand lei	Thousand lei	Thousand lei	Thousand lei
Interest income		3,182,049	2,102,621	2,855,070	2,018,571
Interest expenses		-432,500	-211,802	-377,162	-210,122
Net interest income	8	2,749,549	1,890,819	2,477,908	1,808,449
Income from expenses and commissions		1,029,941	744,313	923,948	704,571
Expenses with fees and commissions		-252,233	-143,800	-229,276	-149,905
Net income from expenses and commissions		9,777,708	600,513	694,672	554,666
Net trading income	10	252,163	278,339	263,448	223,667
Net loss on sale of financial assets available for sale	11	-	-3.206	-	-4.102
Net realized loss on financial assets measured at fair value through profit or loss	11	-7,555	-	-7,774	
Net realized loss on financial assets necessarily valued at fair value through profit and loss	12	-2,570	-	-40,529	-
Contribution to the Deposit Guarantee Fund Banking and Resolution Fund	13	-41,423	-49,696	-39,164	-49,696
Other operating income	14	217,591	173,823	245,419	116,196
Operating income		3,945,463	2,890,592	3,593,980	2,649,180
Net expenses (-) / Net income with adjustments impairment, expected loss on assets, provisions for other risks and commitments of credit	15	-364.421	-29.221	-230.791	1.353
Staff costs	16	-1,065,162	-763,227	-965,972	-715,390
Depreciation expenses		-162,514	-125,024	-129,250	-90,106
Other operating expenses	17	-806,615	-530,498	-697,351	-466,537

Operating expenses		-2,398,712	-1,447,970	-2,023,364	-1,270,680
		_____	_____	_____	_____
Gain on purchases	50.51	160,077	_____	71,830	-
Profit before tax		1,706,828	1,442,622	1,642,446	1,378,500
Income tax expense	18	-446.148	-200.154	-423.055	-192.521

Source: https://www.bancatransilvania.ro/files-aga/situatii-consolidate-si-individuale-la-31-decembrie-2018-situatiile_financiare_individuale_si_consolidate_la_31_decembrie_2018.pdf.

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CHALLENGES WITHIN THE FINANCIAL-ACCOUNTING ACTIVITY IN THE CONTEXT OF COVID-19

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Abstract

The period of the COVID-19 pandemic brought many economic, social and environmental challenges. In the financial-accounting sector, the situation of uncertainty, including remote work, has generated and continues to generate various problems for companies and their employees. One of these is the temporary inability of employees to carry out their activity even within the financial-accounting activity. Another challenge that many companies have faced has been the adoption of online commerce as a method of maintaining the business during the pandemic. This form of trade also meant different work for the financial-accounting departments, which had to adapt to the new style of trade, which also involves new financial-accounting rules and regulations.

In this paper we analyze the challenges to which the financial-accounting activity have been subjected as a result of the numerous measures of fiscal and commercial nature, but also some long-term benefits of these measures.

Keywords: *COVID – 19, financial-accounting activity, essential services, big winners in pandemic, losers and survivors in pandemic.*

1. Introduction

The COVID-19 pandemic took all economic sectors by surprise. No one was prepared for such big changes in the way and pace of daily activities. As a result of the lock-down measures, the companies had to reorganize their activity, and because the authorities took a series of financial protection measures, the financial-accounting departments had additional obligations.

Regardless of the reasons for local or global problems, within the financial-accounting department, the economic entity is obliged to ensure the registration (recognition) of transactions in up-to-date accounting with the appropriate internal control of the company to allow the correct collection of information and, more chosen, they should be timely. It is essential to consider compliance with internal audit requirements, but also the obligation to prepare financial and fiscal statements on time. Daily financial-accounting activities, which must ensure continuity in the collection and processing of information, put additional pressure on the economic entity that, in the context of the current crisis, must dedicate itself to preparing the necessary reports for information users in the decision-making process.

In the presence of such a context, any economic entity must analyse its internal economic resources in order to be able to consider the appropriate solution, adapted to the particularities of the current situation. Accelerating digitalization within the finance department by adopting existing tools on the market, can be one of the ideal solutions for companies that not only want to solve a problem related to the impossibility of employees to carry out their activity, but also aim at streamlining existing processes .

In analysing the situation of the team in the financial-accounting department, in the context of the digital economy, companies can use modern solutions such as outsourcing their own processes to the financial-accounting department, the department responsible for preparing reports necessary for decision making. Another solution would be to outsource operational reporting, using business intelligence tools - Power BI, Tableau, QlickSense.

2. Economic challenges during the pandemic

Since the beginning of the COVID-19 pandemic, the National Institute of Statistics has conducted several statistical surveys on economic activity trends, the impact of SARS-COV2 on the volume of exports and imports of goods and the assessment of the environmental impact of COVID-19 to quantify the impact of the crisis on economic activity and the volume of foreign trade, the results of which were of real interest to decision-makers, the media and users in

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general. The implications of the pandemic on economic activity and the natural movement of the population underlie new national and European statistical data requirements on the impact of prevention measures on sectors of national economies.

In order to control the pandemic with the new coronavirus, unprecedented measures were taken, measures that left traces on many areas of activity. Many sectors of activity are currently in a situation where they need to rethink their strategy, protect their employees and ensure business continuity. The latter is a central element that companies must ensure, including for financial-accounting activities. In the context of the Covid - 19 pandemic, the Romanian state came to the aid of companies but also of citizens with a series of fiscal measures in order to help the business environment to overcome the financial difficulties it is currently facing, as well as to prevent the accumulation of new debts to the state by supporting taxpayers' compliance with payments. Taxpayers are therefore in a rare situation of currently having a very diverse range of tax facilities at their disposal, and the choice of the optimal route requires an analysis of these options.

We can group the fiscal measures into three categories:

- Immediate fiscal measures: funds to strengthen the health system; risk incentive for employees in medical units; subsidizing technical unemployment - 75% of gross salary; allowances for reducing working time; allowances for parents (suspension of courses).
- Fiscal deferral measures, the most important of which are:

- the total cancellation of interest, penalties and all accessories related to outstanding budget obligations on March 31, 2020. The tax amnesty allows taxpayers to request the cancellation of all accessories related to tax obligations due on March 31, 2020. This it applies not only to unpaid accessories, but also allows the return of accessories already paid, but only if they have been paid after the date of entry into force of the ordinance (14 May 2020). Although the scope of the amnesty is quite wide, taxpayers wishing to benefit from this facility must meet certain conditions specific to each of the situations presented above. Of these, the most important is that, at the time of registration of the cancellation request, the taxpayers have submitted all the declarations and have paid up to date (or have extinguished by any method) all the main or ancillary tax obligations due to the state budget, with except for ancillary obligations whose cancellation is sought.
- restructuring of outstanding tax liabilities on 31 July 2020 under certain express conditions. The restructuring procedure, as regulated by this ordinance, with subsequent amendments and completions, is a solution that can benefit any legal entity, except public institutions and administrative-territorial units, which are in financial difficulty, are obliged outstanding on 31 July 2020 and presents a restructuring plan. Legal entities that meet the legal conditions must notify the tax authorities of their intention to benefit from this facility by March 31, 2021, the deadline for submitting the actual application being June 30, 2021.
- a simplified procedure for granting payment rescheduling in accordance with the rules of the Fiscal Procedure Code and, in the alternative, postponing certain deadlines in the context of the COVID-19 epidemic. More specifically, it offers taxpayers the possibility to pay in several instalments the main and ancillary tax obligations whose maturity / payment deadline has been met after the date of declaration of the state of emergency, based on a request subject to conditions of grant, which can be formulated until 15 December 2020. The main and ancillary tax obligations are staggered for a maximum period of 12 months, the beneficiary being any natural or legal person. In addition to the new provisions on payment rescheduling, another welcome measure is the extension of deadlines, namely the extension of the period of non-application of accessories for outstanding debts until 25 December 2020 and the extension of the deadline for VAT refund with subsequent control until 25 January 2021.

- Monetary measures NBR - liquidity requirements

- reduction of the reference interest rate (from 2.5% to 1.5%)
- acquisitions of government securities on the secondary market (5 billion lei)
- framework arrangement with the ECB through which they can borrow up to EUR 4.5 billion (valid until July 2021).

Therefore, taxpayers facing financial difficulties have these modalities at their disposal for the restructuring, cancellation or staggering of outstanding tax obligations, which partially overlap. The decision to choose one of these should be preceded by a careful analysis of the current situation and business forecasts for the next period.

3. The impact of the pandemic on the Romanian economy

The year 2020 had a good economic start, according to data published by the National Institute of Statistics, in the first quarter of 2020 compared to the first quarter of 2019 the economy registered an advance of 2.4% (gross series, provisional data). In terms of economic growth, Romania recorded the second highest growth in the EU (Ireland, 4.6%). Across the EU as a whole, economic growth contracted by 2.4%. On a seasonally adjusted series, the quarterly gross domestic product in Romania increased by 2.7% in the first quarter of 2020 compared to the corresponding quarter of the previous year.

The volume1 "of industrial production decreased in the first 6 months of 2020 compared to the same period in 2019, by 16.4%, the most vulnerable branches, in the context of the pandemic, being those of light industry and capital goods industry (manufacture of motor vehicles, cars and machinery and electrical equipment manufacturing)."

"In the case of the light industry branches, there was a continuation of the decline in recent years, caused by a gradual loss of competitiveness, but also a narrowing of external demand during the pandemic crisis. The minimum activity registered in April resulted in reductions of about 50% in the case of the textile industry and the manufacture of clothing and of 70% for the leather industry. May marked the beginning of the process of recovering from this contraction, as in the vast majority of industries."2

Starting with March 2020, the health crisis is also found in the economic one, aiming at the reaction of the economy both in the short term and in the long term, the Romanian economy being impacted differently from one branch to another, from one sector economically to another. The performance of the construction sector is notable in the context of the pandemic, the volume of construction works increasing in the first half by 18.9%. However, in the last two months, the momentum in the first part of the year has moderated, especially in the new construction component, which recorded an annual increase of only 0.4% in June, as noted by the National Strategy and Forecast Commission.3

The specialists of the Faculty of Economic Sciences within the Babeș-Bolyai University of Cluj-Napoca monitor in real time the impact of the COVID-19 pandemic on the Romanian economy. UBB has launched an online platform in which economics researchers publish interactive infographics with the evolution of COVID-19 cases in Romania and in the world, government social and economic measures, stock market reactions, reactions of top 50 companies in Romania to the coronavirus pandemic4. The analyses of UBB experts show that the areas most affected by the COVID-19 pandemic, after the decrease in the contribution to GDP, are:

- 1. Tourism - 75%
- 2. Culture - 60.4%
- 3. Administrative services - 47.2%.

Having as subject the impact of the pandemic on tourism, the National Institute of Statistics published, on April 2, 2021, a report according to which[5]:

- In February 2021, compared to the corresponding month of the previous year, arrivals in tourist accommodation structures with accommodation functions decreased by 31.2%, and overnight stays by 32.9%.
- Compared to February 2020, in February 2021, at the border points, the arrivals of foreign visitors decreased by 61.0%, and the departures abroad of Romanian visitors by 59.0%.

The National Strategy and Forecast Commission[6] states that the impact of the pandemic on HORECA activity (this being one of the most affected areas) at the territorial level cannot yet be assessed based on data from official sources, but the indicator of overnight stays in tourist accommodation structures (Romanian tourists plus foreigners) is a satisfactory proxy for the real evolutions of the sector.

It is also specified that in 2020 measures were taken to reduce the risk of job loss and provide sources of income for employees and other categories of economically active persons, granting technical unemployment during the suspension of the individual employment contract for about 1,200 thousand employees, being made payments of 4,280 million lei, part of the amount was subsidized by the project #SPER, and the rest from the European Instrument for Temporary Support for Emergency Risk Mitigation (SURE).

"The COVID-19 pandemic also caused a negative evolution in the export activity of goods, both due to the deterioration of world trade flows and as an effect of the measures for distancing. Thus, in the first 10 months of 2020 compared to the similar period of 2019, the largest decreases in exports were registered in the regions: South - East (-19.89%), South Muntenia (-19.79%) , North - East (-18.13%) and West (-15.0%), given that at national level the reduction was 12.21%. At the same time, moderate decreases compared to the national level of exports were in the regions: Bucharest - Ilfov (-9.8%), Center (-9.7%) and North - West (-7.9%) "[7].

On 11 February 2021, the European Commission[8] published its 2021 winter economic forecast. According to them, the Romanian economy suffered a depreciation of 12.2% in the second quarter of last year, returned by 5.8% in the third quarter of 2020, mainly due to the recovery of private consumption, and supported by the strong performance of the construction sector sustained increase in gross fixed capital formation throughout the year. Industrial production offset some of its previous losses in the second and third quarters of 2020, but this

[1] Report on the economic and budgetary situation for the first six months of 2020, https://ec.europa.eu/info/sites/info/files/economy-finance/raport_edp_2020_final_en.pdf.

[2] Ibidem.

[3] http://cnp.ro/user/repository/prognoze/Prognoza_de_vara_2020_prevederi_si_influente_Nota.pdf.

[4] https://www.edupedu.ro/impactul-pandemiei-asupra-economiei-romanesti-reactiile-companiilor-din-top-50-evolutia-indicilor-bursieri-monitorizate-in-timp-real-de-cercetatorii-in-stiinte-economice-de-la-universitatea-babes/?fbclid=IwAR3LHQjCS8-zzV6tvx8rN8twzXdIuEt-ol8mKEtqKZuMN60KpsDF9YlK8cY.

[5] https://insse.ro/cms/sites/default/files/com_presa/com_pdf/turism02r21.pdf.

[6] http://cnp.ro/user/repository/prognoze/Nota_prognoza_teritoriala_iarna_2020_2024.pdf.

[7] cnp.ro/user/repository/prognoze/Nota_prognoza_teritoriala_iarna_2020_2024.pdf.

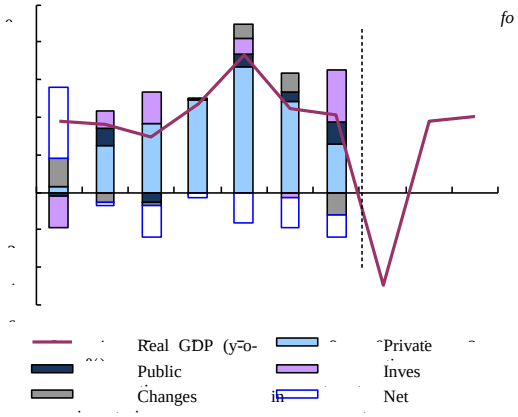
[8] Ibidem.

positive performance appears to have stopped at the beginning of the last quarter.

In the 4th quarter, economic activity weakened somewhat as isolation restrictions caused by the pandemic were reintroduced in response to a new wave of infections. Fiscal support measures, some of which have been extended until mid-2021, have mitigated the impact of the crisis on the economy in 2020. Real GDP is projected to grow by 3.8% in 2021 and 4% in 2022.

By 2022, consumption is expected to remain robust in 2022. Investments will remain strong above the forecast horizon, supported by the construction sector.

Romania - Real GDP growth and contributions



Source:
https://ec.europa.eu/economy_finance/forecasts/2021/winter/ecfin_forecast_winter_2021_ro_en.pdf

One of the sectors severely affected by the COVID - 19 pandemic, restaurants have shifted to online orders. Since the outbreak of the COVID-19 pandemic, "orders for bundled and delivered food have increased by 14% among consumers who order at least once a month, prompting restaurants to reconfigure their networks, according to the Deloitte study" The Restaurant of the Future Arrives Ahead of Schedule - Time to Get on Board ", conducted among US restaurant customers and managers. Almost two thirds (68%) of consumers say they order food with delivery, 52% order in bulk, and almost half (46%) of respondents expect to maintain these habits after the end of the pandemic.

"Millennials exponents[9], aged between 23 and 39, place the most delivery orders (65%), up 13% from the pre-pandemic period, and 77% of Generation X exponents, aged between 40 and 55 years old, order packaged food, 20% more than in the pre-COVID period[10] "shows the Delloite study.

In addition to the negative effects of the COVID - 19 pandemic, we can say that there are some benefits. Among the important changes with a positive effect on the economy caused by the influence of the pandemic is the way we use digital activity. Thus, a Delloite[11] study shows that "During the COVID-19 pandemic, more than eight in ten consumers (82%) tried at least one digital activity for the first time, such as ordering groceries online, using an educational or an exercise app, according to Deloitte Global Marketing Trends 2021, and more than half of them (53%) believe that their new digital experiences are an adequate substitute for activities they used to conduct prior to the pandemic. The study highlights the importance of expanding brands' digital ecosystem, as almost a third of respondents say that digitally native activities were a superior alternative to their in-person experiences… The current context is rapidly changing consumers' behaviour, who seem to favour the adoption of digital channels, with 66% agreeing that the pandemic has increased their appreciation for well-designed technologies. The health crisis has not only contributed to this change towards digital technologies, but it has also set a pattern for the years to come, according to the findings of the study, as 63% of respondents agreed that they would continue to use digital technologies more often well after the pandemic subsides."

The report concludes that purpose, agility, human experience, trust, consumers' participation, fusion and talent are the main seven global marketing trends on which brands need to focus in 2021 in order to build better connections with their customers, workforces and society.

The conclusion of this study should serve as a model for companies to focus on the use of online activity both for sale (those that have the field of trade) and for the development of financial-accounting activity. Since companies operate in unprecedented times, they need to adapt and embrace change as quickly as possible and adapt to new economic trends, seek partnerships outside their traditional fields, and use digital solutions to meet the needs of their customers.

The category of benefits also includes a series of improvements regarding the relationship of citizens, individuals or legal entities, with state institutions, by implementing online communication systems on most levels of social and economic-financial interest, action that brought important benefits in the financial-accounting activity. During the pandemic, online platforms were developed through which taxpayers can communicate with state institutions, submit statements, makes online payments and appointments for those operations that require their physical presence.

4. Conclusions

In order to control the pandemic with the new coronavirus, unprecedented measures were taken, measures that left traces on many areas of activity.

[9] Millennials (Generation Y) are people born between January 1983 and December 1994.
[10] Idem: Deloitte study.
[11] Half of consumers consider new digital experiences are an adequate substitute for activities they used to conduct prior to the COVID-19 pandemic, 25 November 2020. The study was conducted globally with the help of more than 2,400 consumers from China, the Kingdom of Saudi Arabia, Mexico, Qatar, Sout.

Many sectors of activity are currently in a situation where they have to rethink their strategy, protect your employees and ensure business continuity. The latter is a central element that companies must ensure, including for financial-accounting activities.

We can say without fear of error that the economic effects generated by the COVID - 19 pandemic at the sectoral level had an asymmetric social, economic and financial impact and divided the business into four categories. Thus, depending on the vulnerability, the 4 categories are: essential services, big winners, losers and survivors.

"The pharmaceutical services, food, health, telecommunications and utilities sectors are part of the essential services category. The big winners, those for whom the current crisis has represented an increase in market demand, are, for example, companies operating in e-commerce, video communications, cloud or telemedicine platforms, courier services. The obvious losers of the shock are the economic entities in the field of tourism, entertainment, traditional retail or restaurants. The survivors, i.e. those sectors that could "escape" less affected by the crisis, could be companies in the field of financial services, real estate, online retail, fashion or media.[12]"

Regardless of the area in which they operate, companies have felt and will feel the economic effects of COVID-19. The World Bank has forecast that global GDP will decline by 5.2% in 2020, with recessions in both advanced and emerging market economies. This seems to outline the worst recession since the Great Depression and much worse than the Global Financial Crisis of 2008. Some countries in the world have come to the aid of companies and we have seen that they have been and will continue to be given generous to support companies in difficulty.

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STUDY ABOUT SUSTAINABILITY AND THE FOURTH PILLAR ADDED AS A RESULT OF THE CORONAVIRUS PANDEMIC

Mihaela Ioana GURĂU[*]

Abstract

In a century in which everything is directed towards consumerism, implicitly pollution, deforestation, neglect of the environment and not only, the concept of sustainability or sustainable development comes as a helping hand for everything around us: for us, for nature, for the future of the Earth. This concept arises from the need to protect ourselves from ourselves, from all the dangers to which we submit for the simple reason that we are not used to looking carefully to the future. The phrase "carpe diem" (live the moment) is not an exhortation that it is good to rely on in today's economic, social and environmental context. We have to look to the future and to protect it.

In this paper, after a brief history of global, European and national sustainability programs, we make an analysis of the influence of the pandemic period on sustainability programs. We also want to influence as many people as possible towards a behavior that fits in with the sustainability needs of the planet and of humanity, of our descendants.

What do each of us know when it comes to sustainability? Caring for the environment. Nothing less true. In addition to the environment, sustainability strategies have three other pillars in mind, one of which has been added to care for the future as a result of the COVID - 19 pandemic. I invite you to discover them together.

I intend to continue my research on topics related to the influence that content creators have through social media in the field of sustainability so i invite you to follow my future work.

Keywords: *sustainability, sustainable development, sustainability pillars, sustainability goals, COVID-19.*

1. Introduction

The great economic crisis of 1929-1933, started from overproduction was the starting point of the concept of sustainable development, coming in response to the ecological crisis caused by the major exploitation of resources, as well as the increased degradation of the environment.

The modern definition, in 2021, of the term sustainability is much broader than that offered in 1987. In a short time, we will see that the need to protect and preserve the environment dates back to the mid-seventeenth century in Germany, and aimed at forestry. According to the literature, sustainability encompasses three pillars that intersect in a common denominator the vector of sustainability, as follows: social, environmental and economic.

Appearance Commission report Brundtland entitled "Our Common Future" led in 1987 to the idea that "sustainability is provided to meet human needs while avoiding environmental problems, it said a growing movement expanded to economic development and sustainable and new techniques have been developed to enable the measurement and implementation of sustainability. " (Zaman & Goschin, 2010)

Sustainability can be approached, as stated by Professor Zaman "at different reference levels, in time, space and from an ecological, social or economic point of view. Sustainability science connects to several different disciplines and fields of research and, being too complex to be fully understood using a single research method, considers specific ways of combining different disciplines. "(Zaman & Goschin, 2010)

As mentioned above, the term "sustainable" has its origins in Latin - *sustenere*. The terminology is much older than we think. The appearance of the German term "nachhaltende nutzung " (sustainable use) by Hannss Carl von Carlowitz in his publication on sustainable forestry is well documented in 1713. Many researchers have sought to find out the origins of this concept, and according to him (Caradonna, 2014), it considers "that the history of sustainability follows the ecological systems dominated by people from the first civilizations to the present."

In the article " Sustainable Development : A Bird's Eye View ", experts point out that there are three terms commonly used even interchangeably, namely "sustainable development", "sustainability" and "sustainable", which are used in several ways, often with different connotations. (Wass, Huge, Verbruggen, & Wright, 2011)

According to "Our Common Future", "sustainable development is defined as a development that" meets the needs of the present without compromising the ability of future generations to meet their own needs. „Sustainable development can be the organizing principle of sustainability, however others may consider the two terms to be paradoxical (i.e. development is inherently unsustainable)." (United Nations General Assembly, UN. Secretary-General, 1987).

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Some researchers argue that "sustainability is the "goal", while sustainable development refers to the "process" of achieving it" (Zaccaï, 2002)[1], but this conception is not consensual either.

However, in this paper we will use the two terms mentioned above interchangeably

2. Study about sustainable development

When we talk about sustainable development, we normally think of a concept that comes as a solution to current problems, problems that we face because of the rapid expansion and carelessness with which we treat the environment. If we were to summarize and address the colloquial issue, I believe that we can say that environmental sustainability is geared towards issues such as global warming, heavy pollution, major and negligent exploitation of resources. Therefore, we could put forward the idea that sustainability is considered a new model of development, which took shape towards the end of the twentieth century. However, the concept of sustainable development is much older.

2.1. History of the concept of sustainable development / sustainability

The problems and ideas we classify today under the concept of sustainability have their origins thousands of years ago. The search for a balance between the demand for raw materials for food, clothing, shelter, energy and other goods, but also awareness of the environmental limits of ecosystems has been a constant concern throughout human history.

Although the first records of the need to protect the environment appear as early as 8,000 -10,000 years ago, the period in which "agrarian communities emerged that depended largely on their environment and the creation of *permanent structures* " (Gasper, 1977), we will focus research on modern economic, environmental and social crises, which have led to the development and application of concepts and solutions globally.

It is important to remember the period of the Industrial Revolution, from the 18th and 19th centuries, in which the vast potential for increasing the energy based on fossil fuels was exploited. Coal was the basic source for powering more and more efficient engines, and later for generating electricity. Started in Western Europe, at the end of the twentieth century, the environmental problems caused by the Industrial Revolution became global. However, the development of the industry has also led to advances in medicine and the improvement of sanitation systems, which have protected large populations from disease.

Between 1950 and 1960, development continued to focus on economic growth and economic production. The early 1970s bring to mind the huge differences between underdeveloped and developing countries. Part of the population faces great poverty, and all in all it brings to our attention the failure to share the benefits of economic growth with these countries, probably here being the roots of the need for socially sustainable development.

The energy crises of 1973 and 1979 call attention to the extent to which the entire population has become dependent on non-renewable energy resources. The 1970s severely put the planet to the test, which (Lin, et al., 2018) states that "In the 1970s, humanity's ecological footprint exceeded the earth's carrying capacity, so humanity's way of life became unsustainable ."

In the 1980s, environmental protection became the third major goal of development. In fact, we can even say that sustainable development is a combination of different ideas about progress, environmental protection, growth and development.

The famous Brundtland Report "Our Common Future", which I mentioned at the beginning of this paper, was published in 1987 by the World Commission on Environment and Development (WCED), established in 1983 by the UN General Assembly and chaired by Gro Harlem. Brundtland, former Prime Minister of Norway, also gave the name of this report. WCED has been tasked with formulating a "global agenda for change" (United Nations General Assembly, UN Secretary-General, 1987) and, compared to the previous report, has now managed to incorporate development and environmental protection measures.

The report serves as a vital step in the current thinking of development for at least four reasons: First, it launched a famous definition of sustainable development. The second important reason is to establish sustainable development as a substantial component of international development thinking and practice. Third, it initiated what we might call an explosion of work on sustainability. And last but not least, we mention the fact that it represents the discovery at a global level and the popularization of the concept of sustainability.

2.2. Modern landmarks in the process of sustainability

In recent decades, sustainable development has grown from what we can consider to be a simple alternative perspective on development to a recognized and politically supported development model. I want to mention three letters from the scientific community about the danger of increasingly at sea obey lack of concern for the environment and sustainability ways the backing them which can remove these threats.

In 1997, the Union of Concerned Scientists published the first warning to humanity that "Human beings and the natural world are on a collision course" (Scientists, 1997) , a letter signed by 1,700 of the most

[1] The paper quotes from Reid, D. Sustainable Development — An Introductory Guide; Earthscan: London, UK, 2005; Lozano, R. Envisioning sustainability three-dimensionally. J. Clean. Prod.2008, 16, 1838–1846.

important scientists. , many of them being Nobel laureates in science. The letter mentions “serious damage to the atmosphere, oceans, ecosystems, soil productivity and more. It warns mankind that life on earth, as we know it, can become impossible, and if humanity wants to prevent damage, some measures must be taken: better use of resources, abandonment of fossil fuels, stabilization of the human population, eradication of poverty " (Scientists , 1997) .

Ten years later, scientists wrote the second warning to humanity. This letter mentions positive trends, such as slowing down deforestation, but despite this, scientists say that, "except for ozone depletion, none of the problems mentioned in the first warning have been adequately addressed." Scientists “have called for reduced consumption of fossil fuels, meat and other resources and stabilization of the population” (Ripple, et al., 2017) . This letter has more co - signers and supporters than any other article ever published in the magazine. The article is signed by over 15,000 scientists from one hundred and eighty-four countries.

In 2019, a new warning letter was published. It is signed by over 11,000 scientists. Serious threats due to climate change are being reported and major and urgent changes are being called for. The scientists called it a "climate emergency" and called for "stopping excessive consumption, replacing fossil fuels, consuming less meat, stabilizing the population and more." (J Ripple, Wolf, M Newsome, Barnard, & R Moomaw, 2019)

2.3. Global, European, national strategies for sustainable development

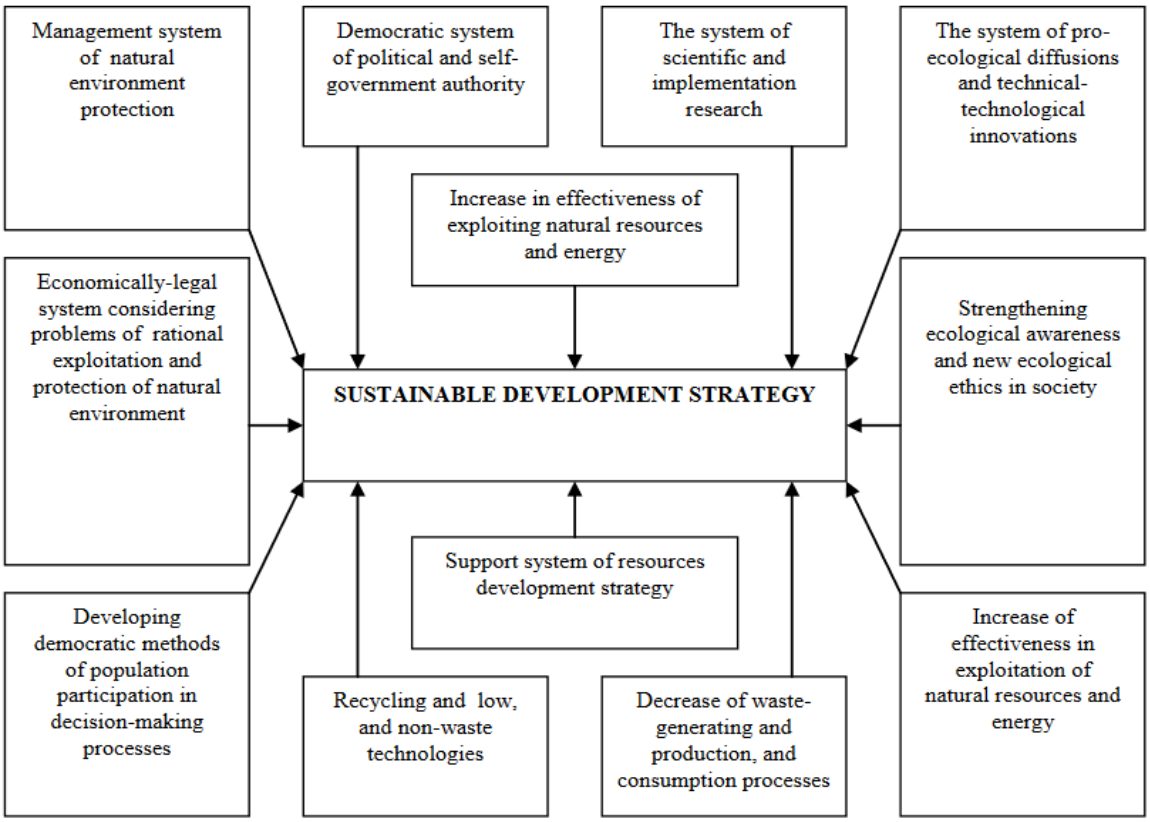
Pillars of sustainable development

Modern sustainability strategies are developed considering three pillars that definitely influence the future of humanity: economic, social and environmental or, informally, we can call them pillars of profits, planet and people.

Another perspective of the sustainable development strategy is presented by Annetta Zielinska in the paper “*Principles of sustainability versus sustainable development, eco- development with reference to the forms of natural areas of value*, as follows:

Figure 1

Source: Elements for achieving the sustainable development strategy, adaptation after (Zielińska, 2012) https://www.economics-sociology.eu/files/14_Anetta_3_3.pdf



The environmental pillar

In the era of the development of the concept of Industry 4.0 and implicitly the transition to digitalization, the strategic interest of the UN Agenda and the EU objectives focused on the environmental pillar. Recent research has shown that companies focus more on reducing their carbon footprint, packaging waste, water use and overall environmental impact. (Beattie, 2015) states about companies that "they have discovered that a beneficial impact on the planet can also have a positive financial impact." And today's consumer is much more selective in terms of the company from which they purchase products or services, the inclination towards the social and environmental environment being a criterion that prevails when making a purchase decision.

For example, "reducing the amount of material used in packaging usually reduces the total cost of these materials." Walmart has launched a campaign to achieve zero waste and has introduced packaging in line with the project, pushing for fewer packaging in their supply chain, and packaging to be made from recycled or reused materials[2].

The social pillar

Although it is the second pillar addressed in the paper, social sustainability is often "the most disadvantaged branch, receiving considerably less attention than economic and environmental sustainability." (Kandachar, 2014) Also, its definition is slightly uncertain and the area it covers is not as well defined as in the case of environmental and economic pillars. The social pillar is of particular importance in view of the fact that in the last decade, it has gained momentum through the attention paid by the business environment to the concept of social responsibility, especially in developed and highly developed countries. During the paper will be presented the implications, importance and role of social media, channels and popular tools used in promoting the social pillar that in recent years, has gained new value through various campaigns launched worldwide.

Social sustainability in the literature (Vallance, Perkins, & Dixon, 2011) has three components: "*social sustainability of development*, which is concerned with basic needs, equity inter- and intra-generational equity, *sustainability of bridge* is based on behavior change to achieve bio- physical environmental goals, *Sustainability of maintenance* refers to social acceptance or what can be sustained in social terms".

Social development aims to treat employees fairly, as well as ensure their responsible, ethical and sustainable treatment. A sustainable business should have the support and approval of its employees, stakeholders and the community in which it operates. The social pillar can be reduced to equal treatment of employees, but also to being a good neighbor and member of the community, both locally and globally.

Returning to the work environment, when we talk about social sustainability we also mean that companies should focus on strategies for retention and involvement, including benefits for employees, such as better benefits for maternity and paternity, flexible schedule, as well as and learning and development opportunities. Companies have also come up with many ways to help the community, such as sponsorships, scholarships and investments in local public projects.

According to the Western Australian Council for Social Services, social sustainability occurs when "formal and informal processes actively support the ability of current and future generations to create healthy and viable communities. Socially sustainable communities are fair, diverse, connected and democratic and offer a good quality of life. " (Western Australian Council of Social Service Inc., 2002).

Amartya Sen, the Nobel Laureate for her work on the well-being of the economy, offers the following dimensions for social sustainability:

"Equity - the community offers equitable opportunities and results for all its members, especially the poorest and most vulnerable.

Diversity - the community promotes and encourages diversity.

Social / interconnected cohesion - the community provides processes, systems and structures that promote connectivity inside and outside the community at a formal, informal and institutional level.

Quality of life - the community ensures that basic needs are met and promotes a good quality of life for all members at the individual, group and community level (e.g. health, housing, education, employment, safety).

Democracy and governance - the community provides open and accountable democratic processes and governance structures.

Maturity - the individual accepts the responsibility for consistent growth and improvement through broader social attributes (e.g., communication styles, behavioral patterns, indirect education, and philosophical explorations)" (Sen, 1999)

Social sustainability is not just the working environment, the rights and benefits offered to employees by employers, but also social inclusion, i.e. respect for the status and rights of all people equally, equality between the sexes, between races and acceptance of any social orientation. This goal is strongly transmitted in the online environment, there are hashtags used in huge numbers (#blm has over 26.2 million references)[3], and the subject is a topical one,

[2] Walmart, "Reducing Waste" https://corporate.walmart.com/global-responsibility/sustainability/sustainability-in-our-operations/reducing-waste, accessed at 18 January 2021, 4:18 PM.

[3] https://www.instagram.com/explore/tags/blacklivesmatter/ accessed at 22January 2021, 2:34 AM.

approached and promoted by the greatest influencers of the moment.

The economic pillar

The economic pillar of sustainability is the easiest to monitor. To be economically sustainable, a business must be profitable, so it must generate enough revenue to continue its business in the future.

This pillar is sometimes called the governance pillar, referring to good corporate governance. This means that "the board of directors and management align with the interests of shareholders, as well as the interests of the company community, value chains and end customers. In terms of governance, investors may want to know that a company uses accurate and transparent accounting methods and that shareholders are given the opportunity to vote on important issues. They may also want to ensure that firms avoid conflicts of interest in electing board members, do not use political contributions to obtain unjustified favorable treatment and, of course, do not engage in illegal practices " (Beattie, 2015) .

(United Nations, 2014) has issued the Sustainable Development Goals, which are its main goals to give humanity and planet Earth a better and more sustainable future. The 17 sustainable development objectives materialized in 69 targets aim to solve economic, social and environmental problems that ensure respect for human rights and equality between all categories of individuals. All these objectives are projected until 2030, when it is hoped to eradicate poverty, eradicate hunger, ensure access to clean water and sanitation, clean energy at affordable prices and responsible consumption and production.

2.4. United Nations strategy on sustainable development

The title of the 15-year Agenda for Sustainable Development, starting in 2015, developed by the United Nations that aims to free humanity from poverty and protect the planet, is called "Transforming our Moon: 2030 Agenda for Sustainable Development" and is the basis of the strategies adopted at continental or country level.

Transforming our world: The 2030 Agenda for Sustainable Development

Signatory's agenda advocating for sustainability aim 17 sustainable development objectives (SDO) is very bold and says "We are determined to realize the three dimensions of sustainable development - economic, social and environmental - in a balanced and integrated manner." (United Nations, 2014). The goals that the UN aims to achieve by 2030 are: no poverty, no hunger, health and well-being for all, quality education, gender equality, clean water and sanitation, renewable and affordable energy, good jobs and good economy, and Novara infrastructure, reducing inequality, cities and communities sustainable, responsible use of resources, climate change, oceans and seas clean, sustainable use of land, peace, justice and strong institutions, partnerships for sustainable goals.

The goals are very great and I could say impossible to achieve in such a short time. Next we will discuss the first objectives and we will notice not only that no progress has been made to achieve them, but even, due to factors such as the COVID-19 crisis, we can even talk about regressions.

The goals of the UN Sustainable Development Agenda are interdependent, so resolving one has a favorable echo in achieving another goal. Thus, if we refer to two of these, namely the eradication of poverty and the eradication of hunger, we will see that those measures that lead to poverty reduction will have a positive resonance in eradicating hunger or, conversely, conditions that increase poverty will increase the degree of poverty. starvation of the population.

Poverty eradication by the end of 2030 is the first goal of sustainable development on the UN agenda because poverty is in stark contrast to the progress that humanity is experiencing today. "Despite ongoing progress, 10% of the world lives in poverty and struggles to meet basic needs such as health, education and access to water and sanitation" (World Bank, 2018). The report presented by the World Bank is a painful and difficult to overcome truth. I believe that this plan cannot, however, be completed so quickly. There are huge communities that still live in precarious conditions, and in many countries it seems an impossible goal for decades to come. In the case of the European Union, the plan is easier to achieve, here we are referring only to a few countries with a GDP that places them in the ranking of countries that are still facing poverty.

As a brake on achieving these goals, humanity faced the COVID-19 pandemic in 2020, which was a huge impediment to fighting poverty. A study published in September 2020 found that "poverty has increased by 7% in just a few months due to the COVID-19 pandemic, even though there have been steady declines over the past 20 years." (BMGF, 2020)

If the goal of eradicating poverty has been hampered by the unfavorable conditions of 2020, this is also reflected in the goal of sustainable development of ending hunger, ensuring food security and improved nutrition, which promotes sustainable agriculture. Globally, 1 in 9 children are malnourished and causes the death of more than three million children annually. At European level, the situation is not so dramatic, there are only eight countries facing famine: Ukraine, Bulgaria, Serbia, Cyprus, Slovakia, Macedonia, Albania and Estonia[4].

[4] https://ourworldindata.org/hunger-and-undernourishment, accessed at 4 February 2021, 10:41PM.

The level of malnutrition has increased from 2015 to the present, after declining in recent decades. The increase in malnutrition, similar to the increase in poverty, is also caused by, among other things, force majeure situations such as the locust crisis and the COVID-19 pandemic.

2.5. European Union Sustainable Development Agenda

The European Union aims to work with the UN to achieve the same 17 goals by the end of 2030. In addition to the 17 goals by which world leaders aim to eradicate poverty and protect the planet, the European Union has reached *the Paris Agreement* on change climate. Both goals represent "the path to a better world and the global framework for international cooperation in the field of sustainable development and its economic, social, environmental and governance dimensions." (European Commission, Paris)

It takes us less than 10 years to achieve the 2030 Agenda, and "the world is not on the right track, the COVID-19 pandemic has further aggravated existing inequalities, sometimes reversing progress on certain goals. Climate change, gender inequality and poverty are the most pressing issues and political will and ambition will be needed to recover better. " (European Commission, 2020)[5]

In 2020, following the first wave of COVID-19, the European Union and its Member States state that "they are fully committed to accelerating the implementation of the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs) to ensure its timely implementation. „(European Union and its Member States, 2020)

In addition to the goals proposed by the UN, the European Union has set itself the goal of making Europe the first climate-neutral continent through *the European Green Pact.* It is "the EU's new growth strategy, with people and the planet at its center." (European Union and its Member States, 2020)

The European Green Pact is an initiative started in 2019, which aims to present developments to all pillars of sustainability by 2050. "The European Green Pact is the EU's roadmap for achieving a sustainable economy." (European Commission, 2019)

From the point of view of environmental sustainability, Europe aims to reduce greenhouse gas emissions, on the economic front we want an increase that is decoupled from the use of resources, and social sustainability is supported by the fact that all people be integrated into society and included in the development plan.

2.6. Sustainable development program in Romania

The national strategy for the sustainable development of Romania 2030 was adopted by the Government of Romania by Government Decision no. 877 of November 2018, this being elaborated under the direct coordination of the Department for sustainable development. Through this normative act, Romania adheres to the 17 sustainable development objectives proposed by the UN and adopted by the entire European Union.

In 2016, Romania registered a high share of materially deprived persons, compared to the EU average, being 23.8% following a report by INS[6]. Numerous measures have been taken to reduce this percentage, such as the Social Assistance Law no. 292/2011, Law no. 219/2015 on the social economy, the National strategy in the field of youth policy 2015-2020 was addressed.

Through sustained efforts, remarkable progress has been made on escalating poverty and in 2021, Romania was promoted by the World Bank at the level of the developed country, which means that we are on the right track to achieving economic, social and environmental sustainability goals. until 2030. The strategy that Romania approaches is oriented towards satisfying the needs of the citizens and focuses on resilience.

The strategy approached by Romania "starts from the premise that sustainable development presents a framework of thinking that, once mastered by the citizen, will help create a more equitable society, defined by balance and solidarity and that can cope with the changes brought by problems global, regional and national levels, including demographic decline." (Celac, Vădineanu, & others, 2018)

From the point of view of economic sustainability, Romania aims to record long-term economic growth. Even if in 2021 it received the status of a developed country, it can be claimed in case of economic setbacks. But, at present, Romania is on the right track and can reach the UN economic objectives.

The proposed targets for 2030 are "eradicating extreme poverty for all citizens, reducing the number of citizens living in relative poverty by at least half and strengthening the unitary national system of emergency response services, further rehabilitation and compensation for losses in the event of natural disasters, industrial accidents or extreme weather events. " (Celac, Vădineanu, & others, 2018)

From a social point of view, it is necessary for Romania to offer its citizens a cohesive society, with a well-developed education and health system. One of the 17 objectives is to reduce inequalities between men and women, and Romania is the country with the lowest discrimination in this regard, especially in terms of wages.

We want society to be more open and citizens to feel supported. "It is necessary to cultivate the resilience of the population, so that the citizen, in a fair institutional framework, can realize his dreams at

[5] https://ec.europa.eu/info/strategy/international-strategies/sustainable-development-goals/eu-and-united-nations-common-goals-sustainable-future.ro, accessed at 8 February, 1:43AM.

[6] http://statistici.insse.ro/shop/index.jsp?page=tempo2&lang=ro&context=20, accessed at 15 Feb, 11:23 PM.

home. At the same time, the state must help increase the potential of the citizen by addressing issues related to health, education and the limits of the free market, problems that can be addressed through public policies, resulting in a high standard of living for all citizens." (Celac, Vădineanu, & others, 2018)

Romania aims to increase the social capital that leads to increasing the potential of the country's citizens, in order to achieve by its own forces, thus ensuring the sustainable development of the community.

Environmental sustainability is receiving more and more attention in our country, targeting both natural and anthropogenic environments. It is important to protect nature, based on human-environmental impact and put it in the forefront in achieving goals.

Some of the goals that Romania aims to meet by 2030 are: "expanding the transmission and distribution networks for electricity and natural gas in order to ensure access for domestic, industrial and commercial consumers to safe energy sources at acceptable prices, ensuring security of the monitoring platforms for the production, transmission and distribution networks of electricity and natural gas, decoupling economic growth from the process of resource depletion and environmental degradation by considerably increasing energy efficiency (by at least 27% compared to the status –quo scenario) and the widespread use of the EU ETS scheme under predictable and stable market conditions, increasing the share of renewable energy sources and low-carbon fuels in the transport sector (electric vehicles), including alternative fuels, improving air quality, recycling in 55% proportion of municipal waste by 2025 and 60% by 2030." (Celac, Vădineanu, & others, 2018)

2.7. Sustainability during the pandemic

The year 2020 gave us another perspective on life. The pandemic, as well as other events that have taken place worldwide, lead us to the conclusion that sustainability is fast becoming the new reality of the world. In just a few months, COVID-19 has managed to transform the world, all at an economic, environmental and social price.

Crisis COVID-19 impacted strong corporate activity and generated a large number of changes on their communication strategy, supply chain, safety and health of employees, unemployment in large numbers and many other powerful transformation. However, the current downturn in economic activity is not expected to generate long-term environmental benefits.

Covid-19 made us aware of our vulnerability. The magnitude of the disturbance caused by this virus is comparable, in many ways, to a world where climate change is left uncontrolled. The pandemic allowed us to experience the real global disruption caused by a scientific- fantasy scenario event, which affected our entire social and economic system, although as a personal note, I would like to add an environmental issue. As a result, political and business leaders are taking sustainability more seriously now, given the conditions caused by the pandemic.

In 2020, in the context of the coronavirus pandemic, the fourth pillar of sustainable development will be developed, namely the health pillar, which is interrelated with the environmental pillar, the economic pillar and the social pillar. A sustainable health and care system is achieved by providing high quality care and improving public health without depleting natural resources or causing severe environmental damage.

According to the World Bank Group "short-term considerations - over a period of six to eighteen months - for governments should be the impact of the pandemic on employment and economic activity, and how long it will take until the full implementation of the creation employment and tax incentives." The article also states that in the long run, governments must "consider the effect of COVID-19 on: (i) human and social capital; (ii) technologies; (iii) natural and cultural capital; (iv) physical capital; and (v) fundamental market failures. " (World Bank Group, 2020)

In the new reality affected by COVID-19, it is essential for companies to integrate sustainability into a long-term recovery and growth plan. At the same time, significant barriers need to be overcome to reuse assets and capacity for post-pandemic markets.

From previous experience of the global financial crisis, it is suggested that any decrease in greenhouse gas (GHG) emissions is likely to be short-lived and followed by a return to emissions, increased due to stimulus packages and low greenhouse gas prices. Following the 2008 recession, "the subsequent increase in CO2 emissions exceeded the observed transient decline and about 40% of the recovery effect was due to a small number of emerging economies, especially China and India. But the effect has also been substantial in the European Union (EU)." (Tienhaara, 2010)

It is important to place health and sustainability at the heart of the economy, implementing post-COVID-19 policies that achieve multiple goals: health, environmental sustainability, employment and equitable socio-economic recovery.

The economic policy response to the COVID-19 shock should pursue integrated actions to improve health and reduce greenhouse gas emissions. (Haines, Pagano, & Guerriero, 2020) I argue that the means that will help in this regard are "eliminating harmful subsidies for health and climate and helping renewable energy sources to remain economically competitive, especially when oil prices are low, but also by recapitalizing companies not only according to economic criteria, but also based on environmental and health criteria."

The need for a post-COVID economic stimulus is an opportunity to redirect harmful subsidies for fossil fuels and other harmful products and services to more productive and necessary goods, as well as sustainable energy. "Currently, subsidies for fossil fuels remain high in some countries and exceed subsidies for

renewable sources" (International Renewable Energy Agency, 2019).

According to the International Monetary Fund, "in 2015 global post-tax subsidies for fossil fuels were estimated at $ 4.7 trillion, reflecting in particular the failure to take into account air pollution and the impact of climate change." (Coady, Parry, Le, & Shang, 2019)

The pandemic also greatly affects the social pillar. Inter-human relations are strongly impacted by the crisis caused by COVID-19. As we saw above, social sustainability includes both interactions for work, relationships with the employer, benefits offered at work, but also social inclusion and human adaptation. We can also talk about the fact that "sustainable human development can be seen as a development that promotes the capabilities of present people, without compromising the capabilities of future generations." (Sen AK, 2000) Societies have been isolated, borders have been closed due to the pandemic, and the unemployment rate is severely affected, rising. Companies are also in trouble.

Over the past year, pervasive challenges have undermined poverty reduction and inclusive growth. A study by the World Bank says that "recently, due to COVID-19 and the economic crisis associated with the pandemic, progress towards social inclusion has slowed down and long-term systemic inequalities and exclusions have been revealed. Extreme poverty is expected to increase due to the crisis, affecting between 73 and 117 million people. Recent protests against racism and persistent discrimination also underscore the structural barriers to opportunity and prosperity for so many human beings. "(Sivaraman, 2020)

Sustainability and social inclusion also work between work teams to build tools to engage citizens in investment projects. It is very important that citizens are involved during the COVID-19 pandemic, as this can provide insight into how the crisis is affecting communities. In Afghanistan, citizen involvement means "working with communities to share COVID-19 prevention messages via WhatsApp and Telegraph, reaching out to people affected by the crisis, including refugees, people with disabilities, poor women and nomads. These channels of communication are two-way, enabling citizens to receive support and share information about changing situations in their communities. " (Sivaraman, 2020)

3. Conclusions

Sustainable development normally leads us to think of a concept that comes as a solution to current problems, problems that we face due to the rapid expansion and carelessness with which we treat the environment. We could put forward the idea that sustainability is considered a new model of development, which took shape towards the end of the twentieth century. However, the concept of sustainable development is much older.

Modern sustainability strategies are developed considering three pillars that definitely influence the future of humanity: economic, social and environmental or, informally, we can call them pillars of profits, planet and people.

The three dimensions of sustainable development are inter-conditioned, the effects of any action whether positive or negative in one area, reflecting like "*boule of neige*" on the other two.

In the era of developing the concept of Industry 4.0 and implicitly the transition to digitalization, the strategic interest in global sustainability has focused on the environmental pillar. Recent research has shown that companies focus more on reducing their carbon footprint, packaging waste, water use and overall environmental impact. And today's consumer is much more selective in terms of the company from which they purchase products or services, the inclination towards the social environment is a criterion that prevails when making a purchase decision.

The social pillar is of particular importance in view of the fact that in the last decade, it has gained momentum through the attention paid by the business environment to the concept of social responsibility, especially in developed and highly developed countries. During the paper will be presented the implications, importance and role of social media, channels and popular tools used in promoting the social pillar that in recent years, has gained new value through various campaigns launched worldwide.

Returning to the work environment, when we talk about social sustainability we also mean that companies should focus on strategies for retention and involvement, including benefits for employees, such as better benefits for maternity and paternity, flexible schedule, as well as and learning and development opportunities. Companies have also come up with many ways to help the community, such as sponsorships, scholarships and investments in local public projects.

The economic pillar of sustainability is the easiest to monitor. In order to be economically sustainable, a business must be profitable, so it must generate enough income to be able to continue its activity in the future. This pillar is sometimes called the governance pillar, referring to good corporate governance.

The signatories of the Agenda for Sustainability set out 17 Sustainable Development Goals which they aim to achieve by 2030: no poverty, no hunger, health and well-being for all, quality education, gender equality, clean water and sanitation, renewable and affordable energy, good jobs and a good economy, innovation and infrastructure, reducing inequality, sustainable cities and communities, responsible use of resources, combating climate change, clean oceans and seas, sustainable land use, peace, justice and strong institutions, partnerships for sustainable goals.

Covid-19 made us aware of our vulnerability. The magnitude of the disturbance caused by this virus is comparable, in many ways, to a world where climate

change is left uncontrolled. The pandemic allowed us to experience the real global disruption caused by a science-fiction scenario event, which affected our entire social and economic system, although as a personal note, I would like to add an environmental issue. As a result, political and business leaders are taking sustainability more seriously now, given the conditions caused by the pandemic.

In the context of the coronavirus pandemic, in 2020 the fourth pillar of sustainable development will be developed, namely the health pillar, which is interrelated with the environmental pillar, the economic pillar and the social pillar. A sustainable health and care system is achieved by providing high quality care and improving public health without depleting natural resources or causing severe environmental damage.

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THE INTEGRATION OF ESG FACTORS IN BUSINESS STRATEGIES – COMPETITIVE ADVANTAGE

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Mirela-Cristina VOICU[**]

Abstract

Uncertainty, increasingly higher and diverse risks but also the opportunities generated by the environmental, social and corporate governance factors' actions, have led to a change of approach in the business environment - these factors are no longer treated randomly and punctually in business strategies but, in an integrated approach, in the form of ESG factors. Consequently, starting with 2005, responsible investments (ESG investments) gradually increased, becoming a decisive criterion in investment decisions, both at individual and institutional level, especially on the financial markets. It was also facilitated by their regulation and the introduction of general principles and criteria for analysis and degree of implementation measurement at the organizations' level.

Given the positive externalities generated, the purpose of the paper is to popularize and promote this type of investment and, implicitly, the sustainable behavior in business, based on the principles of sustainable growth. In this sense, we used open documentation sources of international specialized institutions, the research method having both theoretical character by presenting the conceptual evolution of ESG investments and empirical character by revealing the dynamics, advantages and limits of integrating ESG criteria in business strategies.

Keywords: *competitiveness, investment analysis, ESG factors, responsible investments, sustainability*.

1. Introduction

Awareness of the climate change impact, growing demonstrations to promote and support equity and social justice, the effects of the COVID pandemic have led to a change in perspective in society, including in business. In this context, there is an increase in the interest of investors, both institutional and individual[1], in order to obtain sustainable results and, consequently, a reconsideration of business strategies.

Thus, if initially, the responsible investments were considered niche investments, recently there has been an acceleration of the implementation rate and the degree of spread of this investment paradigm, the impact of non-financial factors such as environment, social and corporate governance (ESG factors) being integrated more often, along with the financial impact, in the analysis and decision-making in business. But while the use of this perspective is on the rise, it still remains a competitive advantage of organizations that implement and advocate for ESG investments, increasing their financial value and long-term resilience.

Therefore, the boundaries of business performance analysis have been extended by including, alongside traditional economic and financial indicators, of ESG criteria.

Table no.1 Examples of ESG factors

ENVIRONMENTAL	SOCIAL	GOVERNANCE
Resource use rationality	Modern slavery	Board of directors and employees diversity
Climate change	Supply chain	Elimination of corruption
Recycling	Exploitation of minors	Lobby policy
Pollution	Labor conditions	Donation policy
Deforestation	Inclusion	The relationship between employees - manager - shareholders (fair remuneration, support for innovative ideas)
Natural resources depletion (water)	Human capital management	Transparency
Circular economy	Health and safety (including data	Organizational culture
Gas emissions and the greenhouse effect	Social conflicts	Fiscal strategy

Source: personal adaptation after "An introduction to responsible investment", available online at

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[1] Banks, insurance companies, pension funds, hedge funds.

https://www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article and https://www.bwfa.com, accessed on 15.03.2021

2. ESG investments – dashboard

2.1. Short history

The history of ESG indicators is relatively recent and has emerged at the initiative of the UN in order to accelerate the inclusion of the financial sector, business in general, on the path of the principles of sustainable development. Thus, it began in 2004 when, at the initiative of the UN Global Compact and supported by the International Finance Corporation (IFC) and the Swiss Government, international discussions were started with representatives of the largest financial institutions in order to identify means to include ESG indicators in the capital markets[2]. The conclusions of these debates were included in 2005 in a reference paper in the field of sustainable investments, the report "Who Cares Wins", on which occasion it was used for the first time officially, in a specialized paper, the concept of factors ESG and the idea that the integration of environmental, social and governance factors in investment processes produces positive effects on their financial performance was promoted. The idea of the relevance of ESG factors in the financial evaluation of a business was reiterated in the "Freshfield" report, also prepared under the auspices of the UN, by the United Nations Environment Program Finance Initiative (UNEP FI)[3].

These two reports can be considered the cornerstone in the direction of integration and interconnection of the three categories of factors for the development and implementation of sustainable investments, consolidated on ESG factors.

The next step in promoting this approach in business strategies was the launch of the Principles for Responsible Investment (PRI) in 2006. Evidence of the growing interest in this type of investment is the continuous annual increase in the number of those who have adhered to these principles. Thus, from 100 signatories at the time of launch[4], on March 31, 2020, the total number of signatories was 3,222, which means an increase of 29% over the previous year in the number of investor signatories (from 2092 to 2701), and of 21% of the number of signatories owning the assets, meaning 521[5].

The rise of responsible investment was favored by three conditions[6]:

- the growing recognition and popularization, both in the business and in the academic environment, of the positive contribution that the integration of ESG factors has on the financial results;

- the emergence of national and international regulatory institutions (reference United Nations Environment Program Finance Initiative - UNEP FI, Principles for Responsible Investing in the New York Stock Exchange -PRI, SSEI Sustainable Stock Market Initiative) which through involvement and creation of instruments and guidance promoted the idea of ESG factors as part of the fiduciary obligation of investors;

- manifesting the clients' interest for the transparency of the information regarding the placed investments.

For example, in the US at the beginning of 2020, $ 17.1 trillion was actively invested in ESG investments, an increase of 42% over 2018[7].

We should not lose sight of the fact that specific concerns for the three problems analyzed by ESG factors have existed before. Thus, topics such as socially responsible investment, corporate governance, environmental protection and reducing the effects of climate change, human rights, gender diversity, labor exploitation of minors, sustainable development have gradually become, since the 1970s, issues of interest for the academic environment, for investors but also for institutional decision makers at national and international level. Notable in this regard are a number of positions on current economic issues, such as: The establishment in 1971 in the USA of the first socially responsible mutual fund, the massive withdrawal in the 80s of South African investments in protest against apartheid, the publication of the first corporate governance code in the United Kingdom, the issuance of green bonds by the World Bank, the involvement of over 570 large investors in reducing greenhouse gas emissions (Climate Action 100+), the UN concern for promoting sustainable development among member countries (the 2030 Agenda for Sustainable Development is the ongoing initiative), the spread of social enterprises at international level since 1978 (although in different forms and names). Under these conditions, the added value generated by the

[2] Georg Kell (11 July 2018), *The Remarkable Rise Of ESG Investing*, available article at http://www.georgkell.com/opinions/https/wwwforbescom/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/3dd3f3501695, accessed online on 18.04.2021.

[3] UNEP FI is a partnership between The United Nations Environment Programme and the global financial sector to mobilize private sector finance for sustainable development.

[4] https://www.unpri.org/pri/about-the-pri, accessed online on 18.04.2021.

[5] https://www.unpri.org/annual-report-2020/how-we-work/building-our-effectiveness/enhance-our-global-footprint, accessed online on 18.04.2021.

[6] https://www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article, accessed online on 10.04.2021.

[7] https://www.forbes.com/sites/joanmichelson2/2021/03/16/esg-investing-is-a-star-women-are-why/?sh=24ed98104bde#16163357088804&{"sender":"offer-0-Pd0MW","displayMode":"inline","recipient":"opener","event":"resize","params":{"height":293,"iframeId":"offer-0-Pd0MW"}}, accessed online on 18.04.2021.

implementation of the principles of responsible investments is the integrated approach of the three dimensions, their merging and their inclusion in a clear and organized manner within business strategies, thus increasing the premises for more efficient risk management and increasing long-term financial returns.

2.2. Opportunities and limitations in adopting ESG criteria

Although the integration of environmental, social and governance indicators in the analysis and implementation of business is still mitigated by the primary desire of investors, namely profit maximization, along with awareness and popularization of positive effects in the business environment that has adhered to sustainable investment values (a short selection is presented in table No. 2), we can gradually note, an acceptance of them as part of the fiduciary debt[8].

Table no. 2 Benefits of implementing ESG factors versus ignoring costs

ESG factors	Superior implementation	Low implementation
Employees (factor G)	involvement, superior training, diversity, innovation => positive impact on labor productivity	poorly trained and uninvolved staff, high staff turnover, inadequate working conditions => negative impact on labor productivity
Clients (factor S)	dissatisfaction mediation, flexibility, accessibility => customer loyalty	lack of a mediation policy in case of disputes (e.g. return conditions), non-compliance with the rules on labeling, over-invoicing => dissatisfied customers and thus reduced sales
Suppliers (factor S)	optimal supply chain logistics, payment on time => optimization of the supply process	supply problems, poor control quality => selected reputational risk industry
Environment (factor E)	control of carbon emissions, use of renewable energy => supply, production distribution on sustainable principles =>long-term economic benefits	pollution, irrational consumption of natural resources => short-term economic benefits
Social projects (factor S)	promotes and implements the principles of social justice => visibility and direct contribution	lack of social involvement => they do not contribute to the creation of economic, political
	to the improvement of the factors belonging to the macro-environment (factors included in any business plan through the analysis of FISH)	and social opportunities, they only pursue short-term profitability

Source: personal adaptation based on information from RBC Global Asset Management (2019), What ESG is, and isn't. Breaking down responsible investing, Canada, p. 2, article available at https://www.rbcgam.com/documents/en/articles/what-esg-is-and-isnt.pdf, accessed online on 1.03.2021

As a result, the sphere of ESG indicators is gaining ground on the financial markets, evolving and developing as a complementary segment of the classic financial information.

Thus, all the more so, the analysis of empirical data revealed a positive financial impact, reflected by increased profitability, reduced risks, reduced capital costs, improved operational performance and, implicitly, a better return on stock prices over the medium term and long in the case of companies where the ESG criteria have been implemented.

Reference in this direction is the study conducted in 2012 "The impact of corporate sustainability on organizational processes and performance" for which the authors George Serafeim, Bob Eccles and Ioannis Ioannou compared the results recorded in 1993-2009 by 180 American companies, divided into two categories: companies that have adopted and implemented sustainable development policies (High Sustainability companies) and companies not interested in their sustainable development (Low Sustainability companies).

Similar results have been reflected in numerous subsequent scientific studies, such as "Industrial changes in corporate sustainability performance - an empirical overview using data envelopement analysis[9]" or "Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk, and Performance[10]", but also within studies and recommendations of some globally prestigious companies activating in the investments evaluations and consulting field - MSCI, Morgan Stanley Institute for Sustainable Investing, Moody's, BlackRock, etc.

For example, BlackRock, Inc., an American multinational investment management corporation, one of the world's largest asset managers, states that between January 1 and April 30, 2020, 88% of the sustainable funds in their analysis exceeded unsustainable counterparts.

Also, for 2020, the Morgan Stanley Institute for Sustainable Investing reported a higher performance of sustainable investments compared to traditional ones

[8] Georg Kell (11 July 2018), *The Remarkable Rise Of ESG Investing*, available article at http://www.georgkell.com/opinions/https/wwwforbescom/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/3dd3f3501695, accessed online on 18.04.2021.

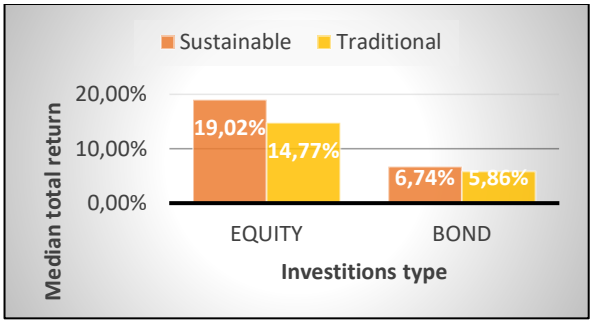
[9] Chang Dong-Shang, Kuo Li-Chin Regina, Chen Yi-Tui (2013), *Industrial changes in corporate sustainability performance – an empirical overview using data envelopment analysis*, Journal of Cleaner Production, Volume 56, pp.147-155.

[10] Guido Giese, Linda-Eling Lee, Dimitris Melas, Zoltán Nagy, Laura Nishikawa (2019), *Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk, and Performance*, The Journal of Portfolio Management, volume 45, number 5, pp 1-14.

from a median total return perspective (chart no. 1), and Moody's stated in February 2021 that "2020 marked a year for the performance of ESG investments" and that "Thematic investments in environment, social and governance (ESG) have become one of the best performing categories of investment in recent years, paving the way for the continued growth of this strategy.".[11]

Therefore, the evolution of the financial results in the context of the COVID pandemic brought an additional proof of the superior resilience of the investments built on the principles of sustainable development.

Chart no.1. Sustainable vs traditional investments - median total return in 2020



Source: personal adaptation based on information available at https://www.morganstanley.com/ideas/esg-funds-outperform-peers-coronavirus, accessed online on 12.03.2021

All these results support the importance of integrating the ESG criteria together with the financial evaluations, within the reference criteria for designing the business strategies and to analyze businesses, respectively investment opportunities, regardless of the activity sector.

2.3. Reporting the degree of implementation of ESG indicators

Given that ESG factors play an important role in a company's ability to create value by identifying and correcting non-financial issues that may impact the organization's financial results, there has been a growing interest in gaining access to such information by default, the ESG reporting request. The diversity of reporting models and tools, the difficult access to the information presented subjectively and fragmented revealed the need to develop and apply standardized ESG reports.

Several evaluation systems are currently used: GRI standards, Stakeholder Capitalism Metrics of the World Economic Forum, Moody's Sustanalytics which calculates ESG ratings for both companies and countries, MSCI ESG Indexes, Standard & Poor's ESG Evaluation.

The first steps towards building a business sustainability reporting guide were taken by GRI in 2000, but limited to environmental factors. Gradually, the GRI guide was extended, completed and improved, being included together with environmental factors and economic, social and governance factors, so that in 2016 the first global standards for sustainability reporting will be formulated. Today, over 80% of the world's major corporations use GRI standards.[12]

Given that investors' interest in ESG information is growing, the ESG information market has evolved, matured continuously, but currently, the diversity of evaluation methods and the selective and optional nature of the reported information generate disputes and difficulties in comparing scores.

As a result, companies and international institutions such as the World Economic Forum, the Global Reporting Initiative (GRI), the US Council on Sustainable Accounting Standards (SASB), the International Federation of Accountants (IFAC) aim to develop standardized sustainability reporting standards. but with ESG factors adapted to each sector of activity.

In this context, the political environment is also emerging as an important actor, with a decisive role in creating a favorable framework, built on global rules and principles that regulate, stimulate and harmonize the practices of monitoring and reporting the sustainability of organizations' activities. sustainability to go beyond formalities and become, along with financial reporting, a relevant source of information, generally accepted and a decision-making criterion for investors.

For example, the rules of the 2014/9 /EU Non-Financial Reporting Directive - NFRD (a supplement to Directive 2013/34 / EU) currently apply at EU level, and the European Commission announced in April 2021 its intention to it imposes additional reporting requirements compared to the rules in force and to extend the scope (by different standards for large companies and SMEs) so that, in the long run, sustainability reporting becomes comparable to financial reporting[13].

Today, thousands of professionals around the world hold the position of ESG analyst, and the sustainability teams of large companies and evaluation institutions also include professionals in accounting and finance[14]. Consequently, ESG reporting is gradually affecting the accounting profession as well.

[11] https://www.forbes.com/sites/joanmichelson2/2021/03/16/esg-investing-is-a-star-women-are-why/?sh=24ed98104bde#16163357088804&{"sender":"offer-0-Pd0MW","displayMode":"inline","recipient":"opener","event":"resize","params":{"height":293,"iframeId":"offer-0-Pd0MW"}}, accessed online on 18.04.2021.

[12] Kell Georg (2020), *The Remarkable rise of ESG*, articol disponibil pe https://www.arabesque.com/2020/02/04/the-remarkable-rise-of-esg/, accessed online on 16.03.2021.

[13] https://home.kpmg/ro/ro/home/presa/comunicate-presa/2021/05/sustenabilitatea-element-cheie-afaceri.html, accessed online on 6.05.2021.

[14] https://blog.aicpa.org/2021/03/are-you-ready-for-these-esg-trends.html#sthash.1 Nu6AcmK.QqkKIgaW.dpbs?utm

2.4. Romania from the perspective of implementing ESG factors

Romania, as a member state of the European Union, took the first steps for harmonization with the European regulations by enforcing the Order no. 1938/2016, amended and supplemented by Order no. 3456/2018. If in the initial version only the institutions of public interest with over 500 employees were targeted, Order 3456 extends the area of applicability, eliminating the condition regarding the public interest institutions. Thus, according to Article 7, starting with the financial year 2019 "Entities which, at the balance sheet date, exceed the criterion of having an average number of 500 employees during the financial year shall include in the administrators' report a non-financial statement containing, as far as they are necessary to understand development, performance and position of the entity and the impact of its work, information on at least environmental, social and personnel issues, respect for human rights, the fight against corruption and bribery, including".

Thus, if approximately 180 entities were initially targeted, after the addition, more than 1000 entities are targeted, especially since, although not directly, the regulation on sustainability reporting also indirectly targets collaborating companies (suppliers, subcontractors) because, the wording a non-financial statement also involves non-financial data provided by them. As a result, these companies will also have to implement a process of tracking and reporting non-financial performance[15] but, although at first glance it may be perceived as an additional burden for taxpayers, previous experiences have shown a positive impact on the long-term financial results of organizations, but also on society, the environment and the national economy.

3. Conclusions

Sustainability must be the core of successful[16] investment since sustainable and responsible investment brings together traditional financial values and environmental, social and governance factors, allowing their promoters to express their own values and preferences from an ethical and moral business perspective, without negatively affecting the profitability of their investments.

Although ESG investments are currently analyzed and measured mainly from the perspective of capital markets, their expansion as a generalized business practice, regardless of the field of activity and scope, must become a desideratum for all actors of national economies. This is because the holistic tracing of ESG criteria in business strategies, through their multistakeholder approach, has proved useful and effective not only for the entities that have implemented them, but also for the evolution of financial markets, of host economies in general.

ESG investments therefore aim to optimize financial results, but also the current impact and the legacy left to future generations.

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[16] Al Gore, vice president of the United States from 1993 to 2001, interview available at https://www.investmentnews.com/al-gore-covid-19-esg-redesign-global-economy-194930, accessed online on 16.03.2021.

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AUDITORS' AND MANAGERS' RESPONSIBILITIES REGARDING GOING CONCERN ASSUMPTION IN THE COVID -19 PANDEMIC CONTEXT

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Abstract

The social protection measures imposed or recommended by the authorities during 2020, as a result of the COVID-19 pandemic, had a negative impact on the activity carried out by several economic entities in Romania, calling into question the presumption of going concern. Such situations require a closer analysis by auditors and members of the management of economic entities in terms of the risk of business continuity and the implications for the annual financial statements. The annual financial statements are the main source of information for a large category of users, including owners, on the assets, liabilities, financial position and financial performance of economic entities. If the management of an economic entity is aware of events that may lead to a significant restriction of the entity's activity or inability to continue its activity, it must be presented in the financial statements, as well as in the accompanying reports, the director's report and the of the independent auditor, as appropriate.

The purpose of this paper is to present the responsibilities of financial auditors and those of the management of economic entities regarding the presumption of going concern, in the context of the pandemic COVID - 19. To achieve this goal there were analyzed studies, conducted so far by various authors, regarding the economic fields affected by the COVID -19 pandemic, the recommendations of the professional bodies active in the field of auditing the financial statements regarding the analysis of the business continuity risk and how they were applied by the auditors, the provisions of national accounting regulations regarding the going concern principle and the responsibilities of economic entities management to prepare the annual financial statements, in the current context.

Keywords: *going concern, annual financial statements, independent auditor's report, significant subsequent events, COVID-19.*

1. Introduction

For most economic entities in Romania, the year 2020, in the context of the COVID-19 pandemic, represented a year full of challenges, which called into question the presumption of continuity of activity. The effects of this year on economic activity will be felt even in 2021 and maybe even in the future depending on the evolution of the pandemic and the restrictive measures that could be imposed by the authorities.

Although it is the first situation of this kind, situations of economic crisis have existed in the past, respectively in the period 2008-2012, the period of the last economic crisis and its effects. During this period, the international and national professional bodies made a series of recommendations that signaled the necessary changes in the approach of the audit mission, and among the identified risk areas was the continuity of activity.[1]

As expected in the context of the COVID -19 pandemic, the Chamber of Financial Auditors (CAFR), the national professional body, made recommendations to the financial auditors to give importance to the analysis of exposure to business risk and implications for annual financial statements.[2]

The International Auditing and Assurance Standards Board (IAASB) also produced, in 2020, a publication for audit firm employees highlighting the potential implications of the current context on audit reports, including significant uncertainty about business continuity.

In Romania, indications regarding the development of the activity of economic entities based on the principle of continuity can be obtained from the financial statements and from the accompanying audit report.

The financial statements are the main source of information on the financial position of the economic entity, financial performance, as well as other information detailing aspects of the activity carried out, presented in the explanatory notes. In most cases, the annual financial statements are prepared on a going concern basis. This principle states that the entity is considered to have a continuation of its business in the foreseeable future with neither the need nor the

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[1] Bunget Ovidiu-Constantin, Blidișel Rodica Gabriela, Dumitrescu Alin Constantin, Demian Raluca, *The Financial Auditor's Reaction to the Challenges of the Economic and Financial Crisis*, Financial Audit, no. 6, CAFR, Bucharest, 2014, pp. 4.

[2] https://www.cafr.ro/wp-content/uploads/2020/03/Recomandari-pentru-AF-COVID_25_3_20.pdf accessed on February 1, 2021.

intention to be liquidated, to suspend[3] or to significantly restrict its activity [4].

According to a study conducted by the National Institute of Statistics, in April 2020, approximately 34% of economic agents that participated in the research could not estimate the evolution of economic activity, 45% estimated a reduction in the volume of activity by more than 25%, while about 14% of economic agents expected the closure of the activity.[5] The statistical research was addressed to the managers of economic entities with activity in the manufacturing industry, constructions, retail trade and services.

The purpose of this paper is to present the responsibilities of financial auditors regarding the presumption of continuity of the activity of an economic entity and those of the entity's management, in the context of the COVID-19 pandemic, from the perspective of companies that apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements and chose as the reporting period the calendar year. In order to carry out the work, a study was carried out on the economic fields affected by the COVID-19 pandemic, a documentation on the provisions of the International Standards on Auditing regarding the responsibilities of financial auditors to assess business continuity, as well as on recommendations issued by the International Auditing and Assurance Standards Board (IAASB) for audit firm employees in terms of reporting in the current context. Also, a documentation was made on the provisions of the accounting regulations regarding the responsibilities of the management of an economic entity to analyze whether the assumption regarding the continuity of the activity is still adequate or not.

In order to highlight the impact of the economic context caused by the COVID-19 pandemic on the independent auditor's report and on the financial statements, the financial statements for 2019 were analyzed, accompanied by the auditor's report, of several economic entities that apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014, with activity in the affected fields.

2. Effects of the Covid -19 pandemic and implications on the going concern

To fight the pandemic, EU Member States have taken a wide variety of measures, including restrictions on travel into the EU and between EU Member States, cancellation of public events, restrictions on private gatherings, closing of schools, bars, restaurants, hotels and many retail shops with the exception of supermarkets, pharmacies and banks.[6]. Most of the measures to prevent the spread of COVID -19 were taken in mid-March 2020, kept during April, and since May, many of them have been abandoned or reduced in severity. During the summer, prevention measures were more relaxed, which led to an increase in the number of new cases of COVID-19, and this situation led the authorities in many EU Member States to reintroduce in September and October 2020 some isolation measures of the population.

In Romania, between March and May 2020, the activity of many companies, regardless of their size, was blocked and they faced major problems related to sales, the impossibility of paying due debts due to non-collection of receivables, as well as the situation of choose between keeping employees, sending them into technical unemployment or firing them[7].

The vast majority of companies in Romania whose activity has been affected by the restrictions imposed by the authorities to prevent the spread of COVID -19 operate in tourism; road, sea, air transport; production and sale of cars; constructions; production of non-vital goods during the pandemic (clothing, footwear).[8]

In view of the information presented above, we conclude that the main economic areas affected are construction, production, services and trade. Thus, in figure 1 we present the dynamics of the volume of constructions, industrial production and trade in the period January - December 2020.

[3] Țurlea Eugeniu, Mocanu Mihaela, *Reflection upon the Accountability of Management and Auditors in Evaluating Going Concern*, Financial Audit, no. 1, CAFR, Bucharest, 2010, pp. 24.

[4] Order of the Minister of Public Finance 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements, article 49, paraghraph 1.

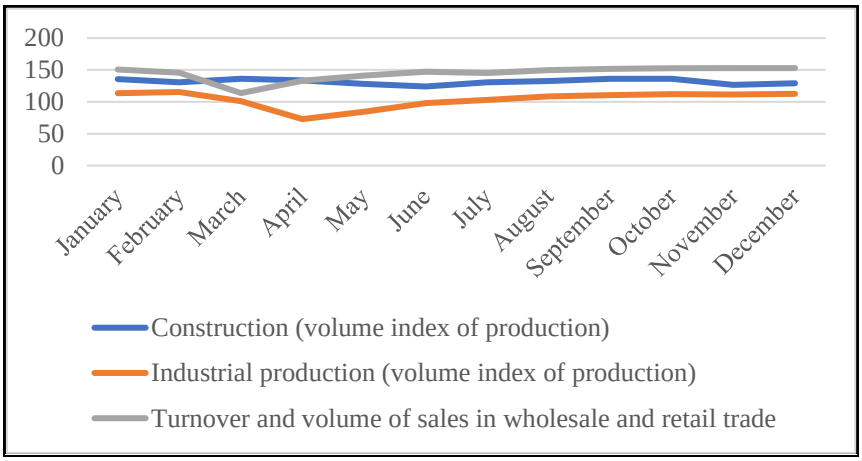
[5] https://insse.ro/cms/sites/default/files/cercetare_impactul_covid-19_asupra_mediului_economic.pdf accessed on February 1, 2021.

[6] Covid-19 containment measures in Europe, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Impact_of_Covid-19_crisis_on_construction#Covid-19_containment_measures_in_Europe accessed on February 20, 2021.

[7] Corina Grazziela Dumitru, Alina Mihaela Irimescu, *Guide to Financial Reporting According to National Accounting Regulations, in the Context of the Crisis Generated by Coronavirus*, CECCAR, Bucharest, 2020, pp. 2.

[8] Corina Grazziela Dumitru, Alina Mihaela Irimescu, *Guide to Financial Reporting According to National Accounting Regulations, in the Context of the Crisis Generated by Coronavirus*, CECCAR, Bucharest, 2020, pp. 3.

Fig. 1. Development of construction, production activities & sales, between January and December 2020



Source: https://ec.europa.eu/eurostat and author's processing

The table below shows the change in the volume of construction production, industrial production and sales in December compared to January 2020 and in December compared to April 2020:

Table 1

	December/ January 2020	**December/ April 2020**
Construction	-4.79%	-3.44%
Industrial production	-0.88%	54.73%
Sales	1.39%	14.70%

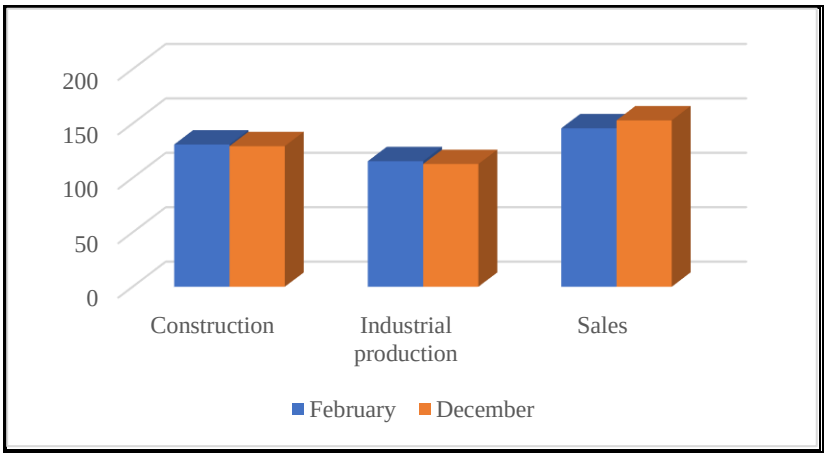
Source: https://ec.europa.eu/eurostat and author's processing

In order to perform the analysis, the first month of 2020, the month in which the COVID -19 pandemic had not yet been declared, was taken as benchmarks, as well as April, which was the first full month in which severe restrictive measures were applied that led to limiting the activity of certain economic entities or to the temporary or permanent closure of others.

Thus, the volume of construction production decreased by 4.79% in December 2020 compared to January of the same year, and compared to April by 3.44%. Meanwhile, the volume of industrial production decreased by 0.88% in December 2020 compared to January 2020 and an increase of 54.73% compared to April 2020. The volume of sales, although in March 2020 recorded the lowest value (Fig. 1), increased both in December compared to January 2020, by 1.39%, and compared to April 2020, by 14.7%.

An analysis of the recovery of the volume of activity in December compared to February 2020 was also performed, the last month before the declaration of the COVID -19 pandemic, which is shown graphically in figure 2. Thus, the volume of construction production was recovered in proportion of 98.85%, that of industrial production in proportion of 97.75%, and in terms of sales volume, it exceeded in December the value recorded in February 2020 by 5%.

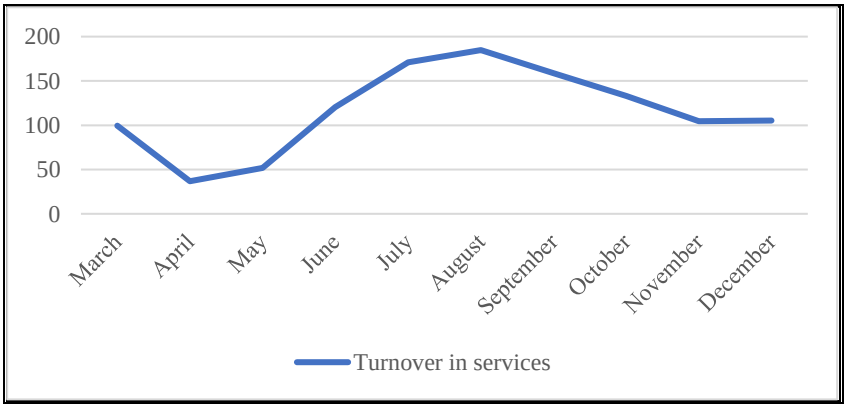
Fig. 2. The degree of recovery of the activity volume in December compared to February 2020



Source: https://ec.europa.eu/eurostat and author's processing

Regarding the economic entities in Romania with activity in the provision of services, they registered a turnover in the period March - December 2020 according to Figure 3:

Fig. 3 The evolution of the turnover of the companies with service provision activity in the period March - December 2020



Source: https://ec.europa.eu/eurostat and author's processing

We present in table 2 services turnover growth rates in first, second and third quarter 2020, depending on the category of services provided:

Table 2

Activities	**Services turnover growth rates (%)**		
	Trim I 2020	**Trim II 2020**	**Trim III 2020**
Transportation and storage	5.7	-14.8	9.4
Accommodation and food service activities	-15.7	-58.3	110.7
Information and communication	5.9	-3.1	3.7
Professional services	7.5	-15.6	14
Administration support	2.3	-17	8.2
Total	**4.5**	**-17.6**	**13.8**

Source: https://ec.europa.eu/eurostat

Economic entities with service activity experienced a decrease of approximately 18% in turnover in the second quarter of 2020 compared to the first quarter of the same year. The largest decrease in

turnover was registered by companies with activity in accommodation and food service of 58.3%.

In conclusion, the Romanian economic entities with activity in the field of constructions registered a decrease of the production volume in February 2020, those with activity in the field of industrial production faced a decrease of the production volume in the period February - April 2020, meanwhile sales volume of trading companies had the lowest level in March 2020. Regarding the turnover of companies with service activities, it decreased in the second quarter of 2020 compared to the previous period. Therefore, economic entities from Romania that apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014 and that have chosen the calendar year as the reporting period, had indications about the reduction of the volume of activity or turnover before the submission, at the territorial units of the Ministry of Public Finance, of the annual financial statements for 2019 , respectively before 31 July 2020[9].

A significant reduction in the volume of activity, production volume or turnover could negatively affect the operating result of an economic entity, as well as the financial position. According to the accounting regulations, the administrators of the companies that became aware of some elements of insecurity generated by the COVID-19 pandemic and that could have led to their inability to continue their activity, should have presented these elements in the explanatory notes of the financial statements for 2019.

Specialists of the Body of Expert Accountants and Certified Accountants recommended that large economic entities, with complex activity, in the context of the COVID-19 pandemic, perform a more detailed analysis of business continuity, taking into account the company's net situation, operating cash flows, generation significant operating losses due to production delays, supply shortages, labor difficulties due to illness or restrictions imposed by the authorities, inability to pay debts at maturity[10].

3. Responsibilities of the management of economic entities regarding the presumption of going concern

Economic entities from Romania that apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014 prepare annual financial statements through which they provide information to a wide range of users regarding financial position, financial performance, cash flows generated by the activity carried out during the financial year, which, in most cases, coincides with the calendar year.

The management of the economic entities is responsible for preparing the annual financial statements[11]. The items presented in the financial statements are recognized and measured in accordance with the principles described in the above-mentioned accounting regulations. One of the fundamental accounting principles is the going concern principle which assumes that the entity will continue to operate normally, without entering into a state of liquidation or significant reduction in business.[12] However, the financial statements will not be prepared on the basis of the going concern principle if the members of the management of the economic entity establish after the balance sheet date that they liquidate the entity or cease the activity.

If the managers of an economic entity are aware of certain elements that could affect the continuity of the activity, these must be presented in the explanatory notes[13], annexed to the balance sheet.

Business continuity requires careful analysis by the management of the economic entity when operating profit and financial position deteriorate.

On January 30, 2020, the World Health Organization declared a state of emergency following the epidemic caused by the new coronavirus, and as of March 11, 2020, it was considered a pandemic. At national level, various measures have been taken by the authorities to prevent the spread of the virus, measures which have included, inter alia, the temporary suspension of the activity of some economic entities.

Given that the date on which the Covid-19 pandemic was declared is later than the balance sheet date of the economic entities that have chosen the calendar year as their financial year, the events generated by the social protection measures imposed or recommended by the authorities are subsequent events that do not adjust the indicators presented in the financial statements for 2019. However, their impact on the activity of economic entities is significant and an estimate of the financial effect must be provided or the reason why such an estimate cannot be made [14] in the explanatory notes annexed to the financial statements for 2019.

[9] The usual deadline for submitting the annual financial statements is 150 days from the end of the previous financial year, but in 2020 was adopted an Emergency Ordinance no. 48/2020 on some financial - fiscal measures, by which the deadline for submitting the annual financial statements for the financial year 2019 has been extended to 31 July 2020.

[10] Corina Grazziela Dumitru, Alina Mihaela Irimescu, *Guide to Financial Reporting According to National Accounting Regulations, in the Context of the Crisis Generated by Coronavirus*, CECCAR, Bucharest, 2020, pp. 17.

[11] Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements, 2018 Edition, Vol. I, IFAC, pp. 84.

[12] Order of the Minister of Public Finance no. 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements, article 49, paragraph 1.

[13] Order of the Minister of Public Finance no. 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements, article 49, paragraph 3.

[14] Order of the Minister of Public Finance no. 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements, article 74, paragraph 4.

The specialists of the Body of Expert Accountants and Certified Accountants from Romania recommended that the information that can be presented in the notes to the financial statements as subsequent events, the following: interruptions in the supply chains; decrease in sales revenues and, implicitly, in revenues; decrease in liquidity, caused by non-collection of customers; cessation / reduction of production for certain periods for certain categories of goods; restructuring plans determined by the closure of some work points or shops; losses caused by the cancellation of certain contracts; dismissing employees or resorting to measures of technical unemployment; renegotiating the maturity of debts resulting from contracts with suppliers.[15]

The administrators' report accompanying the annual financial statements must also contain an analysis of the uncertainties and risks to which the economic entity is subject in the coming period.[16] In this regard, companies are advised to consider potential issues, such as the loss of customers or the decrease in their traffic in sales units, the impact on the distribution chain and supply delays or interruptions and production delays or limitations. At the same time, the impact on human capital, the additional security measures required and their impact on production must be taken into account. Neither the risk of losing significant contracts, which may lead to the closure of production units, shops or installations, nor the risk of penalties for non-performance of contractual obligations should be neglected.[17]

In the table below we have made a selection of the information presented in the Administrators' Report and the explanatory notes regarding the continuity of activity in the context of the COVID pandemic - 19. Economic entities from Romania with activity in the economic fields affected by the health crisis were selected, which apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014 and chose as reporting period the calendar year:

Table 3

Activities	**Date of signing the financial statements for 2019**	**Mentions in the Administrators' Report / explanatory notes**
Clothing Manufacturing; Retail Clothing, Footwear, Watches, Jewelry	April 1, 2020	The Administrators' Report mentions that the financial statements for 2019 are prepared based on the principle of business continuity. There are no risks that could affect the activity due to the COVID -19 pandemic. The explanatory notes related to the financial statements of 2019 state that they were prepared based on the going concern principle and the entity's management is not aware of other events subsequent to December 31, 2019 that could have a significant impact on them. Also, reference is made to the situation of the entity in the context of COVID - 19, namely the activity is partially affected, on the retail side, the work points being temporarily closed.
Retail	April 22, 2020	The Administrators' Report does not present any risks that may affect the activity as a result of the COVID -19 pandemic. The explanatory notes related to the financial statements of 2019 state that they are prepared based on the going concern principle. The note on subsequent events describes the context in which the company operates and states that management cannot assess, at the date of preparation of the financial statements, the financial impact or the duration of the effects of the pandemic. However, this event does not adjust the figures in the financial statements as of 31.12.2019. It is also stated that managers expect this crisis to affect the company's activity in 2020, without a major impact on the financial position.
Automotive and non-automotive production; services - logistics, transport, construction, electrical works.	March 18, 2020	The Administrators' Report does not present any risks that may affect the activity as a result of the COVID -19 pandemic. The financial statements for 2019 have been prepared based on the going concern principle. The explanatory note on subsequent events states that the long-term impact of COVID-19 may affect the volume of products traded, cash flows and profitability. However, in the context of the COVID -19 pandemic, at the date of preparation of the financial statements for 2019, the company fulfills its obligations at maturity and applies the principle of business continuity.

Source: Financial statements for 2019 prepared by listed economic entities with activity in the areas affected by the COVID pandemic -19

[15] Corina Grazziela Dumitru, Alina Mihaela Irimescu, Guide to Financial Reporting According to National Accounting Regulations, in the Context of the Crisis Generated by Coronavirus, CECCAR, Bucharest, 2020, pp. 7.

[16] Corina Grazziela Dumitru, Alina Mihaela Irimescu, Guide to Financial Reporting According to National Accounting Regulations, in the Context of the Crisis Generated by Coronavirus, CECCAR, Bucharest, 2020, pp. 8.

[17] https://www2.deloitte.com/ro/en/pages/business-continuity/articles/cum-reflectam-COVID-19-in-situatiile-financiare.html accessed on February 20, 2021.

In conclusion, the COVID -19 pandemic began to have effects on the activity of economic entities in March 2020, but at the date of preparation of the financial statements for 2019, they were subsequent events that did not adjust the amount of indicators for the financial year ended 31.12.2019.

Regarding the going concern principle, the economic entities that did not intend to liquidate or significantly restrict the activity in 2020, mentioned, according to the provisions of the accounting regulations, in the explanatory notes, that this principle is the basis for preparing the financial statements at 31.12.2019. If the managers of the entities were able to assess the impact of COVID - 19 on the activity in 2020 or on the financial position, profitability, cash flows, they mentioned these aspects in the explanatory notes related to the financial statements of 2019.

4. Responsibilities of financial auditors regarding the going concern principle

Economic entities from Romania that apply the provisions of the Order of the Ministry of Public Finance no. 1802/2014, have the obligation to audit the annual financial statements if they fall into the category of medium and large entities or if they are public entities.

The economic entities that are part of the category of medium and large entities are those that, at the balance sheet date, exceed the limits of at least two of the following three criteria: total assets 17, 5 million lei, net turnover 35 million lei and average number of employees during the financial year 50.[18]

Also, economic entities that in two consecutive financial years exceed the limits of at least two of the following criteria: total assets 16 million lei, net turnover 32 million lei and average number of employees 50, have the obligation to audit the annual financial statements.

Auditors plan and perform the audit to obtain reasonable assurance about whether the financial statements as a whole, including disclosures, are free from material misstatement[19]. Following the audit mission, the auditors obtain evidence on the basis of which they draw up a report in order to express their opinion on the financial statements.

The restrictive measures taken by the authorities, starting with the first quarter of 2020, in order to protect the health of the population as a result of the COVID-19 pandemic, have affected and continue to affect the economic environment. In this context, the Romanian Chamber of Financial Auditors recommended to the auditors that, starting with January 2020, they should be extremely alert to audit risk in terms of direct implications on compliance with the going concern principle of audited companies.[20].

The IAASB also recommends that audit firm employees obtain sufficient appropriate audit evidence regarding disclosures of the significant effects of the COVID-19 pandemic on business continuity reasoning.[21] However, the auditor is not responsible for issuing a final conclusion on business continuity[22], but to obtain sufficient adequate audit evidence, and to conclude on the degree of adequacy with which the entity's management uses the going concern principle in preparing the financial statements and if any significant uncertainty about events or conditions may raise significant doubts about the entity's ability to continue to operate.[23]

The auditor's conclusions regarding the adequacy with which the entity's management uses the going concern principle in preparing the financial statements will have implications for the audit report, which are summarized in the table below:

Table 4

The use of the going concern bases of accounting is		**Implications for the report**
inappropriate		the auditor shall express an adverse opinion
		the auditor may consider it appropriate, in extremely rare cases, to declare that it is impossible to express an opinion
appropriate, but a material uncertainty exists	an adequate presentation of significant uncertainty is made in the financial statements	the auditor shall express an unmodified opinion and the auditor's report shall include a separate section entitled "Material uncertainty regarding on Going Concern"
	an adequate presentation of significant uncertainty is **not** made in the financial statements	the auditor shall express a qualified or adverse opinion, as appropriate, and in the Base for qualified (adverse) opinion section of the report, state that there is material uncertainty that could raise significant doubts about the entity's ability to proceed activity and that the financial statements do not adequately present this aspect

[18] Order of the Minister of Public Finance no. 1802/2014 for the approval of the Accounting Regulations on individual annual financial statements and consolidated annual financial statements, article 9, paragraph 4.

[19] Auditor Reporting in the Current Evolving Environment Due to COVID – 19, IAASB, pp. 2, https://www.ifac.org/system/files/publications/files/Staff-Alert-Auditor-Reporting-Final.pdf, accessed on February 11, 2021.

[20] https://www.cafr.ro/wp-content/uploads/2020/03/Recomandari-pentru-AF-COVID_25_3_20.pdf, accessed on February 1, 2021.

[21] Auditor Reporting in the Current Evolving Environment Due to COVID – 19, IAASB, pp. 2, https://www.ifac.org/system/files/publications/files/Staff-Alert-Auditor-Reporting-Final.pdf, accessed on February 11, 2021.

[22] Țurlea Eugeniu, Mocanu Mihaela, *Reflection upon the Accountability of Management and Auditors in Evaluating Going Concern*, Financial Audit, no. 1, CAFR, Bucharest, 2010, pp. 31.

[23] Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements, 2018 Edition, Vol. I, IFAC, pp. 591.

Source: International Standard on Auditing (ISA) 570 (Revised), Going Concern

In the table below we have made a selection of the information presented in the Independent Auditor's Report on on going concern basis of accounting. The economic entities from Romania with activity in the economic fields affected by the COVID - 19 pandemic, which apply the provisions of the Order of the Ministry of Public Finance (OMPF) no. 1802/2014 and chose as reporting period the calendar year, were targeted:

Table 5

Activities	**Date of signing the Audit Report on the financial statements for 2019**	**Mentions in the independent auditor's report**
Clothing Manufacturing; Retail Clothing, Footwear, Watches, Jewelry	April 1, 2020	Qualified opinion: Except for the possible effects of those presented on the basis of the qualified opinion section, the financial statements present faithfully, in all material respects, the company's financial position at 31.12.2019, financial performance and cash flows for the year ended . The basis of the qualified opinion section mentions the issues that led the auditors to this opinion, which are related to the inability to determine whether value adjustments are required for property, plant and equipment in the absence of their revaluation by the entity and the inability to obtain sufficient and adequate information on the net realizable value of inventories. Revaluation is the accounting treatment chosen by the entity in order to establish the value of tangible assets. No details were provided regarding the uncertainties generated by the effects of the COVID-19 pandemic on business continuity.
Retail	April 22, 2020	Opinion: the financial statements present faithfully, in all material respects, the company's financial position at 31.12.2019, financial performance and cash flows for the year ended on the same date. The paragraph on key issues states that the financial statements have been prepared on a going concern basis, but the auditors have identified an element of uncertainty, namely negative equity, which may significantly call into question the company's ability to continue to operate. No details were provided regarding the uncertainties generated by the effects of the COVID-19 pandemic on business continuity.
Automotive and non-automotive production; services - logistics, transport, construction, electrical works.	March 18, 2020	Opinion: the financial statements present faithfully, in all material respects, the company's financial position at 31.12.2019, financial performance and cash flows for the year ended on the same date. The section on management responsibilities states that managers are responsible for assessing the company's ability to continue its business. No details were provided regarding the uncertainties generated by the effects of the COVID-19 pandemic on business continuity.

Source: Report of the independent auditor accompanying the Financial Statements for 2019 prepared by listed economic entities with activity in the fields affected by the COVID -19 pandemic

If auditors find significant uncertainties that may affect business continuity, they must be reported in accordance with ISA 570 Going Concern, expressing an unmodified opinion, a qualified opinion or an adverse one, as appropriate.

5. Conclusions

In the first quarter of 2020, the World Health Organization declared the COVID-19 pandemic, which prompted state authorities to take action to prevent the spread of the virus. The measures taken, in March 2020, by the Romanian authorities led to the restriction or temporary suspension of the activity of certain economic entities. In this context, in April 2020, one third of the managers of economic entities, subject to a study conducted by INS, could not estimate the evolution of economic activity, more than 40% estimated a reduction in the volume of activity by more than 25%, meanwhile about 14% of them predicted the closure of the activity. Thus, the presumption of going concern for economic entities active in the manufacturing, construction, retail and services industries was called into question.

Indications about the continuity of the activity of the companies that apply the provisions of OMPF no. 1802/2014 and are obliged to audit the annual financial statements, can be obtained from the explanatory notes attached to the balance sheet and from the report of the independent auditor.

The annual financial statements for the financial year 2019 had as deadline for submission to the territorial units of the Ministry of Public Finance July 31, 2020, at that time it was known that the COVID-19 pandemic will have repercussions on future activity, but the indicators presented in the balance sheet 2019 were not adjusted because the events generated by the social protection measures, imposed or recommended by the authorities, were events subsequent to the balance sheet date. However, their impact on the activity of economic entities is significant, it was mentioned in the explanatory note regarding subsequent events, and in the case of entities that could assess the impact of COVID - 19 on the activity in 2020 or on financial position, profitability, cash flows , also

made references to them. Therefore, the provisions of the accounting regulations according to which if the administrators of an economic entity have knowledge about events that would prevent the continuous activity or determine the significant restriction of the activity, they must be presented in the explanatory notes, otherwise it will be mentioned that the financial statements are prepared on the going concern basis of accounting and the events subsequent to the balance sheet with significant impact will be presented in the specific explanatory note.

With regard to the auditors' responsibilities for the financial statements for 2019, they have planned and conducted their work in such a way as to obtain sufficient evidence and adequacy to conclude whether the financial statements as a whole, including disclosures, are free from material misstatement.

Auditors are not responsible for issuing a final conclusion on business continuity, but for concluding on the adequacy with which the entity's management uses the going concern basis of accounting in preparing the financial statements and whether there is significant uncertainty about events or conditions that may give rise to material doubt on the entity's ability to continue its business. If auditors find significant uncertainties that may affect business continuity, they should be presented in the report.

In the audit reports that accompanied the annual financial statements of the financial year 2019, prepared by the studied entities, no mentions were made regarding the uncertainties generated by the effects of the COVID-19 pandemic on the continuity of activity. Instead, clarifications were made that the financial statements were prepared on the basis of the business continuity principle, and in cases where auditors identified elements of uncertainty, they were presented in the paragraph related to key issues.

The COVID -19 pandemic, for the financial statements of 2020, which will be submitted to the tax authorities by economic entities until May 31, 2021, is no longer a subsequent event, its effects on the activity carried out by the entities will be reflected in the amount reported indicators. In this context, the management of economic entities must pay greater attention to the assessment of the business continuity hypothesis, the dynamics of operating results and the financial position, and if it finds the inability to continue the activity it must be presented in the explanatory notes to the financial statements of the year 2020.

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TRADITIONAL CRYPTOCURRENCIES AND FIAT-BACKED DIGITAL CURRENCIES

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Abstract

The digital payments space saw vigorous investment activity during 2020 and there have been a plethora of announcements about account based Central Bank Digital Currencies. The cryptocurrency market can be roughly divided into two segments: traditional cryptocurrencies and fiat-backed digital currencies, including stablecoins and central bank digital currencies. 2021 may be the year we see the world's first sovereign digital currency. China's digital yuan or DCEP (short for Digital Currency/Electronic Payments) looks to be nearing completion. DCEP allows China to push forward into the digital era, while still retaining control over its financial instruments. The European Commission and European Central Bank are working together to investigate the policy, legal and technical questions emerging from a possible introduction of a digital euro. But creating a digital currency is actually the easy part. What is more important is how it is linked into the wider ecosystem to ensure the circulation of money and cash flows. Digital currencies are likely to have big implications for the role of central banks and retail lenders and could change the face of the entire financial system.

Key words: *Central Bank Digital Currencies, cryptocurrencies, stablecoins, digital payments, digital euro.*

1. Introduction

Market dynamics and infrastructure vary greatly per country and region but the direction of innovation and change is converging on the same outcome: digitisation and cashlessness. As the world adopts digitalisation in all sectors and societies, there is greater demand for unbanked communities to be banked and for digital banking to enable better choice and control for consumers, greater opportunities for merchants and business, increased cross-border trade and benefits for governments.

As the White paper from Finextra in association with HPS (january 2021) puts it, the reasons for the transition away from cash and towards digital include enabling connection between unbanked consumers, merchants and services through mobile money; greater visibility and view on liquidity for merchants, including real time confirmation and settlement; reduction in fraud and crime by implementing a digital trace and, hence, audit system; financial inclusion; for banks, greater volumes and transactions are welcomed also.

Cashless society initiatives bring greater transparency to governments, including better regulated tax systems and stronger control on fraud.

On the other hand, there are many who argue that this must be resisted with every fiber of our being because traditional currencies replaced with number on a computer screen will be another step towards total Government control over every aspect of your life. Every purchase you make will be recorded. If you have any outstanding debts e.g., fines the money will be removed from any savings you may without consent. Governments will have the power to Confiscate/Suspend/Freeze your account with a few key strokes.

One of the big challenges with digital currencies is the amount of data that comes with them, said recently Raghuram Rajan, former Reserve Bank of India governor. "We need some sort of broader global rules of the game. What are countries going to do with data collected from abroad on who uses their currency? How do you make sure that the usual safeguards on that use are there? If somebody uses a foreign digital currency to buy certain services which could compromise them, can they be liable to espionage and blackmail, et cetera? And those are concerns that are not farfetched in today's world," Rajan told CNBC.

Digital currencies are likely to have big implications for the role central banks and retail lenders play in the world and could change the face of the entire financial system.

While the idea is still being debated, central banks would likely issue digital versions of fiat currencies. The People's Bank of China is already doing pilots while other central banks are considering whether to issue their own.

The cryptocurrency market can be roughly divided into two segments:

- the first segment includes **traditional cryptocurrencies,** which, in essence, are assets and are used as an investment tool.
- the second segment includes **fiat-backed digital currencies**, including stablecoins, and central bank digital currencies.

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2. Traditional cryptocurrencies

Cryptocurrency market

The total value of all the digital currencies exceeded $1 trillion for the first time ever after the leading crypto asset, bitcoin, continued its bull run to the next all-time peak.

Bitcoin, which accounts for around 70 percent of the value of the entire cryptocurrency market, has been deemed *"digital gold,"* attracting more and more large and institutional investors who consider it as a hedge against inflation and the weakness of the dollar. With some critics insisting that the cryptocurrency is a massive bubble, others still bet on its rising value.

Bitcoin could more than double in price by the end of the year as more firms allow customers to use it to make purchases, says Michael Novogratz, the founder of cryptocurrency investment firm Galaxy Digital. The price of the crypto coin blew past an all-time high driven by Tesla's announcement that it had bought $1.5 billion worth of bitcoin. The company also said it will allow customers to buy its electric cars with the coins.

A long-time crypto enthusiast and investor, Novogratz said that other companies would consider moving excess reserves into bitcoin, perhaps as a hedge against inflation or against a falling US dollar. In a world where central banks issue digital currencies, bitcoin and Libra may find a place

Cryptocurrency bitcoin and Facebook-backed Libra could play a role in a world where central banks globally begin to issue their own digital currencies, Raghuram Rajan, former Reserve Bank of India governor, told CNBC.

Rajan called bitcoin a "speculative asset" while Libra has been designed for transacting. Both could have different roles to play when central banks begin to issue digital currencies.

Bitcoin is a "decentralized" cryptocurrency meaning it has no central authority governing its issuance, unlike fiat currencies. It is built on so-called blockchain technology, which at its simplest level, is an immutable public ledger of bitcoin transactions. Bitcoin has often been criticized as being a speculative asset. Legendary investor Warren Buffett said earlier this year that it has "no value."

Libra takes a more centralized approach. It is a project that was proposed by a Facebook-led consortium of companies last year. But Libra drew heavy criticism from regulators, particularly because of its ties to Facebook and its murky track record of data privacy.

The idea is for Libra to be a so-called "stable coin" which would be backed by a basket of global currencies. That would keep its value stable in contrast with the volatility that has been seen in bitcoin. Libra has scaled down some of its ambitions. Earlier this year, the Libra Association applied to obtain approval from regulators to issue a digital currency backed by one currency. That would mean the consortium's digital coin may be equivalent to a euro or a U.S. dollar, for example.

Rajan said that bitcoin is a "speculative asset" rather than one that is used for transactions on a large scale. He said investors have often flocked to bitcoin when traditional assets such as bonds are less attractive. "In that sense, bitcoin is a little bit like gold, in fact, gold has some value because we value it for jewelry, but bitcoin you can't even do that. Nevertheless it has value because others think it has value," Rajan said.

"On the other hand, Libra is an attempt to create a currency which is used for transacting. And that, the whole idea is not to hold it as a speculative asset which increases in value … but use it for transactions. So the ultimate underlying value is going to be from the central banks, they're going to preserve the value, not of Libra but of what Libra can be exchanged into," he added.

But ultimately there will be competing private digital currencies with different roles. "So the bottom line I think is different private currencies will do different things and it may be bitcoin has value going forward just as a store of value, or as a speculative asset. While Libra may be the kind of currency which is used more for transacting," Rajan said.

Cryptocurrencies, particularly bitcoin and ethereum, started gaining more institutional support last year, triggering another massive rally. Payments companies Square and PayPal have recently backed cryptocurrencies, along with influential hedge fund heads such as Paul Tudor Jones and Stan Druckenmiller. International payment system Visa is moving towards allowing its cardholders to buy and sell cryptocurrencies in countries where it does not contradict the local legislation According to the company, it has partnered with the First Boulevard neobank in the United States, which would allow Visa clients to buy, store and sell digital assets via the Anchorage cryptocurrency bank.

Visa's announcement follows rival credit card major Mastercard, which announced last week it will begin allowing clients to make payments in certain cryptocurrencies on its network this year.

The key change is that Mastercard's current crypto partners, which include Wirex and BitPay, have to convert the digital asset into traditional currencies before making a transaction. The credit card major now wants to support digital assets directly instead. "This change will also cut out inefficiencies, letting both consumers and merchants avoid having to convert back and forth between crypto and traditional to make purchases," Mastercard said.

3. Fiat-backed digital currencies

China

The cashless, digital revolution is on its way, and while the West has so far failed to come up with any comparable scheme of its own, China's is almost at the finish line already.

China's central bank is nearly ready to issue its own sovereign digital currency, according to Mu Changchun, deputy director of the People's Bank of China's payments department. Researchers at the bank have been working on the currency for five years. According to reports, China's central bank would launch its digital token through a two-tier system, under which both the PBOC and commercial banks are legitimate issuers.

But according to crypto-expert Simon Dixon's theory, if your account is full of digital currencies that are backed by the government then, if the bank fails, the deposits are guaranteed because they are in the wallet. "So, this could be a major contentious moment between banks and governments" and "the governments are getting ready to allow banks to fail," Max Keiser says.

The PBOC said it wouldn't rely on blockchain exclusively, and would instead maintain a more neutral stance on which technology it decides to use. Blockchain, otherwise known as distributed ledger technology, is the framework that underpins cryptocurrencies like bitcoin. The digital yuan will be linked to the holder's smartphone number, with transactions taking place through an app. Users will be able to transfer money between accounts by tapping phones, much like having physical cash change hands. The currency will be legal tender, so it could be exchanged without needing a bank as an intermediary. The size of transactions would be limited based on identity verification. A phone number alone would permit only small transactions, while providing proof of identity or a photo of a debit card would raise the limit. Speaking with a bank representative in person could allow for the cap to be removed entirely. Suspected criminal activity will be uncovered via transaction histories.

China is expanding trials of its sovereign digital currency in the capital Beijing, the nation's most populous city of Shanghai and leading tech hub Shenzhen this year. The digital currency was projected to replace cash in circulation. But China's new sovereign digital currency could also transform cross-border trade due to its ability to process payments and handle foreign exchange transactions simultaneously. That's according to the former head of the People's Bank of China, Zhou Xiaochuan, who told the Shanghai Financial Forum that one of the major benefits of using a digital system is that it allows both payments and currency conversions to happen in real time.

"If you are willing to use it, the yuan can be used for trade and investment," he said. "But we are not like Libra and we don't have an ambition to replace existing currencies." The Digital Currency Electronic Payment (as it is formally known) was not intended as a replacement for globally accepted fiat currencies like the US dollar and the euro. According to Zhou, rather than challenging foreign exchange regulatory frameworks and monetary systems, Beijing wanted to persuade consumers and overseas merchants to gradually accept digital yuan payments.

The digital yuan will be the first national currency which will not exist in physical form, but entirely online. While currencies of old were traditionally based on something tangible – such as the gold standard – the digital yuan is built on computer engineering. This means the way it is utilized and regulated differs from a normal currency. A digital currency is more easily managed by its parent government, and more traceable and observable. With a government-controlled digital currency, financial crimes such as money laundering and tax evasion become more difficult. It provides increased security for users, even if it reduces privacy. But even more striking to international observers than the implications for personal use is the potential geopolitical impact it could have.

Many are speculating that this new currency will have global ramifications, with Facebook's Libra executive David Marcus noting that China will create a digital currency system that can be entirely out of reach for US authorities, meaning America's financial sanctions would have little effect. He added that if the digital yuan gets widely adopted across the world, many countries could opt for renminbi as an alternative to the dollar for international clearing and settlement services.

While launching studies on its own digital unit as far back as 2014, Beijing has cracked down on the use of all cryptocurrencies, such as bitcoin. Cryptocurrency trading has been halted on some 100 exchanges in the country since 2017, in compliance with regulation on fraud and money laundering. But elsewhere, the Chinese currency is not a threat to bitcoin because it's a highly-centralized digital currency.

The emergence of a digital yuan, as opposed to the standard yuan, is an international gamechanger. As the first currency of its kind, China has the potential to pioneer it as a new global standard in its own transactions and, by using the country's economic muscle, persuade other countries and financial institutions to use it, too. The potential outcome is clear; it may have a serious impact on the US dollar.

At present, the dollar is the hegemonic currency of the world. It is the preferred medium of transaction for many sectors and commodities alike, not least in the realm of finance. Due to its widespread use and the dominance of American financial institutions, the US government has the power to weaponize the dollar as a form of 'extraterritorial jurisdiction' against countries that it doesn't like. If the US sanctions a company or individual, it effectively cuts them off from the global financial system. The banks who serve these individuals rely on the dollar, and thus face penalties if they violate the sanctions.

This demonstrates the global strength of the dollar, but also shows how the digital yuan may change the current landscape. The creation of a new international medium of transaction means that financial institutions, companies and governments now

have a new avenue to do business without having to use dollar transactions. This will reduce its global reach. For countries like Iran and Venezuela, heavily targeted by US sanctions, it is an obvious way out. Of course, such a system will be met with a mixed response throughout the world. While beneficial to some countries, it is inevitable that others will not accept their financial systems being re-written and dominated by China.

The digital yuan is set to face political resistance from the US, which is likely to respond by eventually creating a digital currency of its own (even though it's well behind at present). The European Union is also likely to move towards a 'digital euro' to safeguard its own interests.

On the other hand, the digital yuan should be expected to gain traction in countries strongly integrated with China, particularly in Asia, Africa and Latin America. There are many nations who will see the opportunity to diversify from the US dollar as a positive development.

And so arguably, the rise of the digital yuan will prove to be an innovation which will truly hasten a multipolar world. It has the potential to effectively break the monopoly of the dollar as a unilateral, extraterritorial weapon and rewrite the rules of the global financial system in a way which will be shaped by China. It could set off a digital currency race with many other major powers too, fragmenting the existing order whereby the US dollar serves as the underbelly of all things.

The People's Bank of China has agreed a **partnership with the global interbank settlement organization SWIFT,** as part of an effort to internationalize the yuan and develop a digital Chinese currency. The new entity, Finance Gateway Information Service, was registered in Beijing on January 16, 2021 with €10 million ($12 million) as incorporation capital, according to the National Enterprise Credit Information Publicity System, the Chinese government's enterprise credit information agency. SWIFT is the largest shareholder, with 55 percent of the capital owned via a Hong Kong subsidiary, while the China National Clearing Centre, a wholly-owned domestic settlement subsidiary of the PBOC, owns 34 percent. The joint venture emerged after concerns were raised that the US might cut off China or Hong Kong from the SWIFT financial payment network as a result of the Trump administration's sanctions over the Hong Kong autonomy issue. Calls have also been growing from within China for Beijing to reduce its reliance on the US dollar by increasing the global use of the yuan amid worsening relations with Washington.

Also, the central banks of China and the United Arab Emirates are joining their counterparts in Thailand and Hong Kong on a CBDC project investigating cross-border foreign currency payments. **The Multiple CBDC (m-CBDC) project** will see a proof-of-concept prototype developed designed to support real-time cross-border foreign exchange payment-versus-payment transactions in multiple jurisdictions, operating 24/7. It will analyse business use cases in a cross-border context with both domestic and foreign currencies. The project was first developed by the Hong Kong Monetary Authority and the Bank of Thailand and is being run with the BIS Innovation Hub in Hong Kong.

Experts say China's plans have triggered concerns about a new threat to US financial dominance. According to Aditi Kumar and Eric Rosenbach of the Harvard Kennedy School, the digital version of the Chinese renminbi could eventually allow Iran and other countries to more easily evade US sanctions or move money without it being spotted by Washington. They explained in an article for Foreign Affairs that one day it might be possible to transfer the digital currency across borders without going through dollar-based international payment systems.

Former US Treasury Secretary Henry Paulson has argued that the threat to the dollar's status as the world's preferred currency is "not a serious concern." He claimed that even if a digital yuan proves to be highly mobile around the world, the US dollar is widely trusted, and oil and other key commodities are still priced in it. However, according to the CEO of Sino Global Capital Matthew Graham, digital yuan could encourage other countries and people overseas to get on board with China's technology and currency.

With Beijing pushing for greater use of the yuan internationally, the Chinese currency could rise to the status of the world's third-largest reserve currency in 10 years, according to a forecast by Morgan Stanley. The share of the yuan in global foreign exchange reserve assets could more than double from its current level of two percent and surpass the share of the Japanese yen and the British pound, the bank's analysts said in a report released on Friday, cited by CNBC. According to their estimates, the Chinese currency, officially known as the renminbi or RMB, could reach five to 10 percent of reserve assets by 2030.

"This target is not unrealistic in light of the financial market opening in China, the growing cross border capital market integration we see across equities and fixed income and an increasing proportion of China's cross-border transactions being denominated in RMB," Morgan Stanley international strategist James Lord said. More and more central banks worldwide have been gradually stockpiling yuan in their coffers. According to Morgan Stanley, at least 10 regulators added the currency to their forex reserves last year, with the total number of holders reaching 70.

International Monetary Fund (IMF) data shows that the renminbi share in global reserves has doubled since it was included in the IMF's basket of major reserve currencies in October 2016. Back then, the share of the yuan amounted to one percent, and now it stands at 2.02 percent. Its main rivals – the yen and the British pound – have a 5.7 percent and 4.43 percent share respectively. The US dollar accounts for almost

62 percent of global forex holdings and the euro for over 20 percent.

Russia

After discussing the launch of the digital ruble with local banks, the country's financial watchdog says it will present a more detailed concept for the national digital currency by summer.

Russia's central bank initially revealed that it was assessing the possibility of creating a digital form of the Russian national currency in its report published in October 2020. The digital ruble is meant to exist along with cash and non-cash rubles and will allow private and corporate users to freely transfer digital rubles to their electronic wallets and use them on mobile devices.

The head of the Central Bank of Russia, Elvira Nabiullina, said on the 18th of February, that the regulator received detailed feedback from the banking community in its October report, in which the regulator introduced the digital ruble as a possible new form of national currency. According to the official, most lenders support a two-level model of the digital ruble, which allows banks to open wallets for their clients on the central bank's platform and conduct operations.

"We will develop a more detailed concept and start discussing it with the public, market participants, and banks at the beginning of summer," Nabiullina said. She added that the next step will be launching and testing a special platform. The adoption of the new form of the currency will also require amending legislation. The new form of the Russian currency is to be test-launched as soon as 2021 in the Crimea. Earlier this year, Russia's central bank said that the digital ruble may be used for international money transfers, but only after its global peers establish their sovereign digital currencies.

More than 30 financial regulators are currently working on their national digital currencies, according to First Deputy Governor of the CBR, Olga Skorobogatova. Given the pace of the development, several countries may launch the new form of currencies over the next 5-7 years, the official added.

The development of digital currencies may challenge the SWIFT international banking payment system and could eventually make it redundant, the Central Bank of Russia (CBR) has said. "Then we can deal with direct integration issues. In this case SWIFT it may not be necessary, because it will be a different kind of technological interaction," Skorobogatova said at an online meeting earlier this week. However, the global banking network may become one of the platforms for the new form of national currencies, she added.

Meanwhile, Russia's largest lender, Sberbank, has applied to the national financial regulator to set up a blockchain platform for its own digital token called Sbercoin. The project may be launched as early as this spring. Sberbank sent the application for the platform to the Central Bank of Russia at the beginning of the year, Director of the Transaction Business Division Sergey Popov revealed earlier this week. He said that the registration was required by the law on digital financial assets, which came into force in Russia on January 1,2021.

However, Sberbak still has to resolve some issues linked to the digital currency, such as the taxation of digital financial assets as well as how the token can be used. According to the bank's top manager, Sbercoin can be used as a "digital promissory note," as this form can open "new opportunities" if it replaces the paper one. **Sbercoin could actually be a stablecoin**. Unlike bitcoin and other cryptocurrencies, stablecoins are pegged to fiat currencies, and Sberbank's token will be pegged to the Russian ruble.

The most commonly used stablecoin is issued by Tether. By March 2020, Tether's market capitalisation was more than USD 4.6 billion, but its use is almost entirely limited to the crypto-asset market. Other examples include Fnality and JPM Coin. Facebook recently announced that it was launching a new stablecoin named Libra in cooperation with a group of multinational corporations, with the currency being operated by an umbrella organisation called the Libra Association.

India

The Indian government plans to introduce a bill to prohibit "private cryptocurrencies," paving the way to outlaw the likes of bitcoin. The law is set to facilitate the creation of the nation's own official digital currency. The legislation moves to prohibit what it calls "all private cryptocurrencies in India," but allows "certain exceptions" to promote blockchain, the underlying technology of cryptocurrency and its uses. It also aims to provide a framework to set up an official digital coin, issued by the Reserve Bank of India.

India has previously tried to ban virtual currencies, including bitcoin. In 2018, its monetary policy regulator alerted banks that they must stop dealing with them, citing "various risks associated in dealing with such virtual currencies." However, the move was subsequently overturned by India's Supreme Court, bearing in mind that there are millions of crypto investors in India and, as Rahul Pagidipati, the head of a leading exchange, ZebPay, said "Crypto assets and digital government currency can co-exist and together, they can bring tremendous benefits to the Indian economy"

European Union

The European Commission and European Central Bank are working together to investigate the policy, legal and technical questions emerging from a possible introduction of a digital euro.

Having just closed a public consultation on the subject, the ECB says it will now consider whether to start a digital euro project towards the middle of the year as it looks to answer design and technical questions ahead of any decision to actually issue the CBDC. Now, the ECB and the EC have created a joint

technical group to look at the policy, legal and technical aspects of the possible introduction of a digital euro. The EC says that one of the reasons a digital euro is appealing is that it could help promote global use of the currency. However, the Commission has also stressed that there are significant issues to address relating to financial stability, financial inclusion, and anti-money laundering and counter-terrorism financing. The public consultation was launched on 12 October 2020, following the publication of the Eurosystem report on a digital euro. Among respondents to the ECB's public consultation, privacy of payments ranked highest among the requested features of a potential digital euro (41% of replies), followed by security (17%) and pan-European reach (10%).“A digital euro solution should not crowd out solutions that come from the private sector. In the ECB report, it is highlighted that such a solution would be complementary to private sector opportunities. There should not be rivalry or competition.” ECB president Christine Lagarde said “A digital euro will never be a substitute for cash. It is a very good supplement and a very good partial substitute for what was being done physically.” “Technology and innovation are changing the way we consume, work and relate to each other,” says Fabio Panetta, member of the ECB’s executive board and chair of the task force. “A digital euro would support Europe’s drive towards continued innovation. It would also contribute to its financial sovereignty and strengthen the international role of the euro.

The Italian Banking Association is to kick of a technicial feasibility study on the use of distributed ledger technology for a future digital euro. The initiative comes at the urging of the European Central bank for EU nations to contribute to the public policy debate around the creation of a central bank digital currency (CBDC) covering the Euro-zone. The experimentation project is divided into two work areas: one involving the infrastructure and distribution model to analyse technical feasibility, and the second focusing on programmability to experiment with use cases that can differentiate the central bank’s digital euro from the electronic payments already available.

The European Central Bank is stepping up its analytical investigations into the potential for creating a central-bank backed digital currency for retail customers, a move which would be "a game changer" for the banking industry, says ECB exec Yves Mersch. "A **wholesale CBDC**, restricted to a limited group of financial counterparties, would be largely business as usual," says Mersch. "However, a **retail CBDC**, accessible to all, would be a game changer. So a retail CBDC is now our main focus." The creation of a retail CBDC would need to address the currency's legal tender status and the relationship between a CBDC and euro banknotes and coins, along with the process by which one could be exchanged for the other. Mersch describes two different ways to design a CBDC - operating either as a decentralised digital token, or based on deposit accounts lodged with the central bank. Of the former, he says: "We are currently looking into the legal questions raised by the potential use of intermediaries to facilitate the circulation of a CBDC and also the processing of transactions in a CBDC. To what extent are we permitted to outsource public law tasks to private entities? And what would be the appropriate extent of supervision over such entities?" The latter approach raises serious policy questions relating to the potential disintermediation of commercial banks and the possibility of digital bank runs, as consumers cash out their accounts in favour of a central bank-issued currency. What, then, could be done to mitigate the impact of a CBDC on the financial system? asks Mersch. "One option could be to remunerate CBDC at below-market rates in order to create incentives for non-banks to rely more on market-based alternatives rather than on central bank deposits. The drawback would be that, in times of crisis, it may become necessary to apply highly negative rates, which could generate criticism from the public and substantially undermine public confidence in the central bank as well as in the basic values of saving which underlie our societies. "Another option is a tiered remuneration system. In line with the functions of money, the first tier could serve as a **means of payment**. The central bank would have to refrain from setting a lower or a negative interest rate in order to keep a CBDC attractive to the public as a means of payment. While the second tier could serve as a **store of value**, the central banks could discourage people from using it as such by setting unattractive interest rates. However, such schemes should draw from the experience of multiple exchange rate regimes. And the repercussions of the intentional use of such schemes need to be subjected to an additional comprehensive investigation." For the moment, the ECB's investigation is purely analytical.

Bank for International Settlements (BIS)

In its annual economic report (June 2020), BIS says that while central banks play a pivotal role in safeguarding the payments system, they also need to foster innovation. One significant way in which they are looking to innovate is through the investigation of Central bank digital currencies (CBDCs) which "deserve consideration" as an additional means of payment.

Last year, BIS surveyed 63 central banks, finding that 70% are currently, or soon will be, engaged in CBDC work. Since then, Canada, Italy and Thailand, among others, have taken significant steps on the issue. The central bankers' bank has previously urged caution on the subject but it now says such digital currencies "could offer a new, safe, trusted and widely accessible means of payment". Benoît Cœuré, head, BIS Innovation Hub, says: "Central banks around the world are stepping up their efforts to study CBDCs and, whether wholesale or retail, the goal is to create safe and reliable settlement instruments for transacting in the digital economy." A group of seven central banks

together with the Bank for International Settlements (BIS) have published a report laying out the key requirements for creation of a central bank digital currency.

The report, **'Central bank digital currencies: foundational principles and core features'**, was compiled by the Bank of Canada, the Bank of England, the Bank of Japan, the European Central Bank, the Federal Reserve, Sveriges Riksbank, the Swiss National Bank and the BIS. It highlights the key principles and core features of a CBDC, but does not give an opinion on whether to issue, although the race is clearly on to catch up with China's trailblazing exploits and beat off private initiatives such as facebook's Libra. The document stresses that any introduction should support wider policy objectives and do no harm to monetary and financial stability. Coexistence with cash and other types of money is considered essential, as well as core features that promote innovation and efficiency. "This report is a real step forward...in agreeing the common principles and identifying the key features we believe would be needed for a workable CBDC system," says Jon Cunliffe, deputy governor of the Bank of England. "This group of central banks has built a strong international consensus which will help light the way as we each explore the case and design for CBDCs in our own jurisdictions." While there will be no 'one size fits all' framework due to national priorities and circumstances, a workable CBDC should at a minimum, be:

- Resilient and secure to maintain operational integrity;
- Convenient and available "at very low or no cost" to end users;
- Underpinned by appropriate standards and a clear legal framework;
- Have an appropriate role for the private sector, as well as promoting competition and innovation.

Benoît Cœuré, working group co-chair and Head of the BIS Innovation Hub, says: "A design that delivers these features can promote more resilient, efficient, inclusive and innovative payments.

4. Conclusions

The digital payments space saw vigorous investment activity during 2020 and there have been a plethora of announcements about account based Central Bank Digital Currency (CBDC). Whilst some emerging markets have announced that they have either launched or are launching a CBDC, what many do not realise is that creating a digital currency is actually the easy part.

What is more important is how it is linked into the wider ecosystem to ensure the circulation of money and cash flows. Without it, it is a cart without a horse. It looks like the likes of China are making good progress having understood this construct and other major nations will not stand by watching and as such here will be some interesting developments with numerous pilots in 2021 starting to develop.

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DIGITAL TRANSFORMATION IN RETAIL BUSINESS

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Abstract

The way of doing retail business and its form has changed substantially during the course of the last 20 years or so. Under the influence of technology, new retail forms have emerged, as well as the new ways of doing business. Modern retail uses advanced tools in sales processes, all for the purpose to make it easier for customers and to speed up the sales process. The objectives of the digital retail transformation are: the increase of efficiency of sales, time savings when purchasing, costs reductions and higher level of organization and productivity.

As a complex marketing strategy, instore technology is changing retail business, and it has become an integral part of modern retail logistics. By providing digitalised services to customers through their integration, digital retail tools contribute to major changes in the trading business. Trading companies are forced to keep up with the social habits and modern technological tools. By implementation of new technological solutions in retail, to customers are offered simpler and more modern ways of selling. However, it is the customers who decide on the use of these tools in retail, so it is necessary for trade companies to listen to the habits of customers.

In the paper are explored and analysed some of the examples of a retail digital transformation, such as: using of QR codes, buying when using the augmented reality (A-commerce), trade without cash desks and sellers, purchase by means of use of virtual googles, purchase when using virtual assistants, or by omnichannel. There are also some of the examples of trading companies that successfully use these sales tools.

Keywords: *retail business, the efficiency of sales, advanced tools, digitalised services to customers, the examples of a retail digital transformation.*

1. Introduction

We are witnessing a time of great technological advances that are reflected in all spheres of our life. Every day, we witness an improvement of new technologies that affect our lives, and thus the way we make purchases. Newer technologies lead to a progress and relieves the very process of buying. In addition to the traditional ways of shopping (visiting the point of sale) customers can also use alternative and new ways of shopping. Under the influence of technology, during the last decade the trade has also changed. Due to customer preferences, their way of life, lack of time, and wide range of goods on the market, retailers want to meet the customer's needs to facilitate the purchase process and make it as simple as possible, but also more pleasant. It is for this reason that retail has been digitized. With the smart solutions, new solutions are constantly being found for upgrading of the old forms of retail and developing the ways of selling, for the purpose of the improvement and acceleration of business processes within the company. The implementation of new trends in the trade business complements the offer and gives to the customers a proposition of a new and unconventional forms of sales. The aim of this paper is to define new trends in digital retail business, the way they work and their application in practice. In this paper are analysed some of the examples of digitizing retail (using of the QR codes, purchasing with the help of the augmented reality (A - commerce), purchasing without need for the cashiers, use of goggles when doing virtual purchasing, and purchasing with the usage of omnichannel).

2. Digital retail

Retail acts as an intermediary subject in the exchange between the wholesaler and the end consumers, i.e., between producers and final consumers[1]. Retail is an important factor in the development of each country's economy. The most important feature for assessing the quality of the retail structure is the sales method, which includes organizational and technical-technological factors. The great influence on the retail has the size of the company, location, variety of assortment, retail prices and diversity of demand[2]. The core functions of retailers are: location accessibility, proper timing, appropriateness in retail size, information and lifestyle support[3]. The digital transformation of a company is a change in a way a company uses digital technologies to develop a new digital business model that helps create

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and deliver greater value to the enterprise[4]. The process of digital transformation of the company includes the development of an innovative business model, the creation and efficient use of the organization's innovation system when creating new services and products, and the complete reorganization of the system[5].

Research on the future of in-store technology[6] proves that retailers face limited resources, and as a result must prioritize investing in technology in their stores. In accordance to the aforementioned study, in order to achieve the largest sales growth, the investment is needed in the quadrant of high practicality and high social presence, in order to improve product vividness, increase in customers experience and increase in sales. The actual potential of information technology in a company's business is realistic, but creating of the business success involves much more than buying software, hardware, and network infrastructure. The use of digital technology in business requires solving problems that, if overlooked, can turn an investment into a cost. Modern business and technology are connected to such an extent that business would be impossible without information technology[7]. Following an e-commerce and its evolution into mobile commerce, the Internet of Things (IoT) will radically transform retail commerce from recognizing the need to engagement after the buying process[8]. For many years, the term IoT has been used only in theory, and only recently we can see materialized examples of IoT in the context of retail. In this form, trade refers to the activity of buying and selling and to the exchange of tangible and intangible products on a large scale[9].

There is a small volume of literature available on IoT and on how companies can improve the user value of IoT devices through energy savings, asset protection, proactivity, or the personalized experience[10]. During recent years, shopping and commerce via mobile devices have been increasingly used. Mobile devices in the context of commerce are devices with a wireless Internet access network that is designed for the mobility of its users[11]. Mobile devices provide location-based services, and advertising is personalised to the local context. For instance, Uber allows taxis to be called to the customer's current GPS location and therefore estimates the time of their arrival[12]. The operational characteristics of an information-enabled trading company include external business activities of the supply chain and internal business activities. External business activities include: steady partnerships with the suppliers, global markets and production, fast delivery, tightly integrated production and accelerated product development for the market segments. Internal business activities include: shared databases, available information's, a wide range of employee's involvement, decentralization of authority, computer expertise, centralized monitoring, and less hierarchical levels between employees[13].

3. Some examples of digital retail transformation

We have lately witnessed that we have been seeing black rectangles, i.e., QR codes[14] featured in various places such as catalogues, tickets for social events, they are visible at the shop's front doors, various products and the like. The QR (Quick Response) code is a two-dimensional code created by the Japanese company Denso Wawe in 1994, which is a subsidiary of Toyota[15]. The initial application of the QR code was in the automotive industry, however, due to its characteristics it as well quickly became popular in other spheres. Unlike with the form of barcode that can store only up to 30 numbers, QR codes can store up to 7.089 characters, so in addition to the numbers of QR codes can store such as Text, Active links, Phone numbers with the activation calls, SMS / MMS messages, Active E-mail, Contact (vCard or meCard) and Calendar Commitment (vCalendar)[16]. In order to be able to use QR codes, it is enough to have a smartphone with a camera that has an application for reading installed QR codes; of course the phone must have an Internet connection. One of the most common uses of QR codes is for reading the URL, or scanning the code that will takes us to the specific Website. Quite frequent use of the QR code is also present in prize games, because it can be found really anywhere, ranging from

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newspapers, product packaging and the like. QR codes appear as a link between the online world and the real world. They represent a strong marketing tool by which it can tell a story to the end users and cause them to additionally attach with the brand. QR codes owe their planetary popularity primarily to the development and mass application of smartphones in people's daily lives. It can be said that QR codes are an unavoidable marketing and sales tool[17]. A fashion brand Polo Ralph Lauren is one of the major exponents of QR codes. Polo Ralph Lauren uses QR code technology as an extension of his brand. With the help of QR codes, the company continuously works on building of its image and thus establishes an interactive relationship between its brand and its customers, the most common on the point of sale. The Canadian coffee company Ethical Bean, uses QR codes to connect with its customers before and after the sale. After a successful campaign in which they promoted the use of QR codes associated with their products, they confirmed that their business has doubled. In addition to diverting the QR code on the Websites of individual companies, nowadays more and more often, QR codes are used to redirect users to the appropriate profile on social networks (Facebook, Twitter, Instagram, Pinterest etc.). QR codes are possible to develop with the help of the QR generator or service to create QR codes that can be found on the Internet. After creating the code, it can be downloaded from the Internet or saved to your computer and use further when and where necessary. In addition, there are many services on the Internet for the free making of QR codes: which service will be used depends on the preferences and complexity of the task to be solved. QR codes have brought a new dimension in the creation of primarily marketing content, so with their help and through the new media we are able to tell a story to our customers that will connect them even more strongly with the brand and encourage them to opt for company products in the future.

Augmented reality (or abbreviated, AR) is a modified and upgraded image of an already existing reality and makes a part between the real and the virtual word. Augmented reality is a practical method that can create links between social content and physical products, because in this way customers get information's about the products[18]. Because of its all-embracing nature and hedonistic values, the experience of augmented reality could help individuals to change consumer attitudes[19]. We can say that the time for more serious application of augmented reality in shopping is yet to come. According to some estimates, it is considered that by 2020, 100 million consumers purchased products online and with the help of classical trade and augmented reality[20]. If we consider the fact and that the global consumption of smartphones in 2018 amounted to 101 billion dollars (wearesocial.com), augmented reality represents great potential for the food and the retail sector. Augmented reality is one of the latest technologies, which has become increasingly popular during recent years. It can be described as an augmented version of reality, that is, as a combination of virtual and real environment. With the help of computer-generated images of the real world we can change to the enhanced version of a reality for that we reinforce the perception of the physical environment. Augmented reality can manifest in a variety of ways from monitors, to handheld devices and glasses (goggles), becoming one of the essential links between retailers and brands that makes the shopping experience simpler, but at the same time more personal for the customer. There are several different types of augmented reality, each of which aims to address different issues and has a slightly different application. Not all of the kinds are appropriate to manufacturing or retail applications, but their capabilities are developing. Marker-based augmented reality is also called the image recognition. An example of this is when cameras are built into an augmented reality device that read QR codes or the two-dimensional codes, and consequently provide information to the user. This use of augmented reality is very common, but it is not flexible due to the necessity of the existence of markers. Augmented reality that doesn't use markers is location-based. It uses a combination of sensors to accurately detect and map the real-world environment with the camera system. With the cameras on their smartphones, users can access information about their environment. This type of augmented reality is currently most widely used and implemented in various technologies; it's often used to access retail discounts. Projected augmented reality works by projecting artificial light onto real physical surfaces. The most well-known application of this type of augmented reality is in the laser projection of 3D interactive holograms in the air. Outline-based augmented reality recognizes different objects. This method has found its application in architecture for outlining buildings. Augmented reality based on superposition or overlap, recognizes objects and can replace the whole object or part of it with a larger display. This type of augmented reality is mostly often used in mobile applications, social networks and real sales facilities. The greatest advantage of augmented reality is the possibility of interactive three-dimensional display of the real objects or products in a demonstrative way, on this way creating a strong impression on the consumer. Augmented reality causes

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consumers to react emotionally to the product, which has an impact on increased awareness and a positive impression of the brand itself. Also, the augmented reality enables a very simple presentation of products through experiential marketing provided by augmented reality technology. The basic components of augmented reality that contribute to marketing achievements are the ability to connect to almost anything, with obtainable high level of interactivity, technology portability, business intelligence, and a measurable rate of return on investment[21]. Augmented reality is well accepted by users because its focus is not only on the product or service being promoted, but the user experience and his overall experience is put in the foreground. According to the Forbes Council, significant annual growth is expected at a rate of 75.72% by 2022, which will reach $ 117.4 million by 2022. Insufficient research into augmented reality and a lack of literature for the purpose of education and informing the users about how to use and apply augmented reality could be considered as the biggest drawback of this technology. Also, there are none of the measuring instruments and the criteria in existence by which it should be demonstrated concrete benefits for the consumers of augmented reality and the companies. It is possible that some of the side effects, such as dizziness or nausea, may occur on the first prolonged encounter with augmented reality. However, according to previous user experiences these are transient and short-term effects that result from the human body's habituation and adaptation to novelties from the environment[22]. For the purpose of the long-term impact analysis, it requires a longer period of application and use of augmented reality technology. All those who follow sports especially football have had the opportunity to see one of the applications of augmented reality in everyday life. The offside line in the broadcasts of football matches on real images of football fields is an actual example of the application of augmented reality in everyday life. Augmented reality has globally shown a full range of its capabilities through Pokemon Go play, and thus clearly confirmed that it is a bigger hit than virtual reality, which may be due to the fact that it does not create a complete world around us but simply implements particular details within what is actually around us. And that is why this technology is revolutionary for retail[23]. It is actually the smaller stores that have the chance to compete with the biggest „players" in their industry, with the help of augmented reality. With the help of AR, retailers can allow their customers to try on shoes or clothes and see how they fit without actually doing so in the wardrobe. In this way, the sales process itself can be significantly simplified and accelerated; and with the warmth of customer's home one can enjoy online shopping having the same shopping experience as if we were in a real sale place.

Globally speaking, the trend of introducing automatic cash registers has been present for the last fifteen years, and in the past few years it has also appeared among retailers present in the Republic of Croatia. The German retail chain Real has introduced automatic cash registers to about forty of its stores in 2004[24]. The first retail chain in Croatia to introduce automatic cash registers was the Slovenian „Mercator", followed immediately by the domestic retail chain „Konzum". The primary goal of introducing automatic cash registers in retail facilities was to speed up the process of payment of selected products, without the subjective influence of employees at the cash register on the payment process itself. The process of introducing cash registers itself has encountered with many difficulties, primarily the resistance from employees who saw them as a threat to their jobs, as well as distrust of older customers in such technological solutions. The disadvantage of automatic cash registers is that they offer only the possibility of paying by card. During the period of application, significant benefits of automatic cash registers have been shown for those customers who buy only a few items and pay by a credit / debit card, thus significantly saving time they spend at the cash register. Automatic cash registers show their benefits at the largest sales formats and with the younger customer population, while in smaller sales formats, classic cash registers with sales staff still have an advantage. In the Republic of Croatia, today it is very rare to come across to the point of sale that have implemented automatic cash registers. The continuation of the development of automatic cash registers is moving in the direction of RFID technology, which is becoming a leader for stores[25]. Radio Frequency Identification (RFID) technology could very quickly replace bar codes on products, and product identification will be done wirelessly[26]. In the storage business and application in animals, RFID technology has largely come to life in practice. There are already a number of large stores in America that have become cash-free zones. Amazon has introduced the Amazon

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Go concept in its stores where there is no scanning and billing at the checkout but the store itself charges what you choose. Walmart in its store in Dallas allows customers to scan the products they have decided to buy via their smartphones and, when leaving the store, they only show the e-invoice they received via the payment application. By reducing the number of cashiers, traders will significantly reduce their labour costs. It opens their opportunities to invest such saved funds in an additional business improvement or to realize investments in new business. To get an idea of what sizes are involved, we will cite the example of America where about 3.5 million people work at the cash registers. For the Republic of Croatia, there is no exact data on how many people work exclusively at the cash registers, but it is known that about 100.000 people work in wholesale and retail trade in Croatia. In time, cashiers will not disappear from stores, but it is certain that their number will decrease[27]. The fact is that on the four automatic cash registers comes one cashier speaks enough for itself about the savings that this technology brings.

Shopping is no longer a problem and is becoming something that could be very simple in the near future and something that we could do from our households with the help of virtual goggles. We will be shopping in virtual stores very soon. Since shopping using virtual goggles is something new, opinions on it are still divided. Some individuals considered it as a progress, but some are resisting to it just like everything else that comes as a novelty. The younger generation is looking forward to virtual shopping and perfecting it very quickly, while the older generations still see it as something that causes big changes that they are not ready to implement. Virtual goggles preferably have been applied in the gaming industry, and later their application has been implied on a large scale. Their application is versatile, and among other things they are applied in medicine, education, tourism, military industry, etc. The very idea of using virtual glasses began long ago in the 30's of the last century (SF writer Stanly G. Weinbaum wrote Pygmalion's Spectacles, the story of glasses that allows the virtual reality). Shortly after it, virtual goggles developed and are improving day by day and their application is gaining ever more share. As already mentioned, their development began in the early 1990s in the gaming industry where several manufacturers made prototypes (SEGA, NINTENDO, etc.), but failed to encourage widespread production and application due to the fact that the production itself was extremely expensive. In the course of the last twenty years, we have witnessed a huge development of this technology and virtual goggles have become something that is affordable and possible to obtain very easily. Of course, as with everything else, there are different classes and pricing and therefore, different types of goggles with different possibilities of application. What has not yet been sufficiently researched and what is still much talked about is that the use of virtual goggles has harmful consequences and that their frequent use leads to nausea, headaches and some other adverse health effects. This segment of safe use and possible harmful effects are still being researched and scientists are making judgments about whether their use is harmful to users. Virtual product testing is also not something new, but the application has not yet taken on a large scale. Many retailers have to make adjustments so that customers can make purchases in their stores with the help of virtual goggles. In addition to preparing their products, retailers must either develop or implement one of the developed applications to enable customers to try out their products or to make a purchase. Currently, the most developed segment of sales where the virtual goggles make their use is the segment of cosmetics and sales of the goggles, where product development is present day by day and where marketing investments are the highest. The financial results of these companies have enabled the biggest step forward in the development of purchasing through virtual goggles. Sales of cars, white goods, clothing and footwear and other products using virtual goggles are still not so developed, but there are also positive examples. Currently, most major brands are working on the development of applications to enable the smooth sale of their products and to ensure secure shopping for customers. Selling through virtual glasses allows for an additional increase in sales, especially in the time we are living (COVID 19 pandemic). Unlike the online way of shopping, this way of shopping causes a reduction of dissatisfied customers, and thus keep savings, because returns are reduced to a minimum. Virtual shopping in retail is still not sufficiently developed, but day by day offers some new opportunities. With it, to the customers products can be better presented and also customers can more easily meet their wishes and their needs. In a way, shopping using the virtual goggles does not have to be dull experience and can bring a certain fun for the customer when using it. It allows its customers to make purchases outside the stores, and to try certain products before the purchase. The use of virtual goggles can also be within the store itself, where they are used to ensure the testing of certain products, without the need to leave the sales premises. Some of the car showrooms offer virtual goggles for the customers to try and experience driving of a new vehicle models without having to leave the showroom. Using VR is extremely interesting when you want to show some goods that are expecting to arrive to the store in the near future. The buying of travel packages is an interesting experience, because before the packet purchasing, by using VR goggles you can experience the destination where you want to go. Even on the Internet, you can see different places and

[27] Jutarnji list (2020) Cashiers are an endangered species, Accessed January 20, 2021: https://novac.jutarnji.hr/novac/novcanik/blagajnice-su-ugrozena-vrsta-zbog-razvoja-tehnologija-uskor.

destinations that you want to visit. In the course of 2017, virtual reality has becoming accessible to the consumers and it is no longer focused solely on entertainment but also on something that is taking an increase share in our daily lives. The definition of virtual reality derives from the merging of the two worlds: virtuality and reality. Reality represents the world we live in, that is, everything we can experience and feel as human beings, and virtuality represents an area that is close to reality, but the individual is not positioned in the real but in an artificially created environment[28].

A virtual assistant is a person who does work for someone else and for such a work receives compensation. The question is what is the difference between an employee and a virtual assistant. The answer to this question gives us a better picture of who the virtual assistant really is and only when we get to know such thing, we can evoke the meaning of such person. The difference between a virtual assistant and an employee is, first of all that the virtual assistant is not a company's employee, he does not have to work in the company milieu, so we are obliged to pay him only for the part of the work we've agreed on, therefore he works with his equipment and in times when it suits him. Unlike the virtual assistant, the employee is obliged to come to work in a given time, so the duty of an employer is to provide him or her with everything necessary to do the job. Employer shall pay the employee pay when he isn't working, i.e., when the employee has taken a vacation, sick leave, etc. For the Virtual Assistants are presumed to be the persons who are top experts in what they offer for their support. In the Republic of Croatia, there are still a relatively small number of virtual assistants and very few of the employers have heard of them, as well as the opportunities that a virtual assistant can contribute to a company. For the time being, the largest number of virtual assistants is focused on the provision of services such as preparing annual (final) accounts and general activities related to accounting, preparation of presentations and other documents necessary for business companies (such as reports and various business analysis), market research, creation and maintenance of Websites, recruitment services for the new employees, buying and selling services and other types of services. When it comes to shopping with the help of a virtual assistant, we have still not come to the favourable solution, and there are very few examples of this type, but it is to be assumed that in the future we will see examples where companies will hire virtual assistants to make certain purchases for them. For now, what it can be assumed is that some of the companies hire virtual assistants to make a purchase of cars, machinery and equipment, office paper, products and services on their behalf, because they either do not have enough of their own time or knowledge and what is the most important, they do not have enough information's to make the right decision for their company. Those companies that recognize and find quality virtual assistants will surely achieve better results in their business.

Omnichannel is a multiple sales approach that is integrated into one whole and aims to offer a unique user experience. Omnichannel uses multi-channel approaches, while multi-channel approaches do not have to make an omnichannel experience. The multiple-channel approach to sales allows the customer to solely choose through the which channel they will examine the product they are interested in. The customer goes through the purchasing segments and realizes the final purchase when the customer can realize certain benefits for future purchases, but the greatest acquired privilege is the shopping experience[29]. Omnichannel is a way for retailers to combine the online and offline user experience, with the hint of a Web shop and a physical store where customers communicate and interact with the brand. Factors of a good omnichannel system are[30]:

- Convenience; today's customers have little time at their disposal, and therefore it is necessary to organize the ways of interaction with the customers, so that customers will get the requested information as soon as possible.
- Consistency; trust is one of the most important elements of today's buying process, and consistency is one of the most important parts in the process for the trust establishment.
- Relevance**;** today's customer expects that all the information's at his disposal are up-to-date, accurate at all times, that the interaction with the brand is personalized and adapted to customer's shopping habits.
- Empowerment; retailers who act on their customers through all stages from inducing an interest to decision making, for the customer to make a purchase, and also the subsequent customer care by which we actually educate the customers on how to make the best purchase decision.
- Agility; The development of technology is extremely fast and retailers who want to constantly provide their customers with an optimal user experience and to keep them, they need to constantly work on improving their processes. Analytical tools provide an extremely large amount of useful data that can provide information's in which direction to introduce changes and adaptations. Through omnichannel we want to achieve a unique experience of communication and shopping through all the channels (offline, online and mobile), to maximally

[28] Virtual Reality Society (2016) What is Virtual Reality?, Accessed January 10, 2021: http://www.vrs.org.uk/virtual-reality/concepts.html.

[29] Orendorff, A. (2018) Omnichannel vs Multichannel, Accessed January 05, 2021: https://www.shopify.com/enterprise/omni-channel-vs-multi-channel.

[30] Kruhek, I. (2019) Omnichannel strategy, Accessed January 10, 2021: https://progressive.com.hr/?p=2293.

simplify processes for customers, digitize offline trading and to improve customer satisfaction and to increase their loyalty.

3. Conclusions

The current situation that is caused by the Covid - 19 pandemic has led purchase on which the majority of customers have used to have developed in some another direction. This is where the development of online shopping has mostly taken place, but at the same time the development of virtual shopping has increased. Although we are still most satisfied when we can try certain products before the decision to actually buy them, we are currently somewhat limited and the shopping on which we are used to has become difficult around the world. The growing popularity of virtual product testing is attempt to make up for the actual departure and shopping we are used to. Every company wants to have better business results and that is sometimes difficult to achieve with the existing employees. There are many examples where companies are forced to look for employees outside the system in order to be able to bring about changes in the business that will enable them an achievement of better results. For the case of the virtual assistant, the agreement on the payment of their service is related to the work the virtual assistant is obliged to do through the period that was agreed in advance. Thus, companies can achieve savings in their business and hire experts for the part of the work that needs to be done during the particular time. With this in mind, some savings can be realised and such resources can be deployed elsewhere in the business. In the future, investing in the development of virtual purchasing is a vehicle that will make it easier to make the purchase itself, but also this investment poses certain risks. For this reason, preparations need to be properly done in order to succeed and realize this way of selling. The analysed examples of forms of digital trade indicate a modern approach to trade that has a tendency of development. Given the fact that the consumers quickly adapt to the use of new technologies and sales methods, trade companies should certainly consider to introduce digital sales methods in their business practice.

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QUALITATIVE RESEARCH IN THE DEVELOPMENT AND IMPLEMENTATION OF ARTIFICIAL INTELLIGENCE IN ECONOMY

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Abstract

We are currently feeling the effects of the Fourth Industrial Revolution (4IR) which has undergone considerable improvements as a result of the advancement of artificial intelligence and its related technologies, as well as other disruptive technologies components of Industry 4.0. The impact that artificial intelligence has had on humanity is spectacular, given that it is a much more present element in our lives than we would have thought. From translation software to virtual assistants (Siri, Cortana, etc.) artificial intelligence makes its presence felt and improves the way we live, communicate and work. Robotics is the most extensive field related to artificial intelligence and deals with the study and development of robots. They have great potential in improving the quality of our lives both at home and at work, and robots that work with human colleagues will help create new jobs and improve existing ones, giving people more time to focus on other activities. Collaboration in the process of work between man and robot will lead to the mutual completion of skills on both sides.

In this paper I will address topics such as artificial intelligence, automation, robotics, the impact of robots on jobs and as a practical part of the paper I will conduct a qualitative research on companies' perceptions of the adoption of artificial intelligence technologies.

Keywords: *Industry 4.0, artificial intelligence, robotics, automation, qualitative research*.

1. Introduction

The concepts of digital economy and technology have been called into question by the movement towards cutting-edge technologies in information, telecommunication and innovation that takes place in the 21st century (Tsyganov, 2016).

The concept of digital economy represents a digital technologies-based economy that mainly utilizes hardware, software, applications and telecommunications in the information technology in all of the economy's domains, as well as the organizations' internal and externa; activities (Domazet, 2017); (Sutherland, 2018). Also, digital economy makes reference to an economy that is based on creativity, market knowledge and a society based on innovation. Digital economy embodies a global level paradigm of the information society that is focused on technological platforms like the Internet, mobile devices being used for the production, distribution and goods or services exchange and consumption in global markets (Tsyganov, 2016); (Balcerzak, 2017).

The European Union Member States are in a conversion to a digital economy. There is a substantial difference between different countries in terms of development, denoted by the deficiency of harmonious relationship between the digital technology advancement level and the time required for their introduction in the business and industry spheres (Galichkina, 2014).

Artificial intelligence (AI) is a field of computer science that designates the development of intelligent machines. Artificial intelligence is specific to both machines (robots) and computers. Some of the activities for which artificial intelligence computers are dedicated include: learning, voice recognition, planning and problem solving.

It is well known that there is no widely accepted definition of artificial intelligence (AI) (Kirsh, 1991); (Allen, 1998); (Hearst, 2000); (Brachman, 2006); (Nilsson, 2009); (Bhatnagar, et al., 2008); (Monett, 2018), consequently, the term "artificial intelligence" being used with many different connotations, in the disruptive technologies field as well as apart from it.

Machine learning represents a fundamental part of artificial intelligence which requires the capacity of recognizing patterns in the appearance of entries concerning unassisted learning (unsupervised), while assisted learning involves numerical regression and classification.

Knowledge engineering is another cornerstone of artificial intelligence research. In order for machines to act in a similar way to humans, they must have pantagruelic information about the surrounding world.

Artificial intelligence can be grouped into four categories, as follows: reactive machines, limited memory, theory of mind and self-awareness.

The first type of artificial intelligence is a limited program of action that has no memory and cannot use its past experiences to change future ones. For example, Deep Blue, IBM's chess program that has limited objectives, analyzes the movements of its competitor and chooses the most advantageous movement.

The second type of artificial intelligence, limited memory can use past experiences to influence future selections. For example, self-driving cars have a section of functions that make decisions based on previous experience. Knowledge changes the actions that will

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take place in the near future, for example an unforeseen event such as a car bypassing an obstacle on the road.

The third type of artificial intelligence, theory of mind refers to other machines that have personal assumptions, aspirations and goals that influence their decisions. This type of artificial intelligence has not yet been developed.

The fourth type of artificial intelligence, self-awareness embodies artificial intelligence systems that possess the ability to memorize. Self-awareness machines can discern their current state and use the information to deduce the feelings of others. However, this type of artificial intelligence has not yet been developed.

Artificial intelligence (AI) tools and techniques' role in business and the global economy represent a topic of interest, of no surprise, given the recent advances and innovations in artificial intelligence, as well as the products and services becoming more and more ubiquitous that are already widely used. All this has led to speculation that artificial intelligence could introduce radical changes in human life and employment in particular.

2. The impact of artificial intelligence on economy

There is no generally accepted, precise and unambiguous definition of artificial intelligence. This is a generic notion for a large number of subfields, such as: cognitive computing (algorithms capable of reasoning and understanding at a higher level, similar to the human mind), machine learning (algorithms that learn to perform tasks), enhanced intelligence (cooperation between man and machine), AI robotics (artificial intelligence integrated in robots). However, the main objective of artificial intelligence research and development is to automate intelligent behavior such as reasoning, information gathering, planning, learning, communication, and manipulation.

Artificial intelligence is divided into two categories: restricted and general, the first being able to perform specific tasks, and the other any task that would require human thinking.

Recently, there has been an impressive progress in the restricted field of artificial intelligence, mainly due to the large amount of data available, the increase in computer processing power and the progress of machine learning (ML). Machine learning incorporates self-teaching algorithms that learn to perform specific tasks. The basis of this method is the processing of "data training", with which the algorithm learns to recognize patterns.

Deep learning (DL) is an embodiment of machine learning that uses neural networks based to some extent on the human brain and that learns through practice and feedback.

Artificial intelligence will have an enlarging impact on the global economy as the adoption of new technologies increases.

Research and development of artificial intelligence has concentrated for an extended period of time on the elements of reasoning, information gathering, communication and perception (visual, auditory and sensory). This has resulted in a large number of uses of artificial intelligence: virtual assistants, speech recognition, translation programs, text-to-speech programs, and so on.

Artificial intelligence is seen as an engine for economic growth and productivity, as it can increase production efficiency and analyze large amounts of data, thus greatly enhancing the decision-making process.

Artificial intelligence can also lead to the emergence of new services and products, as well as industries and markets, thus stimulating consumer demand and generating new revenue streams.

However, artificial intelligence can also have an extremely disruptive effect on the society and economy. Some speculate that AI could lead to the genesis of super-firms - resource and knowledge centers that could have detrimental effects on the expansive economy.

Artificial intelligence could also expand the gap between developed and developing countries and increase the demand for workers with certain skills, while making other workers redundant. This trend could have significant results for the labor market.

Despite the important advances that have arisen in the artificial intelligence (AI) and robotics' field, artificial agents still do not have the autonomy and versatility to interact properly with realistic environments. This requires agents to face unknown situations at the time of design, to discover multiple goals / tasks autonomously and to be endowed with learning processes capable of solving several tasks incrementally and online.

2.1. Ethics of artificial intelligence

Although artificial intelligence tools present a new range of functionality for companies, the implementation of artificial intelligence casts doubt on ethical issues. Because of the deep learning algorithms that underlie many of the most advanced artificial intelligence tools, they cannot be smarter than the data they receive in training. Since a person decides what data should be used to train an AI-based program, the potential for human prejudice is intrinsic and needs to be meticulously monitored.

The most important human skills that an AI system (a computer or a robot controlled by a computer) must manifest are: reasoning, understanding a given situation, generalization starting from a particular case and learning from previous experiences.

A vital objective in the ethical artificial intelligence development is consisted by the encouraging of general acceptance and trust in AI tools. Concerns regarding the business drivers for capitalizing AI have been expressed in the academic literature (Baldini G, 2018); (Bauer WA, 2019), predominantly

from the most opportune strategies for the development of artificial intelligence (bottom-up approaches and to a considerable degree, hybrid approaches). Apart from that, the media has a notable impact on the process in which issues of interest, regardless of the field, are presented to the public (Racine E, 2005); (Society, 2018); (Chuan C-H, 2019). Consequently, the public opinion in what concerns the artificial intelligence acceptance will most probably be affected by media. Market economy consumers as well as liberal democracy members are the key stakeholders of the technology endorsement, as well as to a great extent, for public policy and legal framework. The public opinion could affect the further development of artificial intelligence and the way the government deals with its regulation. When referring to a considerably stigmatized subject, in some cases there is a discrepancy between the media representation and the public opinion (Ding, 2009). However, this shouldn't be the case of artificial intelligence.

3. Robotization

Artificial intelligence is also the major component of robotics, an integrative scientific and engineering subdivision that deals with the planning, assembly and use of mechanical robots. Robots need artificial intelligence to handle tasks such as manipulating objects and navigating, along with location problems, motion planning, and mapping.

Robotics is an interdisciplinary division of science and engineering, including mechanical and electrical engineering, computer science as well as others that deal with the design, construction, operation and use of robots, as well as computer systems for their handle, sensorial feedback and processing of information. Robots represent physical machines that possess sensors, controllers and motors that have the capacity of being programmed to execute tasks in an autonomous way.

Robots have great potential in improving the quality of our lives both at work and at home. Robots that cooperate with human colleagues will help create new jobs and improve existing ones, giving people more time to focus on other activities.

Robots are also better than humans at repetitive tasks because they do not get tired and have a higher work precision in the matter of numbers or typing certain information at which people often tend to make mistakes.

Humans surpass robots in abstraction, generalization, creative thinking given by their ability to reason and act based on their previous experiences.

However, the goal of robotics is not to replace human labor by automating tasks, but to find cost-effective ways of cooperation in the human-robot association.

Collaboration in the process of work between man and robot will lead to the mutual complement of skills on both sides.

However, there are significant gaps between where robots are today and the promise of a future era of "ubiquitous robotics", when robots will be integrated into the fabric of everyday life, becoming as common as computers and today's smartphones, performing many specializations, tasks and, often, operating side by side with people." (Rus, 2015)

The aim of current research is to improve robots in terms of manufacturing, the ability to handle objects, the way they reason, cooperate with humans and other robots and their perception of the environment.

"Creating a world of ubiquitous and customized robots is a major challenge, but its scope is no different than the problem computer scientists faced almost three decades ago when they dreamed of a world where computers would become integral parts of human societies. " (Rus, 2015)

The range of functionalities was made possible by innovations that came in the design of the robot and the development of algorithms that guide the perception, reasoning, control and coordination of robots.

Robotics has benefited greatly from advances in various fields, such as: data storage, computing, wireless communications, electronics, Internet performance, instrument design and manufacturing.

However, such a confined definition of robots ignores many of the important developments underway. "Robots are the latest expression of the growth and diffusion of ICT and can have a huge impact on the labor market" (van der Berge, 2015)

The term "robots" is referring not only to physical robots, but also to technologies like "softbots", artificial intelligence, sensor networks and data analysis. This is the Internet of Robotic Things, where the internet is extended by the senses (sensors), hands and feet (actuators) and, thanks to machine learning (ML) and artificial intelligence they can also be "smart" machines (Kool, 2015)

"Today's robots can recognize objects, map new environments, perform 'selection and placement' operations on the assembly line, imitate simple human movements, acquire simple skills, and even act in coordination with other robots and human partners. (Rus, 2015)

Robots as well as other machines bear different shapes and sizes (Hueck, 2014) and range from industrial and service robots to artificial intelligence-based robots. Industrial robotics is not yet a considerably developed field. According to the latest figures collected by the International Federation of Robotics (IFR) in 2020, there are 2.7 million industrial robots working worldwide and their number has increased for many years and will continue to do so, but not exponentially (IFR, 2020).

Many of the recent robotic applications do not immediately stand out as such. A car navigation system via satellite and the subway access gates represent examples of robotics.

NASA described the human as being "the smallest, nonlinear, universal 150kg computing system

that can serve all purposes that can be mass-produced by unskilled labor" (Brynjolfsson, 2015). Unlike machines, humans are able to originate useful ideas and new alternatives for problems and have the power of empathy (Colvin, 2015); (Toyama, 2015).

Robots can considerably improve our lives as well as our work, but they cannot fully execute human tasks, or at least not yet. For instance, judges are aided by computer algorithms that seek jurisprudence and help organize material, but judges and not robots, will continue to issue judgments for the time being, because what matters is "the social need for individuals to be responsible for making important decisions." (Colvin, 2015).

Starting with developmental robotics (Lungarella, 2003); (Cangelosi, 2015) and gradually expanding into other areas, intrinsically motivated learning (sometimes called "curiosity-based learning") has been studied by many researchers as an approach to lifelong learning in machines (Oudeyer, 2007); (Schmidhuber, 2010); (Barto, 2013); (Mirolli, 2013). Inspired by the ability of humans and other mammals to discover how to produce "interesting" effects in the environment caused by self-generated motivational signals that are not related to specific tasks or instructions (White, 1959); (Berlyne, 1960); (Deci, 1985), intrinsically motivated open learning research aims to develop agents that autonomously generate motivational signals (Merrick, 2010) in order to acquire repertoires of various skills that are likely to become useful later when specific "extrinsic" tasks need to be performed. (Barto AG, 2004); (Baldassarre, 2011); (Baranes, 2013); (Kulkarni, 2016); (Santucci, 2016).

However, in 4IR we do not operate only with robots - they are the most visible component of this new industrial ecosystem. Basically, in a factory where the principles of Industry 4.0 function, the machines will operate independently or cooperate with people in a production process controlled through digital interfaces by the user and not by workers and whose maintenance, supply and logistics could be managed automatically. Thus, the factory becomes an independent and interconnected entity, which has the ability to collect data, analyze it and make automated decisions. The operation of such a factory depends to a lesser extent on traditional production engineers and more on IT specialists.

Table 1 Layers that form the structure of the sampling base

Layer	Sex	Age	Education	Income (lei)
1	F	18-23	pri/mid	<1000
2	F	18-23	pri/mid	1000-2000
3	F	18-23	pri/mid	>2000
4	F	18-23	high	<1000
5	F	18-23	high	1000-2000
6	F	18-23	high	>2000
7	F	24-39	pri/mid	<1000
8	F	24-39	pri/mid	1000-2000
9	F	24-39	pri/mid	>2000
10	F	24-39	high	<1000
11	F	24-39	high	1000-2000
12	F	24-39	high	>2000
13	F	40-57	pri/mid	<1000
14	F	40-57	pri/mid	1000-2000
15	F	40-57	pri/mid	>2000
16	F	40-57	high	<1000
17	F	40-57	high	1000-2000
18	F	40-57	high	>2000
19	M	18-23	pri/mid	<1000
20	M	18-23	pri/mid	1000-2000
21	M	18-23	pri/mid	>2000
22	M	18-23	high	<1000
23	M	18-23	high	1000-2000
24	M	18-23	high	>2000
25	M	24-39	pri/mid	<1000
26	M	24-39	pri/mid	1000-2000
27	M	24-39	pri/mid	>2000
28	M	24-39	high	<1000
29	M	24-39	high	1000-2000
30	M	24-39	high	>2000
31	M	40-57	pri/mid	<1000
32	M	40-57	pri/mid	1000-2000
33	M	40-57	pri/mid	>2000
34	M	40-57	high	<1000
35	M	40-57	high	1000-2000
36	M	40-57	high	>2000

Source: Own study

4. Qualitative research

Due to the unprecedented pandemic situation, the selection of respondents and interviews had to be conducted online via e-mail and specialized platforms for virtual conferences, respectively Zoom. The companies selected for the qualitative research were informed by e-mail and were asked to participate through one or more representatives that are relevant to the purpose of the research.

Participants in the semistructured (interviu semi-dirijat) individual interview were recruited via e-mail in which the recruitment criteria were verified and the attendance at the interview was confirmed.

The recruitment criteria discussed both by phone and in the online interview allowed the selection of those individuals who meet the criteria set out in the sampling process.

- Identification questions regarding some personal data of the interview participants: sex, age, education and income were used.
- At the same time, by the specific question "Are you familiar with collaborative robots, RPA and automation of production processes?", All respondents who answered "no" were eliminated.

The recruited participants were informed of the possible duration of the interview for participation. It was also decided on the date and time.

The interviews took place between February 1 and February 7, 2021 based on the interview guide (conversation guide). The interview guide contains five topics that were covered during the discussion:

- The purposes of using collaborative robots and RPA at the workplace (respectively within companies)
- Workers' motivation to collaborate with robots within the companies where they carry out their activity
- The risk associated with collaborative robots or RPA
- Workers' confidence in robots
- Workers' satisfaction toward the collaboration with robots or RPAs within the companies where they work

4.1. Conclusions and remarks of the qualitative research

The need for exploratory research appears against the background of an atypical reality regarding the adoption of collaborative robots within companies.

Thus, the technique of the semistructured interview conducted on the basis of an interview guide was used, among 26 workers familiar with the robots. The interview followed five main topics on which conclusions were drawn.

All selected respondents are familiar with collaborative robots and RPA and also work with them in the field in which they operate.

Asked about their perception of collaborative robots at work, most respondents agreed that they make their work a lot easier and can also focus on other activities while the robot performs the task for which it has been programmed to execute.

Apparently, the number of repetitive and monotonous tasks is really quite high, and the fact that robots can take over some of these tasks makes labour easier for workers and at the same time considerably reduces the risk of making mistakes even by 99%. Human workers tend to make mistakes when performing repetitive tasks such as entering numbers into a computer.

Along with the benefits, there is also a risk associated with collaborative robots and RPA. Many respondents fear that they will lose their jobs due to the massive automation of certain work sectors in which robots have proven to be much more profitable and efficient than human workers. A robot can take over the work of more than 10 people depending on the tasks for which it is programmed to execute.

Fears also arise regarding the human-robot "symbiosis", as some respondents stated that in some cases they feel compelled to compete with cars instead of collaborating with them. As most respondents have recently started collaborating with robots, they said that this adaptation is difficult and requires a lot of time and patience to reach a mutual completion of the tasks on the part of both human and robot.

Given that they perceive a high level of risk in terms of collaborating with robots, respondents said that they had to improve themselves in the field in which they operate. Precisely to reduce the risk of being replaced by workers who are more familiar with robotics and who know how to collaborate with it. The risk of being replaced by robots is not as high as that of being replaced by more competent people when it comes to highly skilled workers. However, for unskilled or low-skilled workers the forecasts are gloomy in the sense that they may lose their job much easier due to automation (introduction of a robot to take over their tasks).

There is a good level of satisfaction with collaborative robots, in the sense that most respondents consider them useful and even indispensable in the workplace given that they help them by taking over some of the monotonous, heavy, repetitive or dangerous tasks at the same time requiring a human partner (operator) to guide them in performing the tasks.

Of course, there are also reluctant people in the sample used who are afraid of the extent of automation, as it has undergone a rapid evolution in a relatively short time, and what is now present in factories and companies is far from the full potential of automation and robotization.

Most importantly, no respondents stated that they intend to change jobs due to automation, on the contrary, some of them responded that they are willing to specialize in robot-assisted work and unskilled and

low-skilled workers who are the most exposed to the risk of automation of the industry responded that they are willing to undergo training if required or even specialized studies to continue their work in that field.

The use of robots to take on repetitive, monotonous and dangerous activities thus becomes a necessity and comes to the aid of human workers, relieving them of difficult, unpleasant or even life-threatening tasks.

5. Theoretical-Methodological and Practical-Applicative Conclusions

The world is in an era of fundamental transformation which is regarded as the Fourth Industrial Revolution, also called the cognitive era. Artificial intelligence is at the heart of this development, as full-fledged AI has the potential to disrupt every industry in the economy and virtually every aspect of human life in the next 20-50 years.

Today, artificial intelligence is in a period of constant innovation in which new technologies and ideas are emerging. It is transitioning from the advancement of the underlying theoretical concepts (e.g., machine and deep learning, neural networks) to a real impact in a multitude of industries and products. These include areas such as health, retail and e-commerce, transport, finance, national security, energy smart cities and more.

Predictions regarding the impact of artificial intelligence (worth US dollars) may differ, but a common fact is that artificial intelligence will be a disruptive force - not only in every industry and sector, but for society as a whole. Projections show that by 2030 artificial intelligence will have the potential to increase gross domestic product by 10% or more. This is mainly due to product improvements and increased productivity.

The countries which will benefit most from the continued progress of artificial intelligence and its associated technologies are China and the United States.

The current perspective on artificial intelligence now shows that smart cars will become a reality. Today's AI systems respond to voice commands, distinguish images and drive vehicles.

The main limitation of AI is its learning from data and the lack of other ways in which knowledge can be embodied. This means that any data errors will be displayed in the results and any subsequent analysis predictions must be added individually.

In conclusion, the objective of artificial intelligence is to provide software capable of reasoning at the input and explaining at the output. Artificial intelligence will provide human-type interactions with software and support specific tasks, but will not be able to replace the human element.

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THE DEGREE OF DIGITALIZATION OF PUBLIC SERVICES IN ROMANIA

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Mădălina RĂDOI[**]

Abstract

From the appearance of the pandemic until now, we can conclude that this uncertain and completely atypical period still had a positive impact for Romania, namely the accelerated digitalization both in private companies and in the state administration. The main objective of digitalisation is to contribute to the profound transformation of the economy, public administration and society, increasing performance and efficiency in the public sector, by creating new types of value based on digitalisation, innovation and digital technologies.

The study aims to present and become aware of the reality in Romania regarding the lack of interoperability of IT systems in public administration, the low level of integration of digital technology by the business environment, the level of digitalization skills of the population, etc. According to reports and statistics, Romania ranks last in most of the analysis indicators on the degree of digitization in the European Union. Small and medium-sized companies that have been cross the barrier of technology have had the best chance of identifying new business opportunities during the pandemic.

In this context, it is necessary for public administrations to adapt to new realities and to develop not only services that lead to simplification of processes and increase the speed of execution of works, but especially to improve interaction with citizens, by reducing bureaucracy and providing digital solutions. That they can solve most of their problems without having to make unnecessary trips to state institutions.

Keywords: *digitalization, public services, integration of digital technology, economic growth, public administrations, Romanian Digitization Authority.*

1. Content

The Digital Economy and Society Index (DESI) for 2020, ranked Romania at the beginning of the Covid-19 pandemic on the 26th place in Europe. This is due to the lack of interest of decision makers in the state, the lack of precise planning of the digitization process, the instability at the level of responsible institutions, but also the lack of governmental assumption of this priority.

Table 1. The structure of DESI

No.	SERIES	CATEGORY
1	Connectivity	Fixed broadband take-up, fixed broadband coverage, mobile broadband and broadband prices
2	Human capital	Internet user skills and advanced skills
3	Use of internet	Citizens' use of internet services and online transactions
4	Integration of digital technology	Business digitalisation and e-commerce
5	Digital public services	E-Gouvernment

Source: DESI

Starting with the end of 2019, the digitization process has become one of Romania's main priorities, laying the foundations of a central authority, the Romanian Digitization Authority (ADR), with the main objective of coordinating the process of digital transformation of the Romanian economy and society. This objective represents a fundamental element in order to implement the new development model of Romania and to achieve convergence with the more advanced European states.

The Authority for the Digitization of Romania (ADR) was established in 2020. It functions as a structure with legal personality subordinated to the Government and aims at: the digitization of the public sector; developing and ensuring interoperability between public authorities and institutions; development of computer authentication systems and interconnection of public computer systems; development of electronic public services; implementation at national level of information systems that provide eGovernment services; operation

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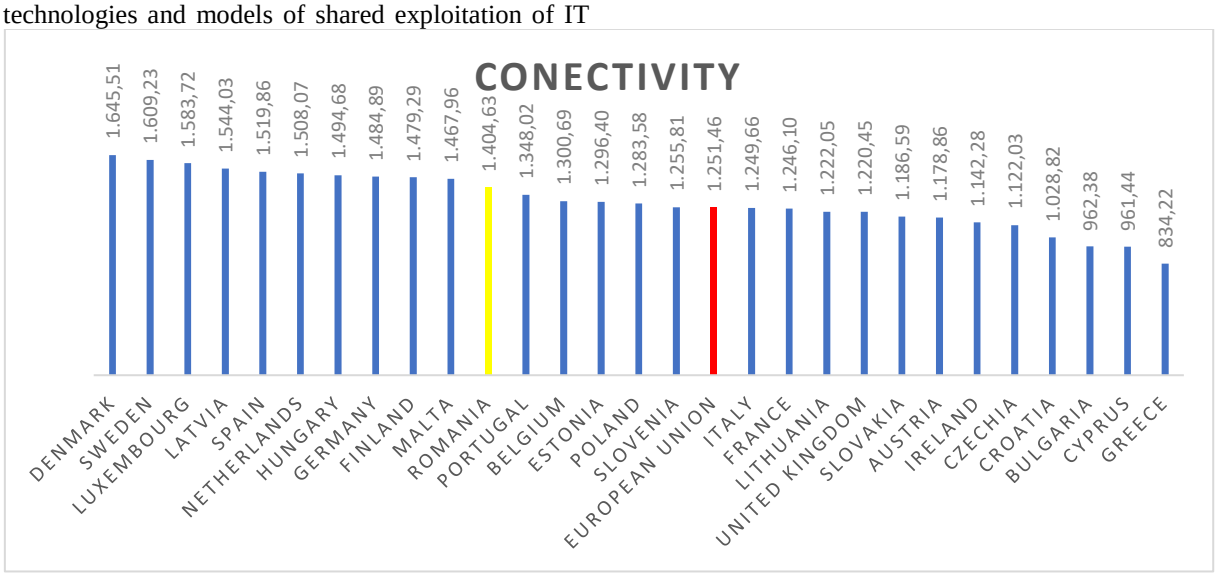
of information systems providing eGovernment services; elaboration and implementation of regulations on specific activities of government by electronic means in accordance with European and national strategies in the field of digitization; the operation of interfaces between the computer systems of public institutions and citizens or the business environment, being a gateway to their electronic public services provided by the public administration; implementation of digital services that capitalize on technical mechanisms for certifying authenticity and ensuring data protection; implementation of specific technologies and models of shared exploitation of IT resources, to support the implementation and provision of digital services including on the basis of cloud platforms; implementation and operation of access mechanisms to digital services in a regime of mobility and independence from access technology, in order to maximize their addressability; ensuring cyber security for the public sector; implementation of artificial intelligence in the public sector.

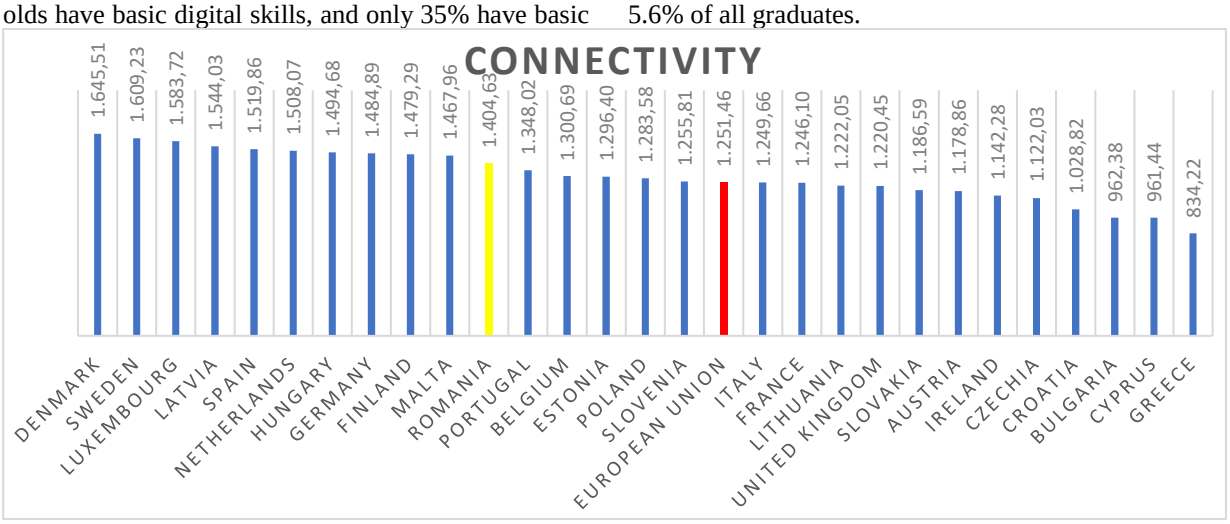
According to DESI indicators, Romania ranks 11th in terms of connectivity. In 2019, Romania improved its results in terms of coverage, but stagnated in terms of use.



Source: DESI

Table 2. DESI values for Connectivity in European countries

In terms of digital skills, Romania ranks 27th out of 28 EU countries. Less than a third of 16- to 74-year-olds have basic digital skills, and only 35% have basic software skills. Romania has good results in terms of ICT graduates, ranking 5th among Member States, with 5.6% of all graduates.

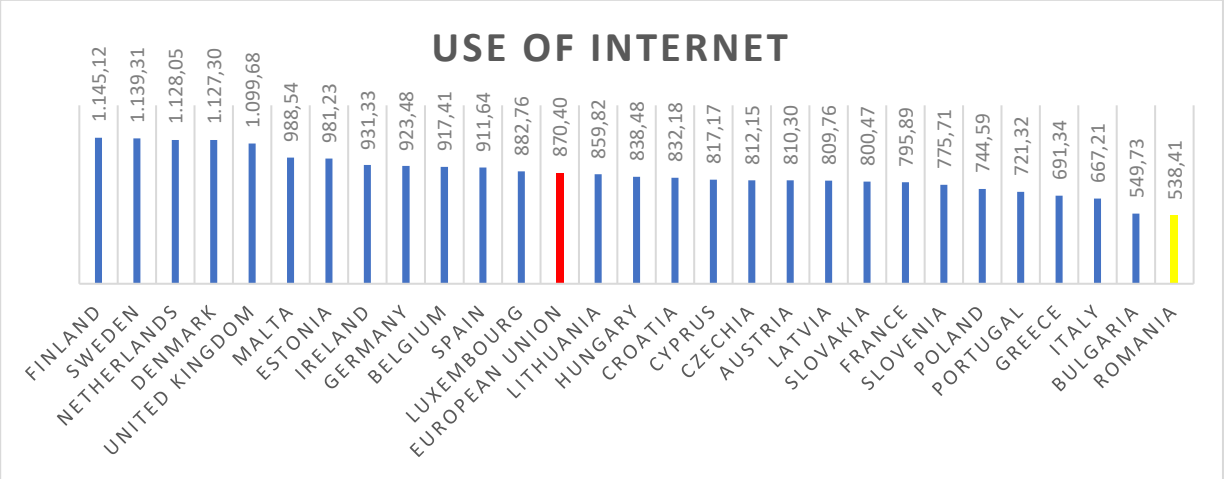


Source: DESI

Table 3. DESI values for Human Capital in Europe country

Regarding the use of internet services, Romania has the lowest level of use compared to EU member states. However, there are two online activities in which Romania ranks first in the use of social networks (82%, compared to an EU average of 65%) and video calls (67%; EU average: 60%). In contrast, the use of online

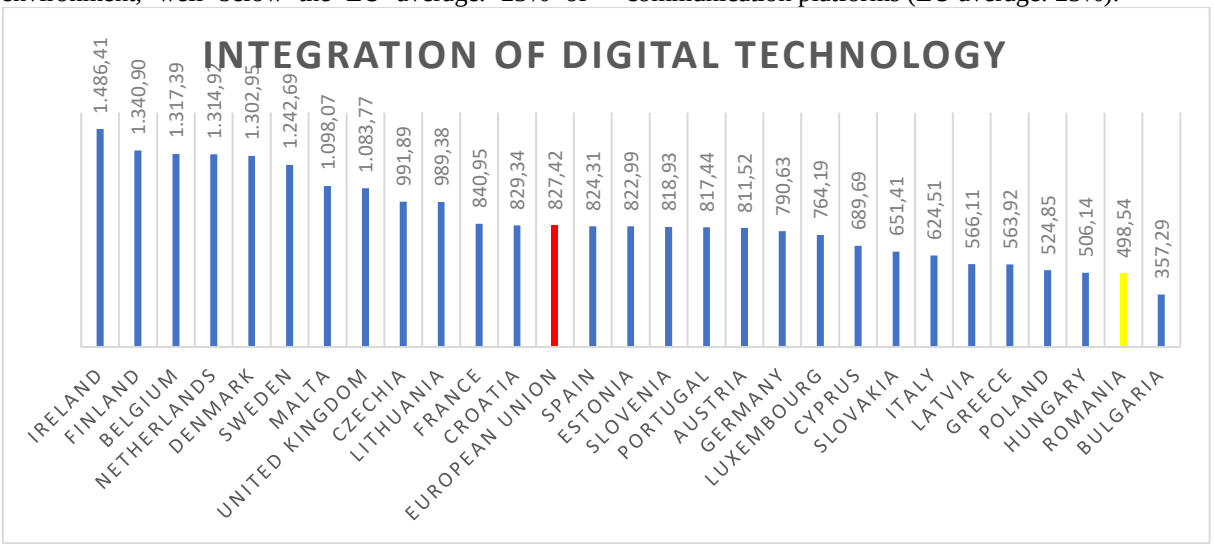
banking (11%), shopping (29%), reading news (55%), as well as the consumption of music, videos and online games (63%) are the lowest among EU Member States, mainly due to a lack of confidence in digital technology. The low level of use of online banking services is also due to the fact that more than two out of five Romanian adults (42%) (16) do not have a bank account



Source: DESI

Table 4. Connectivity value on Europe country - DESI values for Use of Internet in European countries

Romania ranks 28th among EU countries in terms of the integration of digital technology by the business environment, well below the EU average. 23% of Romanian companies exchange information electronically, while only 8% use social communication platforms (EU average: 25%).

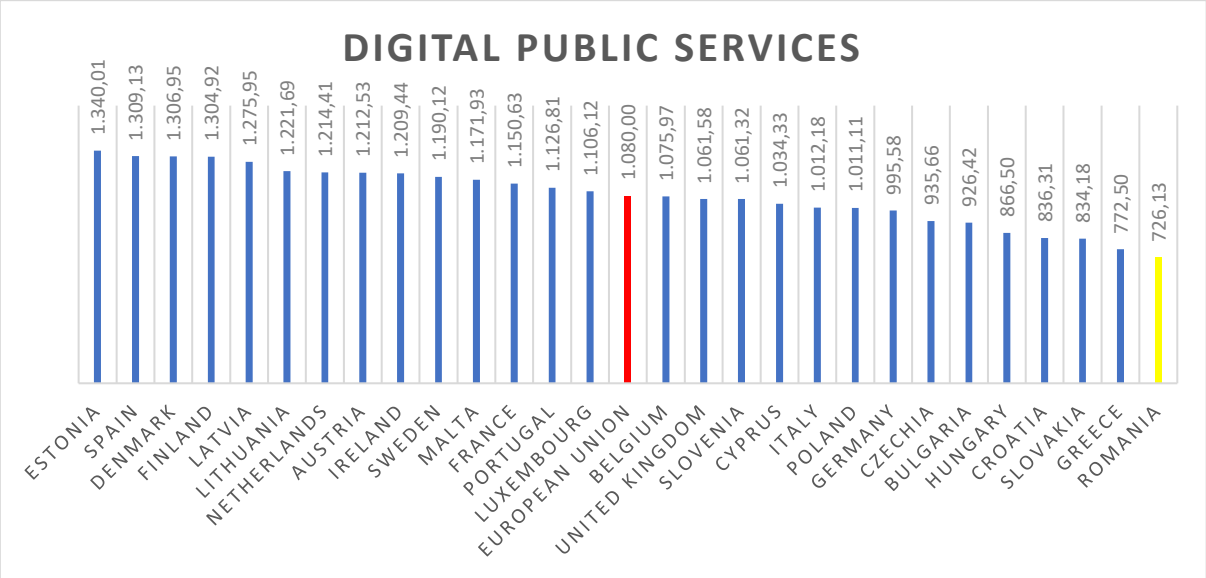


Source: DESI

Table 5. DESI values for Integration of Digital Technology in European countries

Romania has the lowest performance in terms of digital public services, it is at the bottom of the ranking in the EU. In fact, the only online interaction between public authorities and the population is the submission of forms, according to the latest DESI report.

In contrast, Romania ranks 8th in terms of users of e-government services, with 82% of Internet users, compared to the EU average of 67%. However, this high level of online interaction between public authorities and the population only targets internet users who have to submit forms. The low scores obtained on pre-filled forms and services performed entirely online, in which the country ranks 28th, indicate a systemic problem in terms of the quality and usability of the services provided. There was no improvement of digital public services for enterprises, Romania being on the last place in this respect as well.



Source: DESI

Table 6. DESI values for Digital Public Services Technology in European countries

The causes that led to a weak development of electronic public services in Romania were: the lack of an efficient and effective IT architecture, the lack of information systems necessary for central public institutions for the operationalization of electronic public services; the inadequacy of e-government and human resources specialists in the IT departments of public institutions and authorities and, consequently, the skills needed to develop and maintain electronic public services and the lack of a uniform and effective legislative and procedural framework to support electronic public services.

In Romania, a series of IT platforms available to citizens are currently active:

- Online Trade Register (ONRC portal);
- The court portal (portal.just.ro);
- The system of the National Agency for Cadastre and Real Estate Advertising for issuing land book extracts (ancpi.ro);
- The national electronic system for online payment of taxes (ghiseul.ro).

Starting with 2020, the listed IT platforms have been streamlined and expanded, as well as other relevant platforms at national level, to strengthen e-government (PCUe), web platforms and applications have been created to provide correct support and information for citizens. and Covid-19 pandemic management companies. Among the IT systems implemented by ADR, in the event of the COVID 19 pandemic, are:

- https://stirioficiale.ro/informatii - the official page of the government regarding the real information in the fight against Covid 19;
- https://cetrebuiesafac.ro/ - the official website of the government with information on how citizens should act if they have symptoms or are sick;
- https://www.datelazi.ro/ - the official page of the government with official data about the official situation about the disease situation, centralized by regions;
- https://aici.gov.ro/ - the official page of the government for uploading online the documents intended for registration, addressed to public institutions that do not have their own online registration system;
- https://diasporahub.ro/ - the official page of the government for Romanian citizens and support groups from abroad in emergency situations;
- https://rohelp.ro/ro/ - the official page of the government for non-profit organizations actively involved in limiting the effects of the Covid-19 pandemic.

2. Streamlining the institutions of the public system

In the public administrations in the last year the process of implementation of some digitization projects of the institutions providing public services has been accelerated and administrative processes have been streamlined, in relation to the citizens, the business environment and inter-institutional.

Implement the “once only” principle and the interoperability architecture based on an API management provided by all public institutions that have national data registers. The aim is to identify all the basic registers and create a mechanism for amending this list, ensuring the technical infrastructure so that access to the basic registers can be achieved quickly, securely and flexibly, ensuring the confidentiality of data;

In parallel, the electronic signature of public administration officials will be generalized and used by all population, so that they can communicate digitally with companies, reducing reaction time and early correction of possible mistakes.

Introduction of an electronic identity system that will allow full remote interaction with the public administration, with the clear effect of reducing costs, using a unique identity and an SSO (single Sign On) authentication mechanism, including enrolment on this online identification platform being able to be done remotely. The result will be a system that allows zero interaction at the counter for citizens from the moment of enrolment, achieving a reduction in the costs of implementing new platforms and a high level of security for all public services offered online. This e-identity scheme will be notified at EU level and integrated with the European cross-border communication node eIDAS. The national electronic identity system will be open, ready to integrate new types of identities and including to ensure the transition to systems that involve the use of SSI (Self-sovereign identity) mechanisms;

Effective operationalization of a single electronic contact point for citizens and companies by restoring the PCUe and integrating it with the national payment system, ghiseul.ro, in a single platform for citizens. By including all available electronic services and making it accessible through the national e-identity scheme, according to the European regulatory framework, public electronic services will be available and accessible and cross-border based on the eIDAS node. In addition, this approach will generate an increase in the visibility of public services, having as main effect the decrease of the time for the search for information by the companies and the resolution of the different cases.

3. Economic digitalization

For Romania, the potential economic benefits of digitalization would bring a contribution of 42 billion Euros to GDP by 2025. The Romanian economy is dominated by 99% of small and medium enterprises, the speed with which they can be digitized and the digitization that they can achieve, being two elements with far-reaching effects on Romania's competitiveness on the European and global market. Due to the rapid growth of the technology industry at EU level (five times faster than the rest of the European economy in terms of gross value added), digital technologies are disruptively impacting the market dynamics at an increasing speed, creating unprecedented opportunities for European and implicitly Romanian SMEs, enabling companies to innovate, grow and compete using new models and solutions in previous generations of technologies.

Industry can benefit from an indirect effect of digitalization, but with a major impact on the ability of companies to converge on the principles of the digital economy through new business models, business models and a new managerial vision in a new paradigm based on digital innovations and technologies.

The poor level of economic digitalization is also caused by the fact that the process of digital transformation of SMEs has often been misunderstood and reduced to numerous financing programs, assimilated only to simple purchases of IT systems and equipment.

The digital transformation process involves fundamental changes on different levels of a business:

- at process level (use of an increased percentage of automation in production and integration of data in processes and supply chains, leading to increased productivity and resource efficiency),
- at product level (incorporation of ICT in as many product categories as possible) and last but not least
- at the level of business models (smart and connected products lead and adapt to changes in customer behaviour).

The digital economy has the potential to generate major changes and opportunities in a wide variety of fields, such as administrative, social, educational, medical, but also in emerging fields. Increasing Romania's potential to create and innovate digital technologies and, on the other hand, to adopt and use them will generate strategic value on several levels.

The Romanian economy must make a transition as fast as possible to the new economy (Digital Economy) capitalizing on all the advantages of the new industrial revolution. Most SMEs in Romania (1/3 of European SMEs) invest mainly in digital products that allow business optimization, operations, such as Customer Relationship Management (CRM) or Enterprise Resource Planning (ERP), focusing -is on optimizing existing models and processes, without a substantiated business analysis, a simplification of processes, data collection or the use of emerging technologies such as Artificial Intelligence, Cloud Computing, IoT, Blockchain, etc. The fields with the greatest potential for automation in Romania and where we can get the greatest impact are: agriculture, manufacturing, trade and transport.

The European Investment Bank shows that approximately 70% of European SMEs that have implemented a digitization project have used the infrastructure of the regional innovation hub in the region in which they operate, whether or not the SME has a digital profile. Thus, the European Digital Innovation Hubs are the main trans-European tool and vector that the European Commission together with the Member States envisages to drive both innovation and the digitalisation of the economy and the digitalisation of European public administration. Designed as public-private partnerships for digital development, these hubs will be funded mainly through the Digital Europe Program and European Regional Development Fund allocations at the level of each European region and will network to achieve the above-mentioned objectives. up. The Digital Innovation Hubs will highlight the

technological and regional innovation potential to develop digital technologies and tools for fields with a high degree of adoption: industry, public administration, agriculture, healthcare, etc.

The strategic role of the Digital Innovation Hubs is also to define from a geostrategic point of view the role of Romania on a European map, but also a global one of digitalization and technological innovation. Digital Innovation Hubs will become strategic vectors, connected in the European network of Digital Innovation Hubs capable of generating and transferring know-how and generating value in the economy and society.

4. The level of digital education of the population

An important aspect for government action is the development of digital skills in all segments of the population and the workforce. According to the Society and Digital Economy Index published by the European Commission (DESI), here too Romania is at the end of the European ranking, with less than 30% of the population having basic digital skills.

In 2020, the COVID-19 crisis has led education and training institutions around the world to move to distance / online teaching. In a few weeks, the educational landscape in Europe and around the world has changed fundamentally. Teachers, students and parents were forced to adapt quickly to the situation.

For Romania, the COVID-19 pandemic highlighted significant gaps and deficiencies in terms of digital skills, connectivity and the use of technologies in education. In addition, according to the latest Index of the Digital Economy and Society, 42% of Europeans do not have basic digital skills, and the European labor market faces a significant shortage of digital experts. Moreover, the COVID-19 crisis has drawn attention both to the opportunities and risks of online life and to the need for a better and safer digital environment for all, especially for young people under 18.

At EU level, the European Commission, according to the European Competence Agenda for Sustainable Competitiveness, Social Equity and Resilience), has the following objectives: strengthening sustainable competitiveness; ensuring social equity; increasing social resilience; promoting lifelong learning; job skills training; resilience of the economy at EU level.

In the case of Romania, the issues followed by government measures to improve digital skills in education will be the following: investments will be made in the basic digital skills of teachers in regular training programs and in the transfer of IT resources to problem areas and evaluation and modifying the school curriculum to include both age and school-specific digitization hours and the implementation of a digitized teaching mode for all subjects.

5. Conclusions

Through specific mechanisms and activities, it will be necessary to ensure the increase of Romania's capacity to develop and integrate digital innovations and technologies in order to digitize for several fields and sectors of activity, to increase the global visibility, but also to capitalize on the strategic potential that Romania he has it in the IT&C field. These actions will contribute to increasing the quality of life of citizens and reducing costs for companies, by simplifying the interaction with state institutions.

The changes that took place, such as the obligation imposed on public institutions by GEO 38/2020 to accept documents in electronic form and digitally signed, the possibility to send documents and make payments online through the ghiseul.ro or here.gov.ro platforms - represents only the digitization of some services, and not of the administration, which implies a rethinking of processes, interaction, services, etc.

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BRANDING IN TIMES OF CRISIS: BUILDING BRAND ATTACHMENT AND TRUST DURING COVID-19

Otilia-Elena PLATON*

Abstract

When a crisis strikes, it is important for brands to react and respond with adapted messages in order to remain relevant during the crisis and beyond. The way brands respond during and after a crisis will have a significant impact on consumer perceptions and also on the sales. During the crisis caused by the COVID-19 pandemic, the world has been faced with an unprecedented situation, quite unlike any other modern crisis regarding its breadth and consequences. The COVID-19 pandemic has had an effect including on brands' performance. Brands had to rethink their strategies in order to cope with this situation and to limit the impact of the crisis. Companies have started to create marketing campaigns and activities that show how they are helping during the crisis. One of the early responses to the pandemic was a rush by brands to educate consumers about the need for social distancing and about the need to comply with the protective measures to prevent COVID-19 transmission. As the situation evolved, brands aimed to create a solid position from which to respond in a meaningful way to world events and to consumer needs. The aim of this paper was to identify the ways brands responded during this crisis. Also, this paper aimed to investigate, through a secondary data exploratory research, the aspects that matter more for consumers during this time of crisis and confusion, and to identify what type of marketing messages have an impact on consumers' trust in a brand.

Keywords: *COVID-19, brand trust, brand attachment, branding, crisis.*

1. Introduction

An essential element of a company's success is the relationship that a brand has managed to build with its customers. Loyal, satisfied consumers, who maintain a long-term relationship with the brand, ensure the stability of a company. In this sense, companies must give great importance to brand management and to the process of building a solid consumer-brand connection.

In a normal, stable market context, in which the evolution of processes is predictable, a company must develop brand management strategies taking into account two categories of elements[1]:

- *Tangible elements* - the product itself, its packaging, price, etc.
- *Intangible elements* - the experiences offered, the customers' relationship with the brand, the brand values and the value offered to the customers, the level of trust in the brand, etc.

By combining these elements, a brand manages to create a certain image in the minds of consumers, it manages to be associated with a certain user experience and to gain the attachment and trust of consumers.

When the situation on a market becomes unstable or unpredictable, companies can face more easily unforeseen situations or even crises, caused by various factors, and the relationship between consumers and brands can be easily affected. In such situations, companies should focus primarily on intangible brand elements because crises generally lead to a dramatic decline of consumers' trust in brands[2].

According to a Deloitte study conducted on 1000 respondents, emotional factors inspire brand loyalty and "83% of customers believe that trust is the first emotional metric that influences brand loyalty"[3], while rational factors play a key role at the beginning and in the end of the customers-brand relationship.

"Brands, like people, form relationships with consumers and other stakeholders built off trust, reputation and recommendation."[4] In general, "the trust that consumers place on a brand is a mix of empathy (based on positive experiences offered by the brand) and pragmatism (the usefulness of the products, in relation to their needs)"[5]. During a crisis, however, consumers often re-evaluate their priorities, and the emotional factor is minimized, so that pragmatism comes to dominate purchasing decisions[6].

The crisis caused by the COVID-19 pandemic is no exception. During the last year, the world has been faced with an unprecedented situation, quite unlike any other modern crisis regarding its breadth and consequences. The COVID-19 pandemic has had an effect including on brands' performance. In the last year, a series of important changes in consumer behaviour have been observed. Relationships with brands have been under greater pressure and companies have had to rethink their brand strategies to meet new

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[1] Puisor, "7 Strategii".
[2] Puisor, "7 Strategii".
[3] Deloitte, "Deloitte study".
[4] Edelman, "Brand resilience".
[5] Puisor, "7 Strategii".
[6] Puisor, "7 Strategii".

challenges. Brands had to adapt their strategies in order to cope with this situation and to limit the impact of the crisis because the way brands respond during and after a crisis will have a significant impact on consumer perceptions and also on the sales.

The aim of this paper was to identify the ways brands responded during this crisis. Also, this paper aimed to investigate, through a secondary data exploratory research, the aspects that matter more for consumers during this time of crisis and confusion, and to identify what type of marketing messages have an impact on consumers' trust in a brand.

2. Brand management in times of crisis

In general, "a crisis is an unexpected situation that calls into question the organisation's responsibility to its public and threatens its ability to continue its activities normally"[7]. A crisis implies the existence of negative effects at both the material level (sales, production, etc.), and the symbolic level (deterioration of the image of the organization, decreased consumer trust, etc.).

Since 2020, the entire world is experiencing a great challenge, the society and the economy have largely been brought to a standstill and the COVID-19 crisis is affecting every aspect of our lives. It is already obvious that the COVID-19 crisis has substantial consequences for our way of living, working and shopping, and more specifically for consumer behaviour. All these changes affected many businesses. Furthermore the COVID-19 crisis is continuing to have a transforming impact on the lives of consumers and on the activity of businesses. In this context "it would probably be a mistake to assume things will simply return to 'normal' post COVID-19. It would be equally wrong to suggest that the world has been changed forever, but one can reasonably expect a change in multiple areas of consumption going forward, at least in some categories."[8]

In 2020, Edelman, a global communications firm, conducted a study on 12,000 people from Brazil, Canada, China, France, Germany, India, Italy, Japan, South Africa, South Korea, the UK and U.S regarding the critical role brands are expected to play during the coronavirus pandemic. According to this study, 65% of the respondents have affirmed that "the way a brand acts during the pandemic will have a significant impact on their likelihood to buy that brand in the future"[9] and 62% of respondents said that brands are "playing a critical role in addressing the challenges"[10] of this pandemic. Also, 60% said that they are turning to brands that they absolutely can trust. The study revealed that brands that are perceived to be acting unsympathetically are exposed to a greater risk since "one-third of respondents have already convinced other people to stop using a brand that was not acting appropriately."[11] This study shows that there are negative consumer reactions to the misconduct of brands or companies. This demonstrates that during this period "brands can build a new level of connection with consumers or lose the relationship forever."[12]

In these times of crisis, companies need to adapt their marketing strategies because the COVID-19 crisis is affecting consumer behaviour and thus the way in which marketing can be used. Companies have realized that it is important to react and respond with adapted messages in order to remain relevant during the crisis and beyond. Companies have started to create marketing campaigns and activities that show how they are helping during the crisis. One of the early responses to the pandemic was a rush by brands to educate consumers about the need for social distancing and about the need to comply with the protective measures to prevent COVID-19 transmission. "First of all, we observe that companies are adapting their goals and are launching initiatives designed to contribute to tackling COVID-19. Such activities are referred to as 'purpose marketing' or 'cause-related marketing' and demonstrate corporate social responsibility."[13] As the situation evolved, brands aimed to create a solid position from which to respond in a meaningful way to world events and to consumer needs. "In the face of the COVID-19 crisis, brands must figure out how they can help and what actions can be taken that are consistent with their values and abilities."[14] During this period "in terms of messaging, consumers are asking for brands to focus on value, authenticity, social awareness. Brands that clearly communicate a sense of purpose, tap nostalgia and are proactive about social issues will generate greater loyalty and minimize the negative impact of the pandemic."[15]

Thus, brands have now an opportunity to strengthen their relationship with consumers and their bonds of trust by "using data to help determine which actions will have the greatest impact on their employees, customers, and communities."[16] According to a Euromonitor International report, consumers are looking for reliable information about COVID-19 and its consequences, and are also looking for stability and emotional connection with reliable companies. During this period, consumers have the tendency to show a

[7] Coman, "Relatiile publice".
[8] Sarrazit, "COVID-19".
[9] Edelman, "Brand resilience".
[10] Edelman, "Brand resilience".
[11] Edelman, "Brand resilience".
[12] Edelman, "Trust barometer".
[13] Hoekstra & Leeflang.
[14] Qualtrics, "How your brand".
[15] Lewis, "COVID-19 changed"
[16] Qualtrics, "How your brand".

stronger emotional connections mostly with important and well-known brands and to become more engaged with businesses that are characterised by moral and ethical values.

Numerous researches have been carried out and have highlighted the fact that during the pandemic there are a series of communication strategies that will ensure the strengthening of the relationship between the brand and consumers. In this regard, companies need to focus on issues such as[17]:

- *Safety and health* - companies need to assure consumers that all the activities they carry out are responsible and are meant to protect people's health.
- *Responsibility* - companies must transform the business and adapt it to the new context in order to help the business recover as soon as possible after this difficult period.
- *Connecting with the audience* - the audience must be fully understood during this period when people's needs change in real time and emotions become stronger than in normal times.
- *Transparent, positive communication* - companies must rely on correct information during this period and send positive messages of hope and confirmation that things will evolve well.
- *Concrete, authentic actions* - consumers will appreciate actions that demonstrate a real involvement of a company in today's problems. However, it is important that these actions are in synergy with the brand identity and are authentic.

In communication campaigns, companies must have a clear vision, set a mission, and identify the values they want to rely on. In their relationship with consumers, it is advisable to communicate naturally, sincerely, transparently and to show that behind the brand are people with common needs and aspirations as consumers, meaning that the brand has to be humanized. It is also necessary to strengthen the presence on social networks. In this respect, digitalization is more important than ever. This will satisfy the need for connection that people feel stronger during this period.[18]

3. Building brand trust during COVID-19

Brand management strategies must be supported by a constant and effective communication process that will help build, strengthen and develop consumer trust in the brand in times of crisis. Trust plays a central role in this process because "it gives consumers confidence when choosing to engage with a brand. A fundamental component in building trust in today's environment is keeping a pulse on consumer behaviours, drivers of brand preference, and how brand actions influence perception. Ultimately, it's knowing how your consumers want to be engaged - and then delivering against their expectations."[19]

A brand strategy designed to ensure its resilience in the market during this period must take into consideration five attributes, namely[20]:

- *A brand must be risk tolerant*: this means that a company must assess risk from the combined perspectives of protection, management and opportunity. Brand management involves identifying the risks that "the brand needs to prepare for, which it needs to mitigate, and which can help the brand grow and thrive through uncertain and prosperous times alike."[21]
- *A brand must be built to serve*: this means that a brand must provide value to its customers, but also it needs to receive value in the form of trust or attachment.
- *A brand must be values led*: this means that a brand's identity must be built on a solid set of core values, aligned with the company's goals and the brand's broader purpose.
- *A brand must be connected*: this means that a brand should cultivate meaningful relationships with its consumers across multiple media, using appropriate communications and engagement.
- *A brand must be adaptable*: this means that a brand should be "able to respond, pivot, evolve and transform based on changing conditions caused by severe disruption. Being adaptable requires flexibility in how the brand responds, acts and anticipates the needs of its audiences."[22]

In order to better understand the impact of COVID-19 on consumers' trust in brands, Qualtrics, an experience management company, conducted a study on more than 1000 U.S. consumers to test what actions can be taken to build and keep trust among customers. As shown in Table 1, consumers will trust brands that don't take advantage of a crisis to maximize their own profits, that take care of their employees and customers, and that act in a way that demonstrates a real involvement in today's problems. On the other hand, consumers find less impactful the messages of hope, optimism, nostalgia or even statements about strong moral principles. The study showed that 65% of consumers indicated that "during this crisis a brands' actions have a significant or major impact on their trust in that brand."[23]

[17] BizTeam, "10 idei".
[18] Puisor, "7 Strategii".
[19] Ross, "A lesson".
[20] Edelman, "Brand resilience".
[21] Edelman, "Brand resilience".
[22] Edelman, "Brand resilience".
[23] Qualtrics, "How your brand".

Table 1. Factors that make consumers trust brands more in the midst of COVID-19

They don't take advantage of a crisis to maximize their own profits	33%
They take care of their employees	24%
They take care of their customers	24%
Maintain reasonable pricing	22%
Go above and beyond the safety standards and recommendations	21%
Don't overreact or underestimate the circumstances	19%
Help keep me and my loved ones safe	18%
They give back to the community, particularly in times of need	18%
They communicate in a transparent and timely manner	16%
They are among the first to respond in a time of crisis	14%
They represent strong moral principles such as integrity	13%
They demonstrate expertise in their industry	13%
They have established track record of responding well in times of crisis	12%
They deliver a message of hope and optimism	12%
They empathize by showing compassion	11%
They provide a sense of hope	4%

Source: Qualtrics, "How your brand".

The current COVID-19 pandemic has resulted in a series of brand messages that are based on concepts such as human connection, care and community. Companies understood that building brand trust in a time of crisis can make or break a brand and this will ultimately have lasting effects on their brands. Ultimately, brands that fail to take action during this period put their reputations and trustworthiness at risk[24].

The study conducted by Edelman[25] highlighted a number of important issues regarding consumers' expectations during this period. The study showed that most of the consumers (84%) would like brands to offer solutions and focus on how they can help people to cope with pandemic-related life challenges. Consumers (77%) think that companies should communicate in ways that show they are aware of the crisis and the impact on people's lives. Consumers (84%) consider brands as a reliable source of information during the crisis and they are willing to receive brand messages in order to remain informed. Consumers (85%) would like brands to use their power to educate and to offer instructional information about how to protect yourself during this pandemic. Brands should also use their power in order to bring people together at this difficult time. Consumers (84%) think that brands should use social channels in order to facilitate a sense of community, to show empathy and offer support to those in need. A large part of consumers (65%) find it comforting and reassuring to receive from the brands they use messages about what they are doing in response to the pandemic. "In short, respondents believe that brands can and should make a difference throughout the Coronavirus crisis"[26].

4. Conclusions

This global COVID-19 crisis has fundamentally changed a series of aspects regarding how consumers think, behave, and buy products and services. Since this crisis shows no signs of a rapid return to normal, many companies adapted or changed their brand strategies and took into consideration the fact that the way a brand responds to this crisis will have a huge impact on consumers' likelihood to buy that brand in the future. Given the fact that creating trusted relationships is an important objective for every brand, companies have adapted their messages in order to grow an emotional connection and to maintain a long-term relationship with consumers during this period. Many brands position trust at the center of their marketing efforts, since emotional connection is vital to customer loyalty, and customer-brand relationship needs to be built on more than rational factors. During the last year, consumers didn't judge brands based only on their functionality, but also on their wider contributions to society. This period became an opportunity for brands to prove that they put people, not profits, first. So, the COVID-19 pandemic can be a transformational opportunity for brand management.

Companies should adopt a holistic approach, regarding how they treat their employees and how they protect their customers. The main message that a brand should communicate is one of real interest to people' needs and desires. Companies must act in the interest of their employees, stakeholders, consumers and society. They should try to solve problems, offers a sense of protection, compassion and care for consumers, and act in the public interest. At this moment of global crisis, consumers want brands to step up, keep us safe, guide us and help us. Brands that act in this manner will manage to reinforce their trust and to strengthen the bond they have with consumers.

To conclude, this crisis is undoubtedly a threat, but offers many opportunities for companies and brands to demonstrate their value for consumers and to facilitate how they deal with the pandemic.

[24] Qualtrics, "How your brand".
[25] Edelman, "Trust barometer".
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KEY CONSIDERATIONS WHEN DEVELOPING A COUNTRY'S TOURISM BRANDING STRATEGY

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Abstract

Brand identity, brand positioning and brand image are three of the most important concepts that need to be considered when developing a successful tourism branding strategy. A credible positioning is based on a distinctive and coherent identity, therefore the relationship between these two elements needs to be carefully managed. Also, the brand image is formed following the positioning process, it aligns with the brand identity and it symbolizes the perception of consumers. Thus, the successful development of the national tourism brand of Romania is dependent on the ability to create a coherent identity of the country and a distinctive positioning as a unique tourism destination among the competitors in the region that offer similar travel experiences and benefits. In this context, the paper presents the methodology, main results and conclusions of a quantitative research, that was conducted among 246 respondents in order to validate a conceptual model regarding the relationship between brand identity, brand positioning and brand image in case of Romania's tourism brand. The model was designed considering the most important determinants of the national tourism brand identity, namely the brand attributes, the brand iconography and the brand personality, and also of the brand positioning, namely the differentiation elements and the target group. The brand image took into consideration the benefits and associations made with the national tourism brand. The analysis and validation of the proposed conceptual model was accomplished using structural equations modelling.

Keywords: *national tourism brand, tourism marketing, brand identity, brand positioning, brand image.*

1. Introduction

In the context of globalization, which has led to the accelerated development of countries under competitive pressure and, at the same time, of international market positioning, country branding and building a national tourism brand is a matter of great importance and complexity. Although it is based on principles very similar to product or service branding[1], country branding presents a special complexity and it represents a long-lasting process consisting of a set of programs that help a country differentiate itself from other countries[2] or, in other words, a process through which the destination develops and promotes a different identity from other destinations with which it competes[3].

Taking into account the importance of this topic, this paper aims to focus on three of the most significant elements that contribute to developing a successful national tourism brand, namely brand identity, brand positioning and brand image. Analysing the relationship between these elements has the role of pointing out how those three key branding elements support and influence each other. The paper presents, besides a number of theoretical aspects, the results of a marketing research whose purpose was to define, test and validate a conceptual model that aims to analyse how the attributes, the iconography and the personality of the national tourism brand influence the identity of the national tourism brand of Romania and then in what way the identity of the national tourism brand influences its positioning and its image.

2. The relationship between brand identity, brand positioning and brand image in case of a national tourism brand

In a narrow sense, a destination brand is "a name, a symbol, a logo, a keyword or any graphic sign that identifies and differentiates the destination"[4]. In a wider sense, a destination brand expresses the promise of a memorable travel experience that is uniquely associated with the destination, thus serving to strengthen the link between the visitor and the

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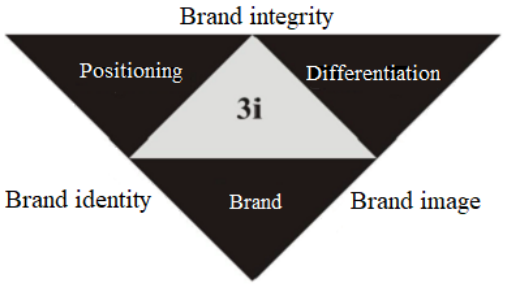
destination[5]. Viewed from the visitor's perspective, the destination brand refers to the personality of the place and the emotional relationship that is established between the destination and the visitors[6]. Therefore, the destination branding is a powerful marketing tool[7], which establishes the link between individuals and places or countries and ensures the visitors of the quality of the experience, while providing a way for destinations to establish a unique proposal in the minds of individuals[8].

At the base of building a country's tourism brand there are two key concepts: the identity and the image of the country, "brand identity and brand image being the ingredients needed for a successful destination branding"[9]. Brand identity must be understood as being created by the organizations dealing with the destination marketing, while brand image exists primarily in the minds of consumers. The identity of a tourism destination can be defined as "the main mean of identification, but also the source of the associations made by the consumer"[10], the identity being the one "creating a relationship between the brand and consumers, proposing a value that consists of functional and emotional benefits"[11]. The ultimate goal of any marketing program designed to develop a national tourism brand is to interweave the identity and the image so that the brand image to be a reflection of brand identity. Thus, destination marketing must reduce the gap between what an area truly is (identity), what visitors think about it (the image) and how it wishes to be perceived by outsiders (the brand or desired reputation)[12].

In the context of marketing 3.0, characterized by value orientation and people viewed as a whole, not only as potential/actual consumers, Kotler, Kartajaya, and Setiawan (2010) define a new brand model focused on three dimensions (Figure 1), represented in the form of a triangle, in which besides the brand, the positioning and the differentiation process, are also included three more elements (3i): brand identity, brand integrity and brand image.

According to this model, it is very important for any brand how it is positioned and differentiated on a market. Through the positioning process, the brand identity is made known and the way the brand is positioned should be unique and relevant to the consumers. At the same time, positioning is in close relationship with differentiation, which gives the consumer the opportunity to check the extent to which the brand promises are respected. Differentiation is generated by the total, functional and emotional, experience which the consumer has with the brand[13]. Regarding the brand integrity, this is in fact the brand credibility, the extent to which it retains its promises, while the brand image represents "acquiring a substantial part of the consumer's affection"[14].

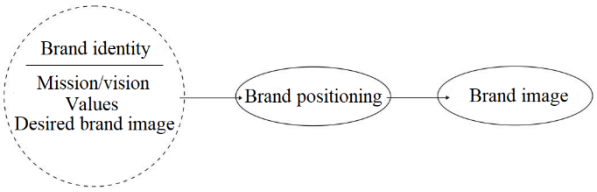
Figure 1. Components of the 3i model



Source: Kotler, Kartajaya, and Setiawan, "Marketing 3.0", 59.

Analysing another model (Figure 2), proposed by Damnjanovic et al., (2009), it can be more clearly and linearly observed the relationship between the identity, positioning and image of the destination brand.

Figure 2. The relationship between brand identity, brand positioning and brand image



Source: Damnjanovic, Kravic, and Razek, "Tourism Branding", 107.

This model proposes a framework for building a branding strategy for a destination. According to this model, the brand identity is composed of the mission/vision, values and desired brand image, leading to a desired positioning, while the brand image is formed following the positioning process and represents "the current image of the brand on the market"[15]. Positioning involves "identifying the brand elements that are important for a better positioning of the destination brand on the market, as well as an

[5] Stăncioiu, F., Teodorescu, N., Pârgaru, I., Vlădoi, A.D., Băltescu, C. "*Imaginea destinației*", 140.
[6] Briciu, Victor Alexandru. "Differences between Places Branding and Destination Branding Strategy Development." Bulletin of the Transilvania University of Brașov, series VII, vol. 6 (55), no. 1 (2013).
[7] Park, S.Y.; Petrick, J.F. "Destinations' Perspectives of Branding." Annals of Tourism Research, vol. 33, no. 1 (2006): 262–265.
[8] Garcia, J.A.; Gomez, M.; Molina, A. "A destination-branding model: An empirical analysis based on stakeholders." Journal Tourism Management, vol. 33, no. 3, (2012): 646-661.
[9] Stăncioiu, F., Teodorescu, N., Pârgaru, I., Vlădoi, A.D., Băltescu, C. "Imaginea destinației", 140.
[10] Nedelea, A.M., Brânduşoiu, C., Candrea, A.N., Cotîrlea, D.A., Dragolea L.L., Isac, F., Mazilu, M., Rusu, S., *Turism: Teorie şi practică,* Bucharest: Casa Cărții de Știință, 2014: 120.
[11] Nicolaescu, Luminita. *Imaginea României sub lupă! Branding şi rebranding de țară*. Bucharest: ASE, 2008.
[12] Briciu, *Differences between*.
[13] Alexe, Florin-Alexandru. *"Branding de oraş. Studiu de caz: Bucureşti."* Ph.D. Thesis, Romania, 2013.
[14] Kotler, P.; Kartajaya, H.; Setiawan, I. *Marketing 3.0: de la produs la consumator şi la spiritul uman*. Bucharest: Publica, 2010: 60
[15] Pike, Steven. *Destination Marketing Organisation*, London: Elsevier, 2004.

effective communication to target groups"[16]. Therefore, the positioning strategy "represents the act of designing the offer and the image of a company so that it occupies a distinct and appreciable place in the attention of the target buyers"[17] starting from what already exists in the mind of the consumer.

3. Romania's tourism brand

In 2010, the new tourism brand of Romania was launched, under the slogan "explore the Carpathian garden". The campaign for promoting the new tourism brand was part of a large project, financed by European funds, whose objective was to create a positive image of Romania by realizing and promoting the country's tourism brand and by increasing the attractiveness of our country internationally. The Romanian Ministry of Regional Development and Tourism developed a Model of the National Brand and created a strategy regarding the positioning of the national tourism brand on the international market. Through the National Brand Model the Ministry designed a brand iconography, established and defined the target group, established the frame of reference (namely what Romania can offer to visitors and the benefits that the traveller gets), identified the key differentiators and the arguments that support and determine the credibility of the differentiation elements, and determined the attributes, benefits and brand personality[18].

4. Research methodology

The research presented in this paper aimed to study the influence of brand identity on brand positioning and brand image, in case of Romania`s national tourism brand. In order to achieve this purpose, it was developed a quantitative research based on a survey. Data were collected using an online self-administered questionnaire, on a sample of 246 respondents. Then, data were analysed using structural equation modelling (SEM) through variance method and partial least squares technique. Taking into consideration all the theoretical aspects presented above, the conceptual model regarding the influence of brand identity on brand positioning and brand image in the case of Romania's tourism brand was developed based on the following hypotheses:

H1: There is a direct and positive effect between national tourism brand identity and national tourism brand positioning.

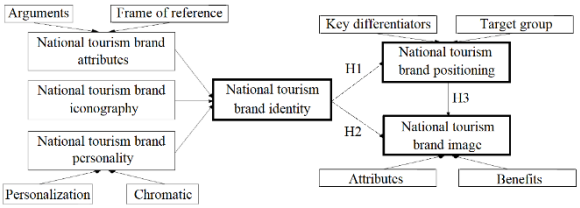
H2: There is a direct and positive effect between national tourism brand identity and national tourism brand image.

H3: There is a direct and positive effect between national tourism brand positioning and national tourism brand image.

Figure 3 presents the three hypotheses, as well as how each variable was formed and measured.

All the variables were measured using a 5-point semantic differential (from 1-to a very small extent to 5-to a very large extent) aiming to determine the extent to which the respondents associated each of the research items with the national tourism brand of Romania. The items used to measure the variables of the conceptual model were adapted from the variables used in Romania's National Tourism Brand Model developed by the Ministry of Regional Development and Tourism, as shown in Annex 1. The relationships between these variables have been proposed taking into account the model of Damnajovic, Kravic, and Razek (2009).

Figure 3. The conceptual model regarding the relationship between brand identity, brand positioning and brand image in the case of Romania's tourism brand



The variable *National tourism brand attributes* is based on the variables *Arguments* and *Frame of reference*. The attributes of the national tourism brand represent the totality of the descriptive elements that characterize the brand[19].

The variable *Arguments* represents "the factors that determine the credibility of the elements of differentiation of Romania"[20] respectively, what Risitano (2009, 7) calls "the culture of the destination brand". This variable is measured based on three items, selected from the structure of the Romanian national tourism brand model, namely: unique Latin-Byzantine heritage; high share of protected nature; one of Europe's most rural countries.

The variable *Frame of Reference* represents the benefits that visitors will gain from their travel in Romania. It is measured on the basis of three items: itineraries for exploration; destinations offering rewarding travel experiences; unpolluted historically loaded areas. The first two items were selected from the structure of the Romanian national tourism brand model and the last item was proposed as a new element

[16] Damnjanovic, V.; Kravic, M.; Razek, T.A. "Tourism Branding Strategy of the Mediterranean Region." *International Journal of Euro-Mediterranean Studies*, vol. 2, no. 1 (2009): 107.
[17] Kotler, Kartajaya, and Setiawan, "*Marketing 3.0*".
[18] MDRT.
[19] Keller, Kevin Lane. "Conceptualizing, Measuring, and Managing Customer-Based Brand Equity." Journal of Marketing, vol. 57, no. 1, (1993): 4.
[20] MDRT.

that would reflect the attributes of the national tourism brand.

The variable *National tourism brand iconography* is made up of all the representations and graphic symbols that represent the country tourism brand. This variable was measured by two items: logo and slogan, chosen based on the model described by Risitano (2009).

The variable *National tourism brand personality* is composed based on the variables *Personalization* and *Chromatic*. Brand personality has been defined as the sum of human characteristics that are associated with the destination brand.

The variable *Personalization* translates into those human qualities that characterize the brand.

The variable *Chromatic* refers to the totality of the chromatic elements included in the graphic representations (logo) of the brand.

The variable *National tourism brand identity* is composed on the basis of the national tourism brand attributes, iconography and personality. The identity of the national tourism brand is supported by the natural and anthropogenic resources of the destination, but also by the iconography of the brand and its personality[21].

The variable *National tourism brand positioning* is composed of the variable *Key differentiators* and the variable *Target group*. Brand positioning implies "identifying the brand elements that are important for a better position of the target brand, as well as effective communication to target groups"[22].

The variable *Key differentiators* represents the sum of the factors that give uniqueness to a country in relation to other destinations that offer similar travel benefits[23].

The variable *Target group* is made up of those categories of tourists that meet certain characteristics pursued by the national tourism brand model.

The variable *National tourism brand image* represents "brand perceptions reflected by brand associations preserved in the memory of consumers"[24] and is composed based on the attributes and benefits of the tourist destination.

The variable *Attributes* represents the totality of the elements that the respondents associate with the national tourism brand. The variable *Benefits* is represented by the personal advantages that consumers give to the attributes of the brand[25].

5. Research findings

The sample used in this research was composed of 78% women and 22% men, 36.6% were aged between 25-34 years old, 39% were aged between 35-44 years old, 22% were aged between 45-54 years old and 2.4% were aged over 55 years old. Regarding their level of studies, 4.9% were high school graduates, 36.6% were bachelor studies graduates and 58.5% were postgraduates. As to the residence, 97.6% of respondents lived in urban areas, while 2.4% in rural areas.

In order to develop the SEM analysis, it was necessary to evaluate the accuracy of the measurements and therefore it was conducted a reliability analysis based on the internal consistency of measurements for all the variables, using Cronbach Alpha and composite reliability coefficients. As shown in Table 1, all the values of Cronbach Alpha and composite reliability coefficients are above the recommended threshold of 0.7. The Cronbach Alpha coefficients are ranging from 0.727 to 0.929 and the composite reliability coefficients are ranging from 0.802 to 0.966, proving a very good reliability.

Table 1. Reliability coefficients

Variable	Cronbach's alpha	Composite reliability
Arguments	0.727	0.846
Frame of reference	0.792	0.878
Iconography	0.929	0.966
Personalization	0.853	0.896
Chromatic	0.793	0.906
Key differentiators	0.735	0.842
Target group	0.781	0.802
Attributes	0.834	0.884
Benefits	0.919	0.935

The validity of the measurements was tested using predictive, convergent and discriminant validity. Predictive validity was measured through Q-squared coefficients. As shown in Table 2, the values of Q-squared coefficients are ranging from 0.784 to 0.991 and are all above the threshold of 0.1, proving that the scales used for measuring the variables have a good predictive capacity.

Table 2. Q-squared and R-squared coefficients

	Brand identity	Brand positioning	Brand image
Q-squared	0.991	0.784	0,908
R-squared	-	0,808	0,910

The convergent and discriminant validity were determined based on the exploratory and confirmatory factor analysis. Before running the factor analysis, were conducted the Kaiser-Meyer-Olkin and Bartlett tests. The KMO test has a good value (0.530), above the threshold of 0.5. Also, the significance value of Bartlett's test is under the threshold of 0.05, proving that the data are suitable for factor analysis.

The next step in performing the SEM analysis consisted in determining the path coefficients and the p values for all the relationships included in the conceptual model. In this manner it is possible to validate the research hypotheses. The validation of the

[21] Risitano, Marcello. *"The role of destination branding in the tourism stakeholders system: The CampiFlegrei case"*, 7.
[22] Damnjanovic, Kravic, and Razek, "Tourism Branding", 107.
[23] MDRT.
[24] Keller, "Conceptualizing", 3.
[25] Keller, "Conceptualizing", 4.

research hypotheses is possible if the values of the path coefficients are above the threshold of 0.1 and the p values are under the threshold of 0.05. The path coefficients and the p values are shown in Table 3. As it can be seen, all the path coefficients have values above 0.1, ranging from 0.19 to 0.38 and all the p values are under 0.01. Therefore, all the research hypotheses were validated.

Table 3. Path coefficients and p values

Hypothesis	β	p
H1	0,38	<0,01
H2	0,19	<0,01
H3	0,32	<0,01

Also, in order to validate the model, fit and quality indices of the model must be analysed. In this case, the values of APC and ARS associated probabilities must be $p<0.05$ and the value of AVIF is considered acceptable if $AVIF\leq5$ and ideally if $AVIF\leq3.3$. As shown in Table 4, the model is validated.

Table 4. Model fit and quality indices

Indicator	Value	Validation
Average path coefficient	APC=0.400, p<0.001	Yes
Average R-squared	ARS=0.843, p<0.001	Yes
Average block VIF	AVIF=1.945	Yes

6. Conclusions

This article aimed to analyse how Romanian tourists perceive the constituent elements of the national brand and what is the relationship between brand identity, brand positioning and brand image. The conceptual model used in this research was developed starting from the directions outlined in the model of the Romanian national tourism brand, launched by the Ministry of Regional Development and Tourism in 2010.

The most important conclusion that can be drawn is that the proposed conceptual model was validated. The research demonstrated that brand identity has the capacity to influence brand positioning and brand image. Thus, all hypotheses were validated. The model shows that there is a direct and positive link between national tourism brand identity and national tourism brand positioning, the value of the associated beta coefficient being 0.38. There is also a direct and positive effect between national tourism brand identity and national tourism brand image, the value of the associated beta coefficient being 0.19. The national tourism brand positioning has a direct and positive effect on the national tourism brand image, the value of the associated beta coefficient being 0.32.

Another important conclusion is that all the measurement scales that were used in this research are valid and the measurements have a good explanatory and predictive capacity. The R-squared coefficients reflect the percentages of explained variance associated with each latent variable. For the national tourism brand positioning, the calculated value of the determination coefficient R^2 indicates that the variable national tourism brand identity explains the variation of this variable in a proportion of 80.8%. The variable national tourism brand image has a calculated value of the determination coefficient R^2 of 0.910, which indicates that the identity and positioning explain the variance of this variable in a proportion of 91%.

Tourists choose a certain destination according to several criteria, and the image intertwines with the identity during this selection process. A tourist's cognitive and emotional evaluations are comprised of all the tangible and intangible components of that destination. Basically, the choice is based on the particularities of that place, such as certain tourist attractions, natural monuments, etc. (which represent the identity of the tourism destination), as well as certain intangible characteristics, such as the feeling of freedom or relaxation or other benefits (which represent the image associated with that destination)[26].

The process of creating a national tourism brand image is a complex process during which "a country actively seeks to create a unique and competitive identity in order to position itself both internally and externally as an attractive destination"[27]. The research results showed that respondents associate Romania as a tourist destination with attributes such as: rural character, authenticity / originality, welcoming character, spirituality, pure character and honesty, and the main benefits they associate with our country are: the connection to nature, health and relaxation and contact with an intact nature. In fact, the main argument that defines Romania from a tourist's point of view, was the fact that it is one of the most rural countries in Europe, followed by the fact that it has a large area of protected nature. Another important conclusion has to do with the visual identity of the national tourism brand and consists in the fact that the respondents consider that the slogan reflects to a greater extent the tourism brand of our country than the logo used.

The research limits derive from the chosen sampling method and from the size of the proposed sample. Therefore, the sample of Romanian tourists was not representative either in terms of its size nor its structure, the chosen sampling method being a non-probability method, namely the oriented method. For this reason, the research results cannot be generalized at the level of the entire target population analysed. Therefore, the research could be improved by analysing a representative sample of respondents.

[26] Stăncioiu, F., Teodorescu, N., Pârgaru, I., Vlădoi, A.D., Băltescu, C. *"Imaginea destinației",* 141.
[27] Nicolaescu, *"Imaginea României",* 16.

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- "Realizarea brandului turistic al României", MDRT, 2010, https://issuu.com/mdrt/docs/romania_tourism_brand_values_and_visual_identity.

Annex 1. Measurement scales of the variables

Variable			Items
National tourism brand identity	National tourism brand attributes	Arguments	Unique Latin-Byzantine heritage; High share of protected nature; One of Europe`s most rural countries
		Frame of reference	Itineraries for exploration; Destinations offering rewarding travel experiences; Unpolluted historically loaded areas
	National tourism brand iconography	Logo	
		Slogan	"explore the Carpathian garden"
	National tourism brand personality	Personalization	Kindness; Elegance; Purity; Maturity; Innocence
		Chromatic	Green; Blue
National tourism brand positioning		Key differentiators	Intact nature/wild landscapes; Hospitable people; Unique cultural heritage; The authentic lifestyle of people living in rural areas
		Target group	I like destinations with intact nature and wild landscapes; I like to travel to destinations with authentic culture features; I like destinations where I can experience the lifestyle of people who live in rural areas
National tourism brand image		Attributes	Authentic / Original; Rural; Spiritual; Welcoming; Pure; Honest
		Benefits	Connection with nature; Health and relaxation; Contact with an intact nature; Discovery and exploration; Simple and good life; Experience of living culture; Contact with people; Escape and slowdown of life; Feeling of courage / adventure; Positive surprises; Respect for people; Safety

MEASURES TAKEN BY STATES IN THE CONTEXT OF THE COVID PANDEMIC AND THEIR EFFECT ON ECONOMIES

Mădălina RĂDOI[*]
Nicoleta PANAIT[**]

Abstract

In the context of the evolution of the epidemiological situation in Romania, like other countries, determined by the spread of COVID-19 and the massive increase in the number of people infected with SARS-CoV-2 coronavirus, starting with March 16, 2020, the state of emergency was established by presidential decree. subsequently extended. The law on establishing the state of alert on the territory of Romania for 30 days was adopted on May 15, 2020 and even at the beginning of 2021 this state of alert is maintained.

By spring 2020, more than half of the world's population had experienced a lockdown with strong containment measures.

Measures taken by states to reduce the effects of the health crisis have been severe, the most important being stopping non-essential activities, restricting travel and banning travel to and from certain countries and causing shocks in production and distribution chains, but also a sharp contraction in demand for a wide range of goods and services.

Beyond the health and human tragedy of the coronavirus, it is now widely recognized that the pandemic triggered the most serious economic crisis since World War II. Many economies will not recover their 2019 output levels until 2022 at the earliest[***]

This paper highlights the strong territorial dimension of the COVID-19 crisis. National government was at the frontline of the crisis management and recovery plan. It reacted quickly, applying a place-based approach to policy responses, and implementing national measures for in response to the COVID-19 crisis. Also, this paper provides examples on policy responses to help mitigate the impact of the crisis on our country.

Keywords: *COVID-19 pandemic, economic crisis, economic growth, evolution of GDP, fiscal impact*.

1. Content

Given the difficult economic context created by the COVID-19 pandemic, the main fiscal response in Romania came from the national budget. EU state aid rules allow Member States to take swift and effective action to support citizens and companies, especially SMEs, who are facing economic difficulties.

Under existing EU rules, any Member State can devise comprehensive support measures. First, an EU Member State, as in the case of Romania, may decide to take measures, such as wage subsidies, the suspension of the payment of income tax, value added tax or social contributions. In addition, it may provide direct financial support to consumers, such as canceled services or tickets not reimbursed by the operators concerned. EU state aid rules also allow Member States to help companies cope with liquidity shortages and need help quickly. Article 107 (2) (b) TFEU allows Member States to compensate companies for damage directly caused by exceptional events, including measures in sectors such as aviation and tourism.

Analyzes of adverse natural shocks over time have shown that the rate of growth in the medium-term post-shock is generally higher than in the absence of shock. The main explanation is the implementation of measures at national, regional and global levels to counteract and avoid the incidence of shocks in the future. In this respect, according to European Council1, a recovery plan for Europe was presented by the European Commission on 27 May 2020. EU leaders agreed on a recovery package which is going to be ready this year. Together with the €540 billion of funds already in place for the three safety nets (for workers, for businesses and for member states), the overall EU's recovery package amounts to €2 364.3 billion. Alongside the recovery package, EU leaders agreed on a €1 074.3 billion long-term EU budget for 2021-2027. Among others, the budget will support investment in the digital and green transitions and resilience.

In Romania, based on the Emergency Ordinance no. 29/2020 and published in the Official Gazette no. 230/21.03.2020, a series of economic and fiscal-budgetary measures were adopted to support the economy and companies, especially SMEs, which may face a lack of liquidity in response to the crisis created by the COVID pandemic, of which the most important are:

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[***] OECD (2020), OECD Economic Outlook, Interim Report September 2020, OECD Publishing, Paris, https://dx.doi.org/10.1787/34ffc900-en.

[1] EU recovery plan and long-term EU budget 2021-2027 - Consilium (europa.eu).

a. guaranteeing up to 80% of the value of financing granted to SMEs; The maximum value of loans or lines of credit for financing the working capital granted to a beneficiary may not exceed the average of the working capital expenditures of the last two fiscal years, up to 5 million lei, and for investment loans, the maximum value of financing is 10 million lei. At the same time, the maximum cumulated value of the state-guaranteed financing that can be granted to a beneficiary within this facility is 10 million lei.

b. guaranteeing up to a maximum of 90% of the amount of financing granted to micro, small and medium-sized enterprises, and subsidizing 100% of the interest on loans to be guaranteed until 31 March 2021 for both micro and small and medium-sized enterprises; The maximum value of financing is 500,000 lei for micro-enterprises and 1 million lei for small enterprises.

c. during the state of emergency, small and medium-sized enterprises that held the emergency certificate issued by the Ministry of Economy, Energy and Business Environment, benefited from the deferral of payment for utility services - electricity, natural gas, water, telephone services and internet, as well as the deferral of payment of rent for the building intended for registered offices and secondary offices;

d. suspension or non-initiation of enforcement measures by seizure of natural persons, with the exception of enforcement which applies to the recovery of budget claims established by court decisions in criminal matters. Measures to suspend enforcement by seizure of traceable amounts representing income and cash are applied, by the effect of the law, by credit institutions or seized third parties, without other formalities from the tax authorities;

e. suspension of the payment of installments due by persons whose income was directly or indirectly affected by the health crisis to credit institutions until March 31 2021. Debtors wishing to benefit from the suspension of the payment of installments to banks must declare, on their own responsibility, that their income has decreased by at least 25% in the last 3 months prior to the request, by reference to the similar period of 2019/2020. Limiting the indebtedness of the population starting with January 1, 2019 allows the population to adapt more easily to unfavorable developments such as those generated by the current crisis.

f. sending into technical unemployment more than 1 million employees in the economy during the state of emergency due to the partial or complete interruption of activity.

Other European countries have also adopted a number of measures, namely:

1. Poland has introduced the option to deduct the 2020 revenue loss from the 2019 revenue provided that the revenue is at least 50% lower than in the previous year. Research and development (R&D) corporate tax exemption is granted to companies conducting research and development for products aimed at preventing the spread of the COVID-19 pandemic.

2. Italy has adopted a number of measures that are good for the business environment, such as: providing tax incentives for donations made to support measures to combat epidemiological emergencies; suspension of deadlines for civil, criminal, fiscal and administrative hearings; extending the deadlines for submitting the financial statements and balance sheets for the financial year 2019, as well as postponing the submission of fiscal statements. Many regions[2] have adopted specific measures to support their SMEs, which be divided into six policy macro-areas: facilitating access to bank credit and reducing related cost; public financing; simplified procedures; labor and welfare; tax relief and planning and budgeting.

3. Belgium has adopted measures on taxpayers facing difficulties as a result of the Covid-19 pandemic, regardless of the object of activity, which may require various tax facilities: payment in installments of payroll tax, VAT, corporate tax; elimination of late interest, elimination of fines.

4. France has adopted the postponement of the payment deadline for direct tax returns (income tax, payroll tax, local taxes). In addition, if the deferral of payments is not sufficient, given the financial difficulties of the company, it is possible to request a tax reduction, provided that adequate documentation is provided. More[3],[4], regional governments unlocked EUR 250 million (in addition to EUR 750 million allocated by the State) to participate in the National Solidarity Fund for artisans, retailers and small businesses. This National Fund has two components: i) monthly aid to very small enterprises, self-employed people, micro-entrepreneurs and liberal professions experiencing turnover losses of more than 50%; ii) a one-time additional payment for the most fragile small businesses. Almost all French regions have developed support programs for SMES and the self-employed.

5. Bulgaria has given new powers to the Customs Agency to donate confiscated goods, if they can be useful in preserving public health to hospitals. It was also adopted to extend the deadlines for profit / income tax payments for 2019, as well as to extend the deadlines for publishing the annual financial statements for 2019 until September 30, 2020.

6. Hungary has adopted a package of measures for companies in certain sectors of activity (tourism, hospitality, entertainment, gambling, cinema, arts,

[2] OECD Trento Centre for Local development (2020), Coronavirus (COVID-19): SME policy responses - A case study: Italian regions (as of 25 March 2020), https://www.oecd.org/cfe/leed/COVID-19-Italian-regions-SME-policy-responses.pdf.

[3] BPI France (2020), Covid-19: les aides regionales, https://bpifrance-creation.fr/encyclopedie/covid-19-mesures-exceptionnelles/autres-mesures/covid-19-aides-regionales.

[4] Organisation for Economic Co-operation and Development (OECD) "The territorial impact of COVID-19: Managing the crisis across levels of government"; https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government-d3e314e1/.

event organization, sports activities, such as: (i) leases cannot be concluded before (ii) the rental price cannot be increased during the emergency period, (iii) for March, April, May and June 2020, employers have been exempted from paying all taxes on income and contributions. granted an exemption from the payment of tax obligations for companies performing passenger services for five months of 2020.

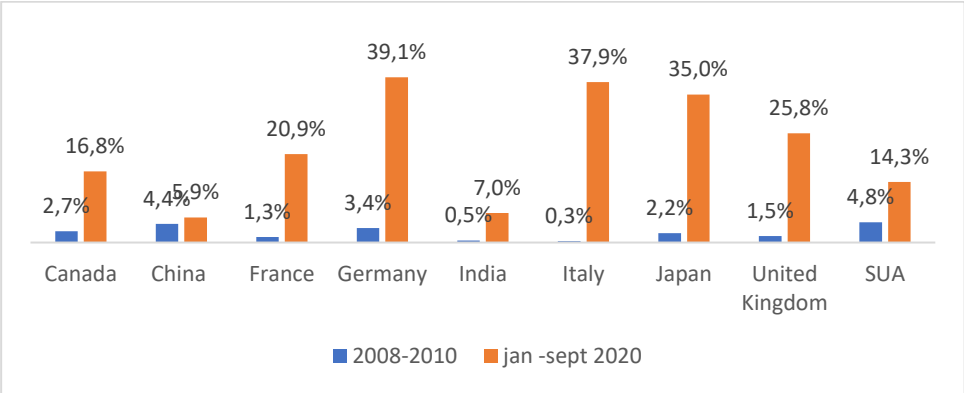
7. Finland has agreed on a package to protect jobs and living standards, as well as to ease economic pressure on companies. The total value of the measures is around EUR 15 billion. The aim is to ensure the liquidity of companies during the crisis and to prevent bankruptcies, these measures being applicable in all sectors of activity.

8. Spain has suspended or suspended until 1 June 2020 the time limits applicable to administrative proceedings as well as to administrative litigation courts. The customs authorities were also able to take any measures necessary to ensure the customs transit of essential goods at all checkpoints and at the border from ports and airports. The regional government of Madrid[5] has passed a financial support plan of EUR 220 million for SMEs and self-employed, to help them cope with the economic impact of the crisis (economic aid and financing schemes). The Basque Country launched a set of measures including an extraordinary fund for SMEs and the self-employed, an emergency credit line at zero cost through the Basque Institute of Finance (IVF), a line of working capital guaranteed by the region at zero cost, refinancing and adaptation of the conditions on repayable advances, technical advice on the implementation of teleworking to freelancers and SMEs.

9. Austria has adopted a reduction in advance payments for income tax or corporate tax for 2020, as far as the expected reduction of the tax base is concerned (possibly up to EUR 0.00, if there is a liquidity problem). No late payment interest will be applied in the event of an additional payment amount occurring during 2020, due to the reduction of advance payments. Late interest and penalties may be reduced or eliminated upon request, as a result of demonstrating the impact of Covid-19 on the taxpayer. All nine Bundesländer[6] set up aid packages for SMEs that complement and expand the measures taken by the federal government. Austria has developed a start-ups support package consisting of a special consulting service by the regional start-up consulting and support council "tech2b Inkubator" and a deferral of active start-up loans from "tech2b Inkubator".

It is well known that fiscal measures can lead to an increase in public debt and budget deficits. National government faces strong pressure on expenditure and reduced revenue, thus increasing deficits and debt. While the crisis has already put short-term pressure on health and social expenditures and on different categories of revenue, the strongest impact is expected in the medium term.

If we analyze comparatively the financial crisis of 2008 with the one caused by the COVID-19 pandemic, we can notice at the Romanian level that the fiscal stimulus rose to values, in general, of over 10% of GDP, in some cases reaching even almost 40% of GDP unlike the whole period of 2008 when the fiscal stimulus was a few percent of GDP to which were added the monetary easing measures.



Fiscal stimulus during the crisis from 2008 to 2010 compared to the COVID-19 crisis (% of GDP)[7]

According to the article elaborated by OCDE[8], there are some examples of COVID-19's fiscal impact on subnational government:

a. in Canada, over the first three quarters of 2020, municipalities may have lost between CAD 10 billion and CAD 15 billion in revenue and unanticipated costs

[5] EU Committee of the Regions (2020), COVID-19 Exchange Platform, https://cor.europa.eu/en/engage/Pages/COVID19-exchangeplatform.aspx.

[6] OECD (2020), Covid-19: SME Policy Responses (as of 15 July 2020), https://www.oecd.org/coronavirus/policy-responses/coronavirus-covid-19-sme-policy-responses-04440101/.

[7] https://www.piatafinanciara.ro/ asf-a-lansat-raportul-de-stabilitate-financiara/.

[8] Organisation for Economic Co-operation and Development (OECD) "The territorial impact of COVID-19: Managing the crisis across levels of government"; https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-COVID-19-managing-the-crisis-across-levels-of-government-d3e314e1/.

including public safety measures and support for vulnerable populations According to estimates provincial governments may have a revenue shortfall of CAD 35 billion in 2020/21 compared to 2019/20 which is representing CAD 1 000 per person.

b. in Germany, in 2020, many state governments saw a sharp deterioration in their budgetary performance given falling revenues and rising expenditure. Behind this are packages adopted by the regions to support local economies and the wish to maintain, and even increase, public investment. It is expected that most states will revert to debt financing to cover their budget deficits, increasing their borrowing needs. According to the Association of German municipalities, the municipal share of income tax fell by 7.4% but transfers from the state governments have increased by 20%. Overall, the funding gap between income and expenditure of municipalities is estimated at EUR 10 billion in 2021, depending on the measures that are taken to mitigate the decrease of municipal revenue in 2021 and 2022.

c. in Italy, the Association of Italian Municipalities (ANCI) developed three scenarios for the loss of municipal revenues due to COVID-19. The first one is a low-risk scenario with a loss of revenue among municipalities of about EUR 3.7 billion (down 9% compared to 2019). This is based on a relatively rapid exit from the emergency beginning in May 2020, where the largest losses would be concentrated on the sectors directly exposed to the crisis, with other sectors recovering relatively quickly in 2020 or by 2021. The second one is a medium risk scenario, with an estimated municipal revenue loss of about EUR 5.6 billion (a decrease of 14% from 2019). Finally, the third one is a high-risk scenario which estimates a loss of EUR 8 billion (a drop of almost 21% over 2019). In this last scenario, COVID-19 triggers a major and long running national and international economic crisis that causes recovery difficulties for all economic sectors.

In Romania, the effect of fiscal measures taken during emergencies and alert on the public budget for the budget is almost 1.5% of GDP which is added over the budget deficit of 4.6% in 2019 as a result of poor revenue collection budget, the high share of rigid expenditures in tax revenues, but also a lower collection of dividends from state-owned companies and the payment of state debts to private companies. The widening of the deficit from 2.8% of GDP in 2018 to 4.6% was determined by a decrease in total revenues of 0.1 percentage points and an increase in total expenditures by 1.7 percentage points.

The increase of the budget deficit has been one of the main drivers of the deepening of the current account deficit in recent years, fiscal easing leading to an increase in household income over domestic supply capacity. In order to provide the liquidity needed to cover government spending, the central bank has reduced its monetary policy interest rate to 1.25% and carried out repo operations as well as purchases of government securities on the secondary market. The reduction of the monetary policy interest rate, in three stages, confirmed the decrease of inflation in the medium and long term, at the end of 2020, the annual inflation rate being 2.1%, the lowest in the last three years.

The state also issued bonds worth 3.3 billion euros at the end of May, the highest amount obtained through an external bond issue, but the interest rate was about 1.6 percentage points higher than the issue of January bonds, indicating an increase in risk aversion by investors. Although the rating agencies kept the evaluation of the Romanian public debt in the investment category, the outlook was changed to negative.

Regarding the evolution of GDP, except for the economic performance in the first two months of 2020, the impact of the pandemic and the state of emergency established by the Romanian authorities since March was felt, thus canceling that strong start. The first quarter of the year brought an economic stagnation (-0.04%, revised data) compared to the level of GDP in the last quarter of 2019.

According to the National Institute of Statistics, the second quarter of 2020 was the worst affected by the pandemic, bringing a record economic decline of 12.2 compared to the first quarter. This figure represents the largest decrease in the quarterly GDP of the Romanian economy, also exceeding the negative quarterly records of the economic-financial crisis of 2008-2009.

After this record decrease, the Romanian economy grew by + 5.6% in the third quarter compared to the previous quarter. Thus, in annual terms, Romania's GDP accumulated a decrease of 5.7%, both on the gross series and on the seasonally adjusted series, compared to the third quarter of 2019, which is at the same time a decrease below the national average. EU (-4.3%).

Regarding the longer-term economic outlook, BBU[9] researchers forecast that the full recovery of the economy in terms of performance in the run-up to this crisis will take about 2.5 years. The most likely scenario at the moment shows that Romania's GDP will return to the level before the pandemic during 2022, this return being conditioned by the production and efficient delivery of the vaccine against Covid-19 throughout the country, respectively the wise use of substantial EU economic support funds. So far, the vaccination strategy adopted at the country level has proved effective, given that Romania is in the top five countries in terms of population vaccinated by early February 2021. In terms of EU funding, Romania is a country with a low rate of contracting these funds, due to lack of submission of projects.

As a whole, the financial system has faced, in the context of the COVID-19 pandemic, a significant

[9] https://news.ubbcluj.ro/perspectivele-economiei-romanesti-in-contextul-pandemiei-pe-baza-analizelor-efectuate-de-cercetatorii-ubb/

increase in uncertainty and a rapid adjustment of risk premiums in the financial markets.

In the context of limiting the spread of the virus, the measures taken have generated supply chain bottlenecks and strong contraction in demand, while financial markets have experienced significant increases in volatility and significant adjustments in financial asset prices. After this virus spread globally and was declared a pandemic, the next day European stock markets reported declines of more than 10 percent, the maximum cumulative losses being over 35% in the first four months of 2020.

These were similar corrections. those recorded during the financial crisis of 2007-2008. By the end of April, more than a third of these losses had already been recovered. Stock price volatility indices reached or even exceeded historical highs recorded during the 2007-2008 crisis. The oil segment was most affected by the decrease in consumption generated by the cessation or substantial slowdown of large economic activities consuming petroleum products and the introduction of social distance measures.

Regarding the Bucharest Stock Exchange, the BET[10] index decreased by about 30% by the end of March, following the evolutions of the main international index, such as S&P 500, DJIA, FTSE 100 and DAX, which experienced decreases of around 35%, recovery of losses in a percentage of approximately 80% - 85% taking place in the next 2 months. During this period, the Bucharest Stock Exchange was in the same trend of high volatility, in correlation both with the number of new cases of illness and as an effect of reducing the activity of enterprises in most fields of activity.

The same strongly negative correlation, of - 0.81, was also found in the case of the evolution of the BET index compared to the evolution of the number of new cases of diseases in China. On the other hand, the analysis of the correlation between the BET index and the number of new cases in the USA resulted in a moderate negative correlation of -0.46, which decreased as the number of new cases of diseases decreased. Thus, the reaction of the local stock market is in the general context of the evolution of international stock exchanges that reacted to the first signs of the pandemic in China, the effects of pandemic transmission later in the US being already absorbed by capital markets.

Overall, the evolution of capital markets was in V, respectively in broad reductions in stock market indices, followed by a fairly rapid recovery, which does not take into account the long-term economic fundamentals, highlighting the decoupling of stock markets from the real economy.

According to the World Economic Outlook Update of June 2020 developed by the International Monetary Fund[11], the following were identified as the main vulnerabilities to global financial stability:

(a) the indebtedness of the non-financial corporations sector to a level above the 2008-2009 values for certain countries,

(b) the sustainability of public debt; and

(c) the indebtedness and maturity and liquidity gaps of investment funds, their portfolios reflecting low-risk environmental risk assessments (especially in the US and China).

Therefore, the IMF and the World Bank have provided substantial resources for liquidity needs and for maintaining the financial stability of states.

2. Conclusions

The balance sheet of the world economy in 2020, the first year of the COVID-19 pandemic in the history of capitalism, is far from being analyzed and understood in depth. The changes it has generated represent long-term trends in the emergence of a new paradigm of the functioning and development of the global economy model, which, at this time, we can only notice without being able to predict in order to achieve a higher degree of predictability.

China was the only major economy in the world to see GDP growth of 2.3% in 2020, although it was the weakest since 1976. Strict measures to stop the spread of the virus have largely allowed part of the Chinese authorities to control the pandemic faster than most states, while massive incentives for local producers have accelerated the production of goods that have been exported to many countries affected by the effects of the crisis.

While the United States has been and is mired in a pandemic and has had a difficult presidential transition, China has continued to promote an extremely active economic policy. An example of this, from mid-November 2020, was the signing of a trade agreement involving the 15 largest countries in the world. respectively from Asia and the Pacific. Certainly, China and the emerging countries from Asia will fare better in the near term.

According to the October 2020[12] IMF report on the outlook for the world economy, even if the global economy is coming back, the ascent will likely be long, uneven, and uncertain. Emerging market and developing economies, excluding China, are projected to incur a greater loss of output over 2020-21 relative to the pre-pandemic projected path when compared to advanced economies.

Global growth is projected at 5.2 percent in 2021 reflecting the more moderate downturn projected for 2020 and consistent with expectations of persistent social distancing. Following the contraction in 2020

[10] https://www.economistul.ro/stiri-si-analize-business/prof-univ-dr-dan-armeanu-ase-impactul-covid-19-asupra-pietelor-de-capital-18037.
[11] World Economic Outlook, October 2020: A Long and Difficult Ascent (imf.org).
[12] https://www.imf.org/en/News/Articles/2020/10/06/sp100620-the-long-ascent-overcoming-the-crisis-and-building-a-more-resilient-economy.

and recovery in 2021, the level of global GDP in 2021 is expected to be a modest 0.6 percent above that of 2019. The growth projections imply wide negative output gaps and elevated unemployment rates this year and in 2021 across both advanced and emerging market economies.

Latest world economic outlook growth projection[13]

		projection	
Real GDP, annual percent change	2019	2020	2021
World output	2,8	-4,4	5,2
Advanced economies	1,7	-5,8	3,9
United States	2,2	-4,3	3,1
Euro area	1,3	-8,3	5,2
Germany	0,6	-6,0	4,2
France	1,5	-9,8	6,0
Italy	0,3	-10,6	5,2
Spain	2,0	-12,8	7,2
Japan	0,7	-5,3	2,3
United Kingdom	1,5	-9,8	5,9
Canada	1,7	-7,1	5,2
Other Advanced Economies	1,7	-3,8	3,6
Emerging markets and developing economies	3,7	-3,3	6,0
Emerging and developing Asia	5,5	-1,7	8,0
China	6,1	1,9	8,2
India	4,2	-10,3	8,8
ASEAN - 5	4,9	-3,4	6,2
Emerging and developing Europe	2,1	-4,6	3,9
Russia	1,3	-4,1	2,8
Latin America and Caribbean	0,0	-8,1	3,6
Brazil	1,1	-5,8	2,8
Mexico	-0,3	-9,0	3,5
Middle East and Central Asia	1,4	-4,1	3,5
Saudi Arabia	0,3	-5,4	3,1
Sub-Saharan Africa	3,2	-3,0	3,1
Nigeria	2,2	-4,3	1,7
South Africa	0,2	-8,0	3,0
Low income developing countries	5,3	-1,2	4,9

In the case of Romania, the recovery of the economy after the medical crisis[14] will also depend on the way in which the existing structural vulnerabilities will be solved. The lax financial discipline of Romanian companies represents a significant structural vulnerability and is characterized, on the one hand, by a relatively high value of arrears in the economy and, on the other hand, by a significant share of companies with a high level of capital below the minimum value provided by the legal framework, their recapitalization need being in a significant amount of almost 34 billion euros.

Another structural challenge refers to the need to avoid the middle-income trap, by looking for solutions to increase the added value produced in the economy, including by stimulating innovation. In order to realize the potential for economic growth, solutions are needed in terms of the demographic problem and inequalities in society. In this sense, we also mention the need for the role of banks in financing the economy to increase, but prudently, the financial intermediation in Romania being on the last place in the EU.

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QUALITATIVE STUDY REGARDING THE EVOLUTION OF PUBLIC INVESTMENTS AND PRIVATE INVESTMENTS

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Abstract

In this written paper I will conduct a qualitative research on the evolution of public investments and the evolution of private investments.

Qualitative research in the field of public investment and in the field of private investment is introductory and I must say it necessary to go through a few steps: a short introduction; it is important to show the types of qualitative research methods designed in this way and those that have led to the perception of the target audience and the disclosure of the behavior of the target audience; then the research objectives and qualitative research procedures in the field of investments and their applications are established, the outline of the research methodology and the analysis of the details and results, as well as the highlighting of the conclusions.

Keywords: *the public investments, the private investments, qualitative research, the evolution of public investment, the evolution of private investment.*

JEL: A10, O16, H54, P45, P40

1. Introduction

From an economic point of view, the effect of the COVID-19 pandemic on the global economy is negative, as economic activity is reduced by direct government action and decisions to suspend business activity to limit the spread of the virus among many states, including our country.

Every effort must be made to increase the resilience of businesses, to increase the resilience of economic activities and to increase the resilience of public services to the crisis caused by COVID-19. All these efforts must be made in order to return to the activities carried out before the COVID-19 pandemic.

Qualitative research in the domain of public investments and in the domain of private investments has an exploratory character, and in this sense I consider that it is necessary to go through the following stages:

» it is important to highlight the types of qualitative research methods designed in such a way as to lead to the disclosure of the behavior and perception of the target audience;

» the objectives of qualitative investment research must be set;

» qualitative investment research procedures need to be established;

» the methodology of the research must be highlighted;

» analysis of data and results such as;

» highlighting the conclusions.

2. Highlighting the types of qualitative research methods

The results of the qualitative methods are very suggestive, and the conclusions can be obtained quite easily from the data obtained.

The qualitative research methods are the following:

2.1. The interview

Conducting in-depth interviews is one of the most common methods of qualitative research. It is a conversation method that helps to obtain as detailed details as possible from the respondent (from the interviewee).

The advantage of this method is that it offers a very good opportunity to gather accurate data about what people think and what are the motivations behind it. If the researcher asks relevant questions, they can help him collect meaningful data. Interviews can be conducted face-to-face, over the phone or online.

In-depth interview: this type of method is rarely used because interpretation is difficult due to the variety of answers received.

Informal interview: is based on free discussions conducted through a mini-questionnaire, which reveals their own opinions, satisfactions or dissatisfactions. This method provides inconclusive data, has a high degree of subjectivism.

2.2. Focus group

A focus group is one of the qualitative research methods that used in data collection, based on a broad discussion with a limited number of persons, a limited number of participants, selected according to defined

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criteria, being active participants in the discussion, the moderator must have relevant skills to facilitate interactions between participants, with the possibility of mutual clarification on the topic, and members subsequently have the option to return to positions as a result of the interaction. At the same time, the moderator allows the respondents to build a conversation, making real-time data, ensuring the correct course of the conversation and the necessary depth.

Focus-group is an expensive method compared to other qualitative research methods, such as online. They are used to explain complex processes. This method is very useful when it comes to market research of new products and testing new concepts, testing new products.

The focus-group interview is an interview focused on a specific topic in a planned discussion, conducted under the attention of the moderator whose goal is to obtain relevant information, respectively feelings, needs, motivations and opinions, being an integral part of the category of quality techniques. data collection for perception analysis.

With the help of this method, qualitative data are obtained that highlight the respondents from a behavioral point of view, their opinions and perceptions regarding the proposed topic.

2.3. Focus group online

An online focus group is one of the newest online research methods used. The most important thing is to conduct business research, consumer research and other research that requires qualitative research online. The COVID-19 crisis has accelerated the adoption and use of this information as much as possible, being an effective technique in managing qualitative information, including using tools such as online communities.

2.3.1. The practices for managing an online focus group are as follows

• *Proper training* - online focus groups are a method of qualitative research considered remote, and detailed, strict planning is needed in relation to the tools used, in relation to the selected participants, in relation to the questions to be asked, so as to achieve the objectives of the research.

• *Appropriate sampling* - Sampling and placing the right people in an online focus group is very important and uses appropriate sampling techniques with appropriate respondents to achieve the highest possible quality of data collection.

• *Sample size* - online focus groups should be between 7-10 participants to get the best information.

• *Rigorous moderation* - The role of the moderator is to lead the conversations in a way that provides the best results in relation to the topic.

• *Online focus group platform* - is one of the most critical aspects of online focus groups is the tool used to provide data analysis and reporting as flexible as possible to meet the proposed objectives.

2.3.2. The advantages of online focus group research

Among the benefits offered by qualitative online focus-group research we list:

• New perspectives due to online discussion groups that can take place at any time, with the ability to monitor information from members.

• It offers another dimension of qualitative research, while traditional focus groups have specific advantages, the ease of managing the information obtained in the case of online focus groups offers fast tangible benefits.

• The absence of restrictions on the time or place of development from a geographical point of view and the low costs compared to those of the traditional focus group.

• Ease of analyzing the data obtained using the tools specific to the online focus group.

• Paid online focus groups, more and more companies are resorting to such ways to recruit and obtain information from people with whom they are most likely to co-operate, with respondents more likely to join and provide opinions, thoughts and to add value to the research process.

2.3.3. Types of online focus groups

Synchronous online focus group (real time): Takes place in real time at a set time, lasts between 30-90 minutes and consists of 6-10 participants who can interact with the moderator and each other in real time.

Asynchronous online focus group: It does not take place in real time, it can take days, weeks, months, years. Users can interact with other users and moderators, respond to surveys and questionnaires, post images, provide video feedback, and more.

3. Case study

It is one of the simplest ways to conduct qualitative research, it is used in collecting the widest possible answers and involves reaching a deeper understanding of the subject.

Ethnographic interviews. It is long-lasting and time-consuming, as it involves in-depth observation to be able to analyze, observe and correlate data. It is the most in-depth observation method that studies people in their natural environment, the goal being to understand respondents, their lifestyle and daily routine, geographical constraints, etc.

The observation. It is a qualitative research method carried out in the environment of the participant, his behavior being very carefully analyzed with the aim of collecting information, collecting systematic data.

Objectives of qualitative research: how investment is perceived, how public investment is perceived, how private investment is perceived, identifying effects, identifying economic and societal changes caused by the COVID 19 pandemic,

identifying ways for economic recovery of companies in the context pandemic.

4. Understanding the investment idea

The investment, from an economic point of view, represents a long-term capital investment in industry, agriculture, trade, etc. It is the current financial effort made for a better future, created through development and modernization, having as source of financing the renunciation of current safe but small and non-performing consumptions, in favor of higher future consumptions and in a modern structure.

Investments are: tangible / tangible investments - represent expenses for the acquisition of machinery and equipment, constructions and others similar, with certain exceptions / limitations regarding the acquisition of land; intangible / intangible investments - represent expenses for research - development, purchase of patents and patents; financial investments - means any investment of capital (money resources) made by a natural or legal person investor, in one of the investment systems offered in the economy: government securities, shares, bonds, real estate investments, mutual fund investments, currency etc.

5. A better understanding of investors with the help of qualitative research

Qualitative research helps us understand how consumers behave when they are interested in a product or service; how consumers behave in different situations; how consumers differ from each other.

Every consumer is influenced by his environment. Social networks are a good example of this phenomenon. Consumers are often willing to share where they are and what they would be interested in. Research is conducted to correctly identify opportunities for future products, services, serves to collect as much data as possible about current or future investors, in order to better address the target audience.

Customer feedback is used to identify customers, identify wishes, etc.

6. Implications of COVID 19

The pandemic COVID 19 made very big changes, both economic and societal, triggered new economic inequalities, geopolitical tensions, negatively affected the entire global economy.

Private equity companies are adapting to ways to save the adversely affected parts of their companies, as well as new directions they could support in their business.

From an economic point of view, the effect of the COVID-19 pandemic on the global economy is negative, as economic activity is reduced by government action and decisions to suspend business activity to limit the spread of the virus among many states, including our country.

All countries that are affected by COVID-19 must show commitment, interdependence and effectiveness in the face of this state of emergency, protecting all affected employees and all affected businesses. Every effort must be made to grow up the durability of the businesses, of the economic activities and of the public services to this crisis, and to be able to do our normal activities as before the COVID-19 pandemic.

In order to be able to specify the ways to reduce the negative effects of the COVID-19 crisis, it is very important the collaboration between the government and the employers' organizations so that the socio-economic crisis caused by COVID-19 can be overcome. The government must be called upon to set up a national committee of private sector representatives, together with trade unions, academia, scientists, and related ministries, to address the negative economic and social effects of the pandemic. COVID-19.

7. Measures to support employees

»Businesses must ensure that all required social distancing measures are complied with in such a way as to avoid meetings that are not urgent (unnecessary), but at the same time maintain the provision of information relating to business safety and security procedures. employees such as: implementing sanitation procedures, disinfecting common areas, increasing the number of hand sanitizers, reducing the number of seats in common areas.

»The government must provide adequate support, especially to households and workers with family responsibilities, during the closure of schools, so that the economic difficulties of the crisis are mitigated until it is eradicated.

»The government must provide financial provisions so that employers can afford the payment of sick leave and unemployment benefits.

»The government must explore the possibility of providing subsidies to enterprises for the immediate stimulation of cash movement and support urgent payments.

»In order to provide a basic monthly income for all workers affected by the COVID-19 crisis, the government should provide wage subsidies and provide social assistance measures.

»During the COVID-19 pandemic, national funds could be accessed at low interest rates.

8. Business support measures

In order to keep businesses running, to avoid job losses for employees, and to ensure that financial support reaches companies during the COVID-19

pandemic, the government is introducing business support measures such as:

»The government needs to expand its support for liquidity and tolerance measures through the tax authorities.

»The government could offer companies affected by COVID-19 a zero-interest loan program.

»The government could provide direct subsidies to enterprises to cover part of the expenses with staff salaries or loss of income.

»A delay of a few months in the payment of taxes and fees must be taken into account, in the context of the crisis caused by the COVID-19 pandemic.

9. Research methodology. Study of young investors' attitudes towards investments

The organization of qualitative research involves the composition of the sample "with the help of theoretical sampling methods" (Catoiu et al., 2009, p. 211).

In the case of qualitative research, we work with small samples.

The sampling base included persons domiciled in Bucharest, both female and male persons, persons aged between 18 and 35 years, persons with low, medium and above average income.

Criteria underlying sampling:

a) Sex:

» The layer of females

» The layer of males

b) Age

» The layer of people aged between 18 and 25 years

» The layer of people aged between 26 and 35 years

c) Income

» persons with net monthly income below 2230 RON

» persons with net monthly income between 2231 - 2500 RON

» persons with net monthly income between 2501 - 3000 RON

» persons with net monthly income between 3001 - 5000 RON

» persons with a net monthly income of over 5000 RON

d) Education

» the layer of people with primary or secondary education

» the layer of people with graduated higher education

The structure of the sample and its specific size (30 interviewees), has the following form:

Figure.1. The structure of the sample and its specific size

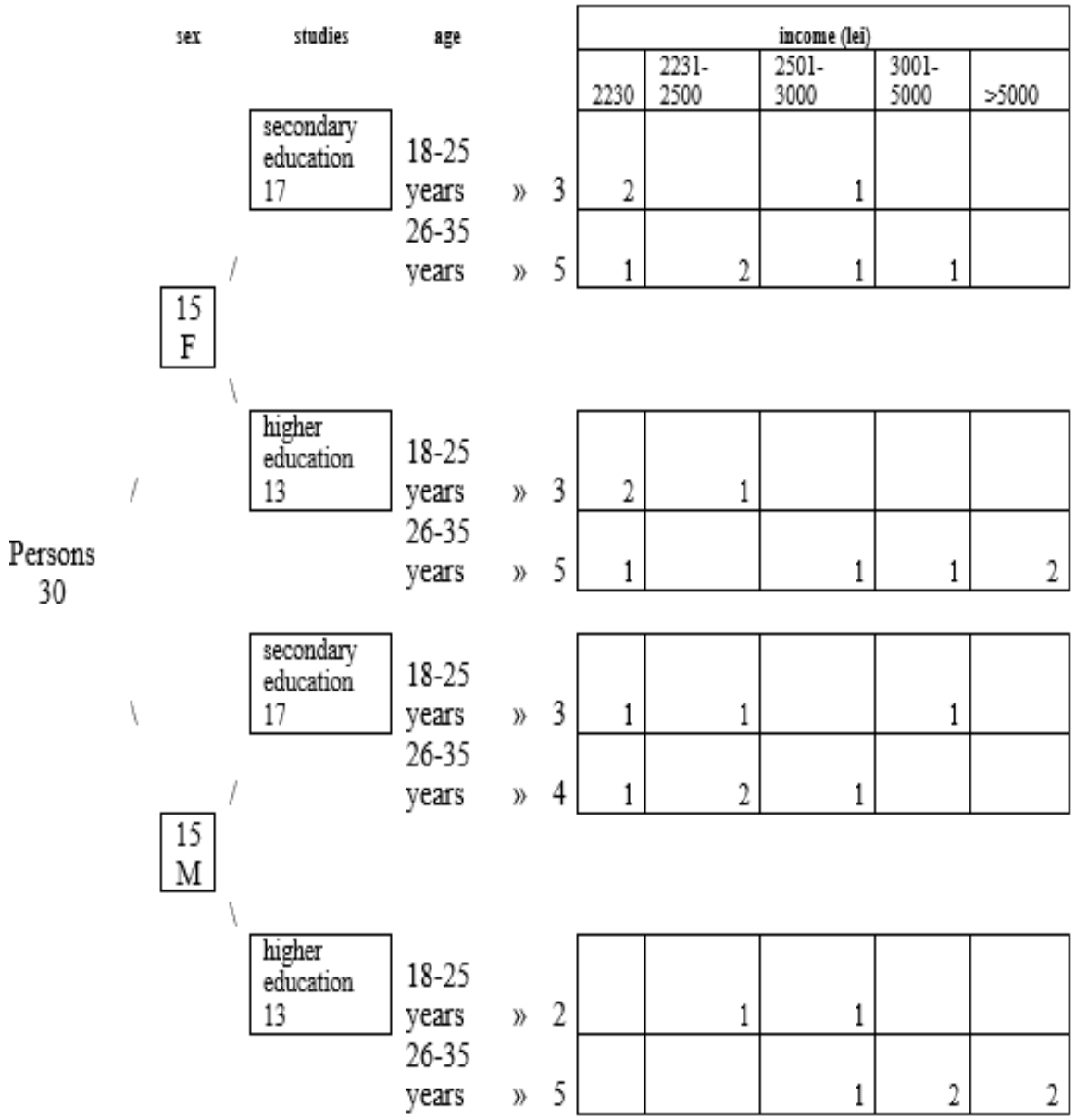

Figure 1. Source: own study

Figure.2. Sample structure

Bucharest City	18-25 years	26-35 years	Total
M (male)	3	6	9
F(female)	5	16	21
Total	8	22	30

Source: own study

Research population: people aged between 18 and 35, from Bucharest.

10. Recruitment of interview participants

Participants in the semi-structured individual interview were recruited through telephone interviews in which the recruitment criteria were verified and attendance at the interview was confirmed.

The recruitment criteria discussed both by telephone and face to face, allowed the selection of those persons who meet the criteria established in the sampling process.

Identification questions were used regarding some personal data of the interview participants: sex, age, education and income.

The recruited participants were informed of the possible duration of the interview. It was also decided on the date, time and place.

11. Modal, spatial and temporal coordinates of the research

Method used: the method used is the survey, the investigate method.

Technique used: the technique used is the half-conducted interview (conducted online).

Research tools: the research tools are the selection questionnaire as well as the conversation guide

Spatial coordinates: given the context of the COVID 19 pandemic, the selection and interview were conducted online through digital platforms.

Temporal coordinates: the questionnaire was applied on 08.02.2021, and the conversation guide was applied on 10.02.2021.

12. Content analysis

The analysis of the information obtained from the interview to draw conclusions was based on the review of the interviews. It was necessary that the data obtained from the interviews be reviewed through domain recordings and notes.

Each topic brought up is treated separately.

Most respondents said that they were interested in investing in order to be self-employed, to generate labor, and then to make an investment through state aid programs. A smaller percentage replied that they want to make an investment with the possibility to take out life insurance, etc.

In descending order, the respondents answered that they are interested in investing in areas with access to universities and the center, safe areas.

Respondents chose to invest primarily based on the purchase price, the area in which the investment will be located, the quality and revaluation in the medium - long term.

13. Conclusions

Research serves us to understand: how consumers are interested about a product or about a service; how consumers it manifests itself in different situations.

I can say that social networks are a good example: consumers are willing to share where they are and what they would be interested in.

Qualitative research serves to collect as much data as possible about current / potential investors, in order to better address the target audience.

The method used is the survey, and the technique used is the half-conducted interview based on a selection questionnaire as well as a conversation guide (the operator must guide the respondent to give reasoned answers without influencing him, and if it deviates from the topic, to direct the discussion to that topic) among 30 respondents.

The interview followed several topics on which conclusions were formulated to highlight the way Romanian respondents think.

Qualitative research is usually the one that feeds different hypotheses.

Customer feedback is used to: identify customers, identify desires, identify investment issues.

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DIVERSIFYING OF INVESTMENTS PORTFOLIOS BY ALTERNATIVE ASSETS

Mihaela SUDACEVSCHI*

Abstract

A well-diversified portfolio means investments în stocks, bonds, cash or alternative assets, such as cryptocurrencies, commodities, real estate, art pieces, wine collections or even collections of cars or diamonds. Alternative investments have been used for long time by investors, but these have been diversified permanently, depending on the interest of investors for new categories of assets, depending on the level of demand, as well as on returns and risks of these assets.

The development of the capital market also had the effect of updating the legislation in the field. At the beginning of 2020, the Romanian legislation, aiming to increase investors' confidence in alternative investments, regulated the operation of alternative investment funds, as well as their obligation to request authorization from the Financial Supervisory Authority.

This article aims to present a number of advantages and specifics of investments on the capital market in diversified portfolios, as well as in investment funds.

Keywords: *financial market, alternative assets, cryptocurrencies, portfolio management, alternative investments.*

1. Introduction

The capital market is the market in which financial instruments are sold and bought. Financial instruments are represented by various forms of holdings that can be easily traded on the capital market: shares, bonds, government securities, futures contracts, options, fund units, etc. But investors can also choose to invest in alternative assets as forms of efficient investment, the advantage of which is the low correlation with traditional assets.

One of the basic laws for the investment portfolios efficient management is diversification. This involves investments in different assets across multiple markets, so that portfolio risk can be minimized. Each type of asset has a certain specific risk, but at the same time is accompanied by a certain systematic risk of the market in which it is traded. Therefore, investors need to invest in the most profitable assets in a given market or looking for the most profitable markets at one moment in time for trading securities, and the best solution is to investing in as many types of profitable assets as possible in different markets. Thus, the potential loss of a particular asset will affect the performance of the portfolio only in proportion to the asset's participation in the portfolio.

2. Investments on the capital market

Regarding to investments on the capital market, each investor, depending on his profile (riskofil person or riskofobic person) will choose to build a more or less risky portfolio. Financial securities are characterized by a certain level of profitability and a specific risk, i.e.:

- shares - are risky securities with a level of risk, which is proportional to the specific return, but also to the systemic risk of the market on which they are listed;
- bonds – are financial securities with a lower level of risk, but which, at the same time, will offer a lower level of profitability;
- government bonds (including municipal bonds) – are low-risk securities that offer a minimum return (in minimum risk conditions)

In these circumstances, if the investor seeks to achieve as much gain as possible in the shortest possible time, he should invest in very risky securities. However, prudent management of the investment portfolio requires that only 15% – 20% of the investment be made in very risky securities.

Financial theory describes two models of investment portfolios strategies:

- passive strategy
- active strategy

Passive and active investment strategies properly impose to check if the results meet the objectives. Thus, investment passive manager has to check if portfolio return rate is at the same level as stock index performance. Instead, the manager who prefer to apply an active strategy of the investments and who has to manage the informational efficiency of the market, too, should check if the excess return level achieved is big enough to offset the risk supplement level.

3. Investment portfolio strategies

The decision of how to manage the portfolio (active or passive strategy) depends on whether the manager has access to superior analysts. A portfolio

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manager with superior analysts or an investor who believes that he has the time and expertise to be a superior investor can manage a portfolio actively by looking for undervalued or overvalued securities and trading accordingly. In contrast, without access to superior investor, the manager should manage passively and assume that all securities are properly priced based on their levels of risk.

A portfolio manager with access to superior analysts, who have unique and analytical ability, should fellow their recommendations. The superior analysts should make investment recommendations for a certain proportion of the portfolio, and the portfolio manager should ensure that the risk preferences of the client are maintained[1].

3.1. Passive investment portfolio strategy

(or indexing strategy) starts from the premise that the investor has no information that would make him giving of his portfolio a different structure of the market portfolio, in which case, the portfolio risk is only the systematic risk. Passive investment management involves minimal trading, based on the belief that is impossible to beat averages on a risk – adjusted basis consistently.

The equations underlying this theory are:

$$E(\overline{R}_{pf}) = E(\overline{R}_M) \quad and \quad \sigma_{pf} = \sigma_M$$

Where: $E(\overline{R}_{pf})$ is the expected return for the portfolio, which depends on the expected return of all the assets returns in the portfolio

σ_M is the Variance of the portfolio's return, which depends on the variance of all the assets in the portfolio and the covariance of returns between al pairs of assets in the portfolio

$E(\overline{R}_M)$ is the market return, expressed by the official market index

σ_M variance of the market return

Indexing is a sensible strategy because the security market appears to be remarkably efficient in adjusting the new information. When information arises about individual stocks or about the market as a whole, that information is generally reflected in market prices without delay. But passive management would still be a winning strategy even if markets very inefficient. This is so because winning performance must be a zero – sum. Clearly all stocks have to be held by some of certain investors achieve above – average returns, then it must be the case the other investors are achieving below – average performance. It is clear that all investors cannot be above average.[2]

If the market where portfolio securities are quoted is an efficient market, the only criterion considered for buying them is their relative capitalization. But it is not possible to know if the share's decreasing price is the effect of constitutive factors of securities. Investment passive strategy is considered the most appropriate method for managing a portfolio, in the stock exchange efficiency conditions. The result of choosing this strategy is the elimination of portfolio's specific risk.

Another great advantage of buy and hold strategy is also, the low cost, because broker's commission fees, spreads and other dealing costs become occasional rather than frequent. Passive strategy or buy- and-hold investment strategy means that rather than trading regularly securities are purchased and held for a long time (many years).

3.2. Active investment portfolio strategy

Another portfolio management strategy, opposite of the one, previously presented, is the active portfolio management. In an active portfolio strategy, a manager uses financial and economic indicators along with various other tools to forecast the market and achieve higher gains than a buy- and-hold (passive) portfolio.

Active portfolio management strategy is based on the selection of securities included in the portfolio. Manager will select securities according to their own performance and not according to their affiliation to an index or sector. Active management objective is to achieve higher performance as the benchmark (the stock market's official index).

Accordingly, the return rate obtained by the investment's active management, which involves investing in securities with high return rate and risk is random, being the result of a normal distribution around the average return. (Gaussian function). Managers who adopt this strategy relies on a certain degree of market's inefficiency. They noticed that it could be achieved a higher return rate for very short term, as long as financial asset's price is not steady. Portfolio active management can be applied both on the individual securities, in which case we are talking about "stock selection" (picking) and on various financial assets (from the stock exchange market and from the banking sector), in which case active management is called "active asset allocation". The third form of active management is "market timing", the strategy which is based on expectations of market's return development.

Portfolio managed by an active strategy has fewer titles than the one which is managed by the passive strategy, because requires individual analysis of each title of the portfolio. The active strategy also involves higher costs than the passive one.

4. Alternative investments

Structuring of efficient portfolios implies the existence of a correlation coefficient as lower as it

[1] Reilly, Frank, Brown, C, Keith - Investments Analysis and Portfolio Management (10th Edition), South – Western Cengage Learning, Mason, Ohio, USA, 2012.

[2] Burton G. Malkiel – "Passive Investment Strategies and Efficient Markets" - European Financial Management, Vol. 9. No. 1, 2003, Blackwell Publishing Ltd., 2003.

could be, between the portfolio component assets, so that the fluctuation in profitability or risk of one of them does not influence the financial performance of the other securities in the portfolio. That's why investors are choosing more and more the alternative assets for investing their economies in, aiming to conserve the value or increase the value of their economies. Such alternative assets could be: investments in gold, investments in art objects, investments in various collections (jewelry, machines, wines and stamps), investments in the forex market or, more recently, investments in cryptocurrencies.

One of the methods used for trading alternative assets is represented by contracts for difference (or CFD). Contracts for Difference (CFD) = are complex, derivative financial instruments that operate on the basis of leverage, which does not imply the effective holding of the underlying asset. The underlying asset could be: a commodity, a currency, a stock index, for which a certain fluctuation in the market is anticipated. The investor's aim is to obtain as much gain as possible from the change of the underlying asset price.

Initiating a CFD transaction involves acquiring a long/short position, based on estimates of the price evolution of the underlying asset:

- the anticipation of the increase in the price of the underlying asset leads to the opening of a long position. This financial position means that, in the following period, the investor will could buy the underlying asset at the price fixed in the contract, if on the market the asset's price increases;
- anticipating the decrease in the price of the underlying asset implies the opening of a short position, which will permit to the person who initiated the transaction to sell the underlying asset in the following period at the price stipulated in the contract, given that its market price is falling.

But, the risks of such transactions are high, when the evolution of the market price of the underlying asset is contrary to expectations.

The development of the financial market, as well as the desire of investors to make the greatest and most secure profit, have led to the emergence of a wide range of investments. Alternative investments, in recent times, are showing a growing trend, in terms of quantity and quality, and they are becoming more diversified and at the same time increasingly risky[3].

In 2016 – alternative assets accounted 23% of sovereign funds assets (up 4pp. from 2010[4]) as a result of lower interest rates on banking markets and yields on traditional assets (shares, bonds). Each category of alternative investments has its own advantages and disadvantages, such as the reduced correlation between the profitability of alternative assets and the profitability of financial markets, under the conditions of high financial performance of these investments. But, at the same time, the specific risks of these alternative assets may make them less attractive (the difficulty to determine their real price, their low liquidity or even the high price of alternative assets on the market).

Many types of alternative investments have existed for a long time and are known to investors. Others are relatively new, the alternative investment opportunities continuing to expand in the same time with rising demand. This is how alternative investments such as cryptocurrencies, real estate, art, wine collections, cars, diamonds and jewelry, as well as peer-to-peer loans, have emerged over time.

1. The cryptocurrencies. Investing in cryptocurrencies is based on the same principles as any other type of investment – diversifying the investments for the risks minimizing. This investment diversification can be achieved as time as more and more national entities will enter on the cryptocurrency market, which situation will create a favorable and safe environment for cryptocurrencies in the global economy. The cryptocurrencies provide a high degree of security in terms of how they were created, with Blockchain technology, which enabling users to have the image of all transactions and avoid fraudulent losses. Actually, any intervention by a hacker can be observed in the network of connected computers, which have a copy of the operations performed. The greatest risk of the cryptocurrencies investments remains the strong variation of their price on the market.

2. Art objects. In Romania, the art market has developed very strongly over the last 10 years, which has led to the appearance of the Art Market Index (developed by the Artmark Institute of Art Management, together with Price Waterhouse Coopers) and the TudorArt Index. Internationally, there is the ArtPrice portal, which monitoring public transactions with works of art and publishes the annual returns for the authors with high sales on the specific market.

Made it with inspiration, the investment in artwork can be more cost-effective than other alternative investments. The contemporary art market is more active from an investment point of view, both internationally and in Romania. The "old" art market is the most stable, but positioned far above contemporary art in terms of prices.

The risk factors of the art objects market are:

- the authenticity of the art object
- the real value of the art object (hard to evaluate)
- the emotional involvement of the investor

The specific elements of the art market are: belonging to an important art collection, the provenance of the art object, the mention in the art catalogues or showing in collections and exhibitions. All these specific elements are reflected in the value and the price of the art object.

[3] Conf. dr. Ivan Luchian, conf. dr. Angela Filip – "Abordările conceptuale modern ale investiţiilor alternative", *Paradigme moderne ale economiei şi antreprenoriatului inovativ*. Ediţia a XII-a, 3-4 noiembrie 2017, Chișinău. Chișinău, Republica Moldova: Centrul Editorial-Poligrafic al USM, 2017, pag. 164-170.

[4] According to consulting firm Price Waterhouse Cooper.

Volatility of an art object translates into the intensity of its trading on the market, and from this point of view, such investments are characterized by a low volatility, but which is offset by the fact that, over the time, the investment value will be kept or even will increase.

The trading of art objects is done on the primary market (of art galleries) and the trading through auction houses is increasing. This situation means a benefit from the visibility point of view, greater than the visibility offered by the art galleries and, also, offer the possibility of important gains.

3. Wine collections – are a safe investment, as the price of wine has never experienced sudden collapses on the market, unlike the other traditional assets. At the beginning of the financial crisis, in 2018, all the main sectors of the economy and the capital market suffered considerable losses, but the investments in the wine generated for the investors a profit of 7%, which over time reached even +16% in 12 months.

Accordingly with a study from Mediobanca, investment in wine generated a profit of 160% to 190% in 10 years, surpassing almost all investments in traditional assets, including gold investments and oil investments. In addition, the wine being an absolutely natural product and subject of a large number of factors, (which influence its ageing over time) and being considered a perishable good, the result of these reasons, is that wine isn't subject of any capital gains taxation.

4. Diamonds and the jewels. The investment in jewelry is an opportunity that carries just a few risks and will be a very profitable investment for long term.

The advantages of the investment in jewelry are: a steady increase in long-term value; the jewelry are easy to sell and the demand of jewelry is growing.

a) The steady increase in long-term value

While currencies, cryptocurrencies or shares on the stock exchanges have a volatile value and any increase or decrease of their value is almost impossible to predict, the precious metals from which the jewels are made are stable on the market and aren't devalued. The price of precious metals, too, may decrease for short term, but their value increases in for long term.

b) The jewelry are easy to sell

Even if investments in art objects or in art collections could be profitable for long term, selling them for profit is complicated. Finding a buyer interested in that object and willing to pay the correct price for it can be difficult and may take a long time.

By contrast, gold jewelry and gemstone jewelry are much easier to resell, as the number of people interested in such accessories is high. Also, in situations when it is necessary to sell a jewel and there is no buyer on the market at that time, one of the possible options is to sell the jewel at a pawnshop. The risk of not being able to sell a jewel immediately and with profit may be the result of a declining popularity of a jewelry collection. However, this situation can also be an advantage, because a not very popular jewel can be purchased at a low price and could be sold in the future at a much higher price than the purchase price, as the market trend may change.

c) The demand of jewelry is bigger and bigger

In recent years, the popularity of jewelry, especially gold jewelry, has reached new heights and more and more people are interested in getting jewelry or adding a new model to their collection. As all the signs show that this upward trend of interest for jewelry will continue in the next years, the price of these accessories is possible to increase more and more, like the price of any good for which demand is increasing. In these circumstances, the investment in jewelry is very profitable, both in terms of resale price and in terms of resale opportunity. But, an owner of a gemstone jewelry will never be able to resale the jewelry at the exact market price, because in most cases the person who redeems the jewel will want either its resale or separating gold from the gem and then selling them separately. So that in the price offered for the purchase of the jewelry must also include the future gain of the buyer. But, generally, at least 75 to 80% of the market value at the time of redemption can be obtained, or even less, but if the investment was made at least 1 year before the resale date, it could be obtain a gain over the price registered at the time of the first purchase.

Modern investors prefer alternative investments. In this way, the Rally platform of New York was created for alternative investment. Founded in 2017, Rally platform buys collectibles such as rare cars, sporting items that evoke important moments, old books and so on, and divides these assets into shares which are sells to investors for just $5, making these collectible objects much more affordable. The value of the shares is subject of market fluctuations, the investors being able to sell or buy that shares after a 90-day lockdown period.

The Rally platform facilitates peer-to-peer transactions in a secondary market, where prices can fluctuate over time. But, collectibles are considered risky investments, because the value of some of them can increase greatly over time, and the value of others can quickly depreciate. This situation is generated by the fact that investors lose their desire to own the luxury asset, which they have bought it and will sell it, which will cause the falling of its price. The advantage of such a trading platform, like Rally platform, is that investors can purchase and hold practically a small part of a very valuable asset.

5. Conclusions

Investments in alternative assets offer investors the chance to earn high profits, if they are open to taking high risks. Although traditional financial markets offer a wide range of financial assets, investors' goals of earning as much and as securely as possible make the alternative investment market very attractive. In the latest period, the alternative sources of funding and the

removal of barriers to cross-border investment are intensive promoted. They will stimulate the cross-border market for investing funds, promote the EU market for secured bonds as a source of long-term financing and will provide investors with greater certainty in cross-border securities and receivables transactions.

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TYPES OF JUDGMENT WITHIN THE ACCOUNTING THEORIES

Viorica Mirela ȘTEFAN-DUICU*

Abstract

In the content of this article, we will briefly expose the explanation of the accounting theories classified on a general level, namely the positive and normative theories of accounting. The purpose of the present article is to provide the type of judgments that lay foundation to each type of accounting theory.

Also, we will highlight the documentation from the specialty literature regarding these demarches and we will build a pertinent research speech. The professional judgment represents an important concept in carrying the existing processes in the organizational environment and is dictated by a plethora of factors that are fitted and guided by these theories.

Keywords: *normative theory of accounting, positive theory of accounting, inductive judgments, deductive judgment, research.*

1. Introduction

Most of the times, the academic environment focuses on the present reality of the economic and social processes and not limited to but losing out of sight the fact that a real help is the recognition of the importance of the starting point of each phenomena. This starting point is represented by the laws that provide the development and trigger of phenomena and certain theories.

Below we will present the accounting theories focusing our attention on the positive and normative theories of accounting. An important role within our study is represented by the professional judgment that is shaped by these types of accounting theories.

2. General fitting of the professional judgment within the context of the positive accounting theory

An important aspect is represented by the fact that „the positive accounting theory occupies a central piece in the contemporary process of founding the accounting research" [1] therefore the „researcher must remember the interest into the rigorous formalization of sentences, relationships, results of his scientific demarche starting from the agreed type of judgment and from the corresponding scientific methods of the investigated domain"[2].

The type of the judgments on which the positive accounting theory relies is *inductive*. The inductive judgment demarches are focused on getting new information and on issuing a new theory having as starting point the empirical posture. The direction of forming the knowledge starts from particular to general, from effects to cause leading to the extension of conclusive signification of the observed phenomena at a universal level.

„Studying asymmetries of information with the help of *game theory* allows examining numerous problems neglected by traditional microeconomics, such as: advantages which can be obtained by more informed agents, the manner of markets' functioning in the conditions of information asymmetry, loss of resources involved by the functioning of these markets etc."[3]

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[1] J. F. Casta, „Théorie positive de la comptabilité", Encyclopédie de comptabilité, contrôle de gestion et audit, 2009, pg. 1393-1402, pg. 1394.

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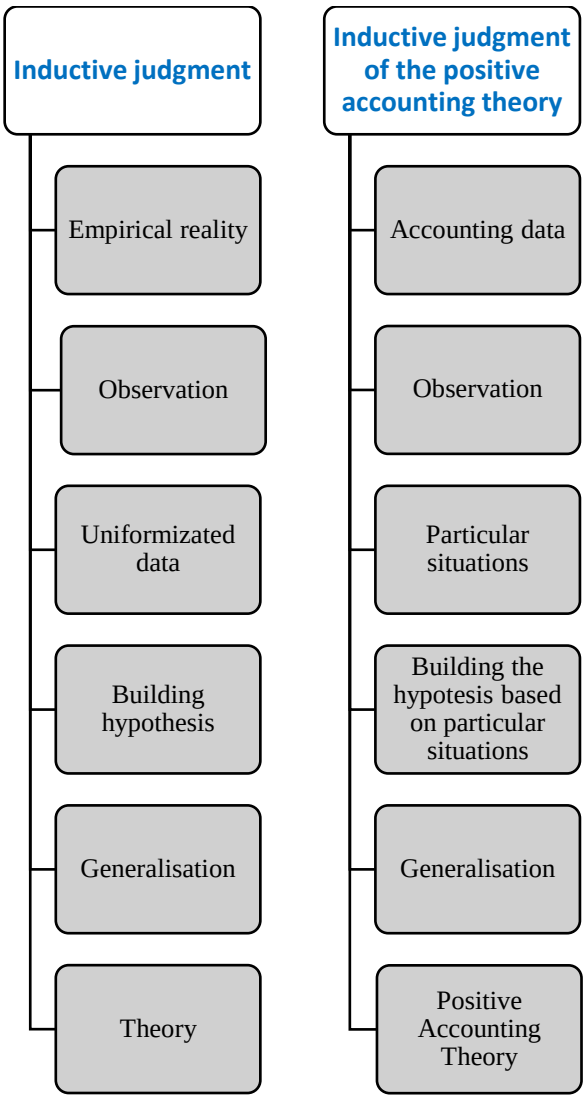
Figure 1 The representation of the inductive judgment



Source: issued by the author

The professional judgment in the context of the positive theory of accounting imposes specificity both in the theoretical and practical framework.

Through the prism of the imposed principles of the positive theory of accounting, the employee uses his professional judgment under the aegis of an informational guidance that determines the actions carried at an organizational level.

A professional judgment seen through the positive accounting vision requires the application of the observation techniques of the accounting phenomena and also involves an ascertainment empirical side of the use of the professional judgment in practices and financial statements useful in the domain, generating a systemic evidence of particular situations that delimit the hypothesis meant to lead to the formalization of the initially established problematic, meaning a generalization of the use of the professional judgment.

„ In the case of accountants, the marketing must provide a description of the services offered by professional accountant, and the description must concords to reality".[4]

After the generalization of the principles that dictates the professional judgment through the filter of the positive theory of accounting, a standing rule is issued. This rule folds on the framework of the hypothesis validated at the beginning of the inductive demarche.

The result of this demarche takes the shape of a theory such as „a form of rational knowledge, an assembly of judgments systemically coming from each other or more general principles that offer together a

[4] Sudacevschi, M., The promotion of the accounting services within the limits of professional ethics. Challenges of the Knowledge Society, 2016 718-722, pg. 718.

descriptions and an explanation"[5] of using the professional judgments within the context of the accounting reality.

3. The normative theory of accounting and the professional judgment

3.1. Developments regarding the normative theory of accounting

„The normative theory of accounting consists into a general reference framework due to which it's possible to evaluate the accounting practices, framework that serves as guidance for the development of new practices and new procedures (improvement)"[6] and consists into „a logical production that takes the shape of a high principle assembly"[7].

The normative theory draws the directions to be followed in order to solve issues and represents within its corpus pertinent expressions of practices. The utility of this theory derives from the standardization process of practices and from providing an improvement following the use of the principles on which relies on. These kinds of improvements can lead to the creation of a standard that, from compelling pragmatic reasons, departs from a principle stated within an applicable conceptual framework[8] empowering the fact that the normative approach sustains the prescription of facts at a practical level.

Out of the normative theories we highlight *The theory of bureaucracy*[9], *The theory of efficient markets*[1011], *The theory of business revenue estimates*[12], etc.

The normative theory of accounting „relies on standards and principles that are applied in the accounting process and also implies a specific environment in which measurements are carried and the issued norms are verified"[13] .

„The normative theory of accounting is objective through the prism of base values and judgments of value which it incorporates and through the empirical testing of the accounting instruments recommended for reaching the pre-established mechanisms"[14] .

The normative theory of accounting was most used in the '70s and has supported the accounting research domain in the area of financial statements, representing a precursory element for the positive theory of accounting.

Jensen stated that „the answers regarding the normative questions always depend on the choosing of the criteria or objective functions that highlight self-values"[15] .

Professor Joel S. Demski states that „no normative theory of accounting can be build using a single set of standards in particular because this fact will lead to an incomplete or incorrect demarche in the accounting domain"[16] .

„The objective of the normative theory of accounting is to maximize the accuracy in the prediction related to the accounting reports trough concentrating over the crucial attributes of the accounting mechanism prescribed in the normative"[17].

„The normative approaches are concentrated on highlighting the modality of decision taking and represents a basis for the examination of information carried by the investors and employees"[18].

„The economic reality is, in fact, the cumulus of operations within an economy, and its normative representation involves the write down in accordance with the accounting regulations at the „economic reality" precisely to represent what it needs to and mainly what it supposes to"[19].

From the predecessors of the normative theory of accounting we name: W.A. Paton, J. B. Canning, H. W. Sweeney, K. MacNeal, P. Gensse, E. O. Edwards, P. W. Bell, etc.

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[5] N. Vasile, „Introducere în logica științei", chapter in "Epistemologie. Perspectivă interdisciplinară", M. Niculescu, N. Vasile, Ed. Biblliotheca, Târgoviște, 2011, pg. 40.

[6] M. Niculescu, Seminar de cercetare doctorală cu titlul „Marile școli de gândire în contabilitate", 8 februarie 2012.

[7] Ibidem.

[8] „Accounting theory and conceptual frameworks", „The IASB conceptual framework", pg. 121.

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[17] A. Riahi-Belkaoui, „Accounting theory", Cengage Learning EMEA, 5th ed, 2004, pg. 366.

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[19] M. M. Voinea, „Contabilitatea - o reprezentare normativă a realului economic?", Management Intercultural, Vol. 28, 2013, pg. 108-114, pg 109.

Table 1. Structure of the normative theory as seen by K. MacNeal (1939)

Postulates of environment	• Numerous uninformed title owners • The existence of a free and competitive market • The continuity of the operational activities of entities
Objectives	The objective of accounting is to supply information regarding an entity and useful information for shareholders and creditors in taking decisions regarding investments and credits.
Information needs	Managers, creditors and shareholders are interested in knowing the net value of the business and in having information regarding all the profits and losses.
Recognition and accounting evaluation	• The balance sheet must be reported at the economic value of its assets and liabilities. • Profit and loss account must report losses, current and capital profits realized and unrealized. • The principle of realization is abandoned. (The principle of realization is the concept that refers tot the fact that revenues can be recognised just at the moment in which the goods or services on which it relies have been delivered or respectively rendered.)

Source: issued after Md. Humayun Kabir[20]

Table 2 – the structure as in accordance with the vision of Paton and Littleton (1940)

Postulates of environment	• Existence of numerous passive investors. • Existence of various groups of shareholders within the company.
Purposes of accounting	The purpose of accounting is to provide reliable information (relevant) regarding the economic entity.
Base concepts	• The entity as a business environment. • Continuation of activity. • Cost attachments. • Efforts and realization. • Objective, verifiable evidence.
Accounting evaluation	• Transactions are recorded at fair value of the attributed importance. • Accounting records should not be adjusted with the modification of prices.

Source: issued after Md. Humayun Kabir[21]

[20] M. H. Kabir, "Normative accounting theories", Social Science Research Network, 2005, pg. 7.
[21] Ibidem pg. 13.

Table 3. The structure of the normative theory as seen by Chambers (1966)

Postulates of environment	The enterprise wished to adapt to the market conditions.
Relevant information in taking decisions	The relevant decision relies on knowing multiple possibilities for an entity, possibilities expressed in current monetary units.
Accounting function	The accounting function is to supply contemporary financial information as a guide for future actions.
Evaluation and accounting recognition	• Assets and liabilities should be recognized at the current cash equivalents. • The principle of realization is abandoned. (The principle of realization is the concept that refers to the fact that revenues can be recognised just at the moment in which the goods or services on which it relies have been delivered or respectively rendered.)

Source: issued after Md. Humayun Kabir[22]

Over time, theoreticians have divided in two major categories: the ones that support the concept of „historical cost" out of which we name Paton and Littleton and the ones that support the concept of „market value", represented by MacNeal and Chambers. „Historical cost is the assessment base most commonly adopted by companies to prepare their financial statements"[23].

In MacNeal's opinion, the role of accounting is to highlight the economic reality by stating that the economic statements do not represent a specific truth, having the possibility to misguide the creditors and investors. MacNeal states that the principle of historical cost prevents the real presentation of the financial status and the operational results in the company's financial statements. This links the development of the accounting principles to the economic and business conditions found in medieval Europe and through reconstruction, he points that the accounting principles have followed the natural development of those conditions, conditions that have stopped from existence. Therefore, the accounting principles did not keep up with the changed conditions.

Paton and Littleton aimed at developing a presentation regarding the accounting standards that will provide guidance for the accounting practice.

At a methodological level, Paton and Littleton carried within their research deductive demarche, supporting their theories on more basis structures: the entity in the business environment, the continuity of the activity, attached costs, efforts and achievements and the evidence of achieving the proposed goals. The matters presented did not led to a complete verification of the forwarded proposals but the work they put in was characterized as coherent, objective and with a high contribution.

The proposals forwarded by Paton and Littleton are different from MacNeal's because the difference in grading the importance of the relevance and trust in the accounting information. MacNeal stated that the accounting practice doesn't always have a common point with the investors and creditors' need of information while the proposals of Paton and Littleton were highlighted by the need of providing reliable information at corporation's level especially for investors.

Following the normative demarches, Chamber's proposal is based on the idea of the entity's adaptation to the dominant market through engaging it to the changes imposed by the environment. In his opinion, the role of accounting consists in providing contemporary financial information (prices/current values) that will direct the actions carried by the entity.

„Accounting axiomatization products produce change because are based on the arrangement of users of financial information and on their information evolutionary needs".[24]

Theoreticians have different opinions when discussing the construction of the normative theory. Differences mainly appear due to debated concepts and

[22] Ibidem pg. 16.

[23] Cristea, V. G., The necessity to introduce the accounting rules and fair value in the conceptual framework. Procedia economics and finance, 26, 2015, pg. 515-521, pg. 517.

[24] Cristea, V. G., Accounting Paradigms which Favor Historical Cost. Challenges of the Knowledge Society, 2014, 488-493.pg. 489.

mainly from the notions given to the role of accounting. For example, Chambers states that the central problem of an entity is whether it can adapt or not to the environment the market involves, having as base the information provided by accounting at current level, contemporary, while Littleton considers that the entity has as purpose to provide goods and economic service, the performance of the entity being measured as it reaches the proposed objectives.

The development of the normative theory consists in assimilation the contributions provided by the theoreticians through the revision of accounting practices and through debating the ways of improving the accounting system. These lead to supplying an accounting framework that supports the regulating authorities in establishing a measuring accounting basis.

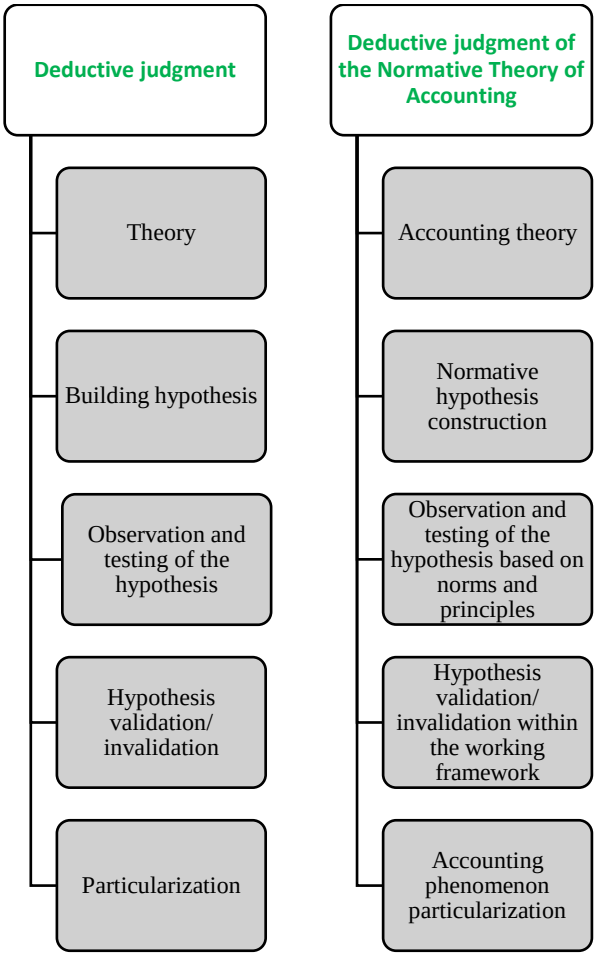
3.2. The normative theory – deductive judgment – professional judgment relationship

The normative theories have as starting point an assembly of standards and principles out of which we name IFRS/IAS, an assembly that delimits, in the named context, the development of a guide that contains accounting practices and procedures. Within these theories the deductive judgment is being used, having as purpose the gain of improvements of the described environment.

„Judgment is a diluted and hierarchical informational structure in which thinking starts from certain data (judgments) and reaches the gain of new ideas (conclusions)"[25].

„The hypothetical-deductive demarche for research starts by studying the theory (theories), followed by the selection of hypothesis, test and validity check through observations, experiences and measurements"[26].

Fig. 2. The representation of the deductive judgment



Source: issued by the author

[25] Definition from the paper „Gândirea, un proces psihic" available at: http://www.ipedia.ro/gandirea-un-proces-psihic-79/.
[26] M. Niculescu, N. Vasile, „Epistemologie. Perspectivă interdisciplinară", Ed. Bibliotheca, Târgoviște, 2011, pg. 111.

4. Conclusions

„A normative theoretical system needs a judgment of value in order to be validated. This inclusion of judgment of value differentiates the notion of „normative" from "positive"[27]. „Theories are essentially normative and formative, meaning that it assumes the judgments of value and shape future actions. In Steve Smiths' words, „theories not only explain or predict, it tells us what human action and intervention are possible: it defines not only our explicative possibilities but also our practical and ethical horizons"[28].

In Milton Friedman's opinion, the positive vision „is independent from the situations that imply ethics of normative judgments"[29]. Explaining this statement, professor D. Wade Hands highlights the identification of the normative judgment with the ethics represented as documentary basis at an economical level in the economy[30].

The professional judgment in the context of the normative theory of accounting represents a set of linked logical judgments that serve to obtain conclusive results for the carried activities taking into account certain circumstances, knowledge, evidences, methods, criteria and proper regulations.

Accounting practices, in the normative vision, impose the compliance of standards and regulations in order to achieve the major goal and namely gain and prescription of solutions or improvements of the accounting treatments.

The professional judgment, guided by existing norms, is strictly directed by the regulatory framework which leads to shaping the idea that the professional judgment tents to overlap from a utility point of view with the normative theory of accounting.

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GRADUATES AND THE LABOR MARKET DEFICIT IN THE ROMANIAN HEALTH SECTOR

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Abstract

The main directions of the migratory flow of health specialists are towards more developed countries. Around 1/3 of Romanian health professions graduates are working abroad while the national health system faced with a chronic shortage of staff. The paper highlighted the fact that the increase in the number of graduates in recent decades did not ensure coverage of the deficit, because only a small part of them remain on the Romanian labor market, the motivation of migration being much higher income, lack of equipment and low level of transfer technological as well as working conditions. The lack of an integrated and realistic national plan for health care reform runs counter to developed countries' measures to attract and hire migrant physicians, and rapid integration facilities for new jobs promoted during the pandemic have kept the migration alternative as a solid alternative for graduates to pursue and progress in their careers abroad.

Keywords: *Medical staff, health graduates, health workforce migration, Romania, linear model regression.*

1. Introduction

The challenges of the external labour migration of health professionals are not a new problem, being specific to most developing countries. The demand for human resources in health care sector is growing rapidly worldwide due to a) last demographic transition and medical care for all principle implementation, b) shortage of graduates in health professions in developed countries and c) epidemiological conditions, especially in the context of the COVID-19 pandemic. The expansion of the migration phenomenon both at European and national level in the context of globalization attracts the interest of experts from different fields of activity, who turn their attention to the analysis of the consequences of this phenomenon on health services (Teodorescu, 2012).

The main directions of the migratory flow of health specialists are towards more developed countries from developing ones, known as "brain drain" (Mullan, 2005). There is an established link between an adequate level of staff and the positive outcomes of healthcare (Chen et al., 2004).

International recruitment and migration of medical staff has become a common practice for many economically prosperous countries to fill vacancies, but with negative externalities for developing countries of origin, which remain in (even more) employment deficit. The migration of medical staff unbalances national health systems, which are already threatened by financial shortage and the lack of medical staff in relation to the needs of the population. The increased deficit of medical staff, including highly qualified staff, is a matter of particular importance for the performance of health systems and undermines the ability of these countries to achieve sustainable development and to provide quality health services for all, both for preventive care and for treatments.

Romania is among less developed countries of EU that is facing an acute shortage of employment in health care sector, and the migration of both experienced specialists and health graduates is a high challenge having complex impact of the whole society. The crisis of the health system in the current pandemic conditions has highlighted the profound negative effects of the migration of medical graduates in the last two decades as its have spread within health systems across all disciplines.

The purpose of this research is to identify the impact of the mobility of health graduates on the shortage of medical staff in Romania and on the size of the stock of Romanian medical staff working abroad.

2. Literature review

The process of globalization and the growing demand for medical services worldwide have determined both the development of trade in services, equipment, and technologies in the medical field, and

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have encouraged the mobility of medical staff in this sector.

The cost and duration of training for the health professions are substantial and, therefore, the most effective option for developed countries is to cover staff shortages by recruiting them from the international labor market, both recent graduates and young staff with several years of experience / practice, offering comparative advantages. So, among the determinants of the decision to migrate of the medical staff we can identify: salary differential and opportunities for career development and promotion, better working conditions, the desire to acquire new skills and knowledge, for family reasons (Apostu et al., 2020; Apostu et al., 2020; Vasile et al., 2018; Buchan et al., 2014; Humphries et al., 2015; Boboc et al., 2011). Also, a number of other factors shape the geographical distribution and intensity of mobility flows of medical staff, including doctors, nurses or other categories of health workers. De Vries (et al., 2016) studied the typology of migrants in the field of health, and their results highlight the fact that a large part of medical staff are motivated by higher salaries compared to the country of origin and a more flexible work schedule. While for other categories of doctors included in the study, the language spoken in the destination country is important, in consequence they migrate to countries in the same language basin.

At European Union level, some Member States are paying more attention to the phenomenon of medical staff mobility and building databases on these categories of migrants, and a wide range of studies have been carried out (Buchan, 2006; Cehan, 2013; Humphries et al., 2008; Humphries et al., 2012; OECD, 2008; WHO, 2008). These studies give a realistic analysis of the medical staff mobility, but also highlight variations in terms of detailing the topics to be studied, and analytical depth or of statistical research that do not allow comparisons. An analysis of the data provided by the Romanian College of Physicians on Current Professional Certificates issued to work abroad (Apostu et al, 2020) only partially highlighted the size of the phenomenon, namely the intention to mobilize for a job abroad, without measuring statistically and the proportion in which this intention was materialized, So, at the national level, there is a lack of data on Romanian doctors who emigrated abroad, and studies on the size and structure of migrant flows in the field of health care are limited. Thus, in the research conducted by Suciu (et al., 2017) on a sample of 975 graduates from medicine faculties for the period 2013-2015, are analyzed their intentions to work abroad. The study's results indicate that 84.7% of these graduates plan to look for jobs abroad, and of these, 44.5% have already taken language courses that can help them to integrate in the destination country, while 26.5% have already looked for jobs abroad using online medical platforms. The migration determinants for Romanian graduates are higher salaries, better living and working conditions, professional opportunities, "lack of internships" in the chosen specialty and disappointment regarding the medical system in Romania.

The migration process of Romanian medical staff is also studied by Dornescu & Manea (2013). They support the development of control levers for the migration of physicians, such as codes of ethics for medical staff that should be used by all developing countries facing this phenomenon. Similar policy measures in order to restrict migration are supported by Cehan and Teodorescu (2012). Medical staff is involved not only in permanent migration, but in temporary too, most often for carrier opportunities. When the medical staff migrates temporarily, they return with a much wider experience in the field and with examples of good practices that they can implement in the Romanian medical system and can lead to an increase in the quality of services offered to the common public.

But, unfortunately, examples and situations of temporary migration among medical staff are very rare, and the effects of permanent migration are overwhelming for the country of origin.

3. Research methodology

Current research uses linear model regression in order to analyze the impact of the mobility of health graduates on the shortage of medical staff in Romania and on the stock of Romanian doctors practicing abroad. Therefore, the dependent variables used in the research are:

a) the number of medical staff in Romania;
b) the number of Romanian medical staff abroad.

In order to investigate the impact between the listed variables included in the present research, we formulated the resulting economic hypotheses:

• H_1 - the increase in the number of health graduates contributes to the growth in the number of employed medical staff in Romania;

• H_2 - the increase in the number of health graduates contributes to the increase in the number of Romanian medical staff working abroad.

Using linear model regression, we will observe if exists a statistically significant and direct relationship between the variables by elaborating several equations.

The general linear model regression has the following form:

$$Y_i = \beta_0 + \beta_1 X_i + e_i \quad (1)$$

where:

Y_i represents the dependent variable,

X_i is the independent variable,

β_0 is a parameter and shows the mean value of the dependent variable when X is equal to 0,

β_1 represents the slope and indicates the mean variation of Y when X variable vary with a unit,

e_i is the residual variable.

Parameter estimation of the linear model regression will be performed using the statistical software R.

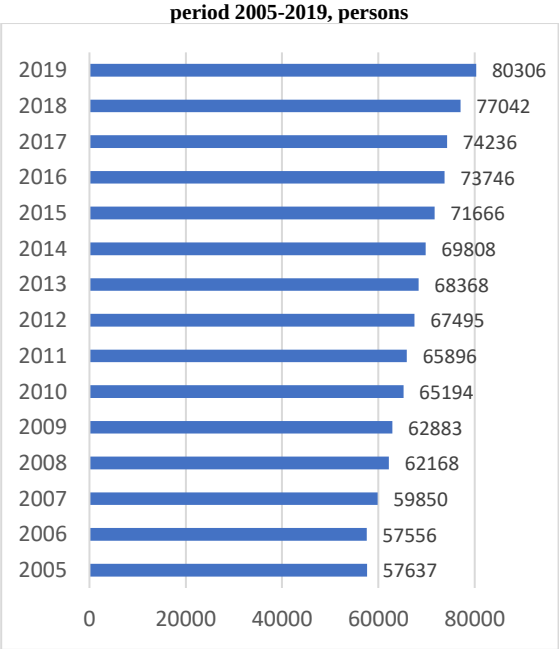
4. Data description

The data used in the research are provided by the National Institute of Statistics of Romania and the OECD for the period 2005-2019.

The importance of the phenomenon of migration of Romanian doctors derives from the shortage of doctors registered by Romania.

As we can see in Figure 1 the number of Romanian doctors working in Romania is increasing, reaching the value of 80306 in 2019.

Figure 1. The evolution of medical staff in Romania in the period 2005-2019, persons



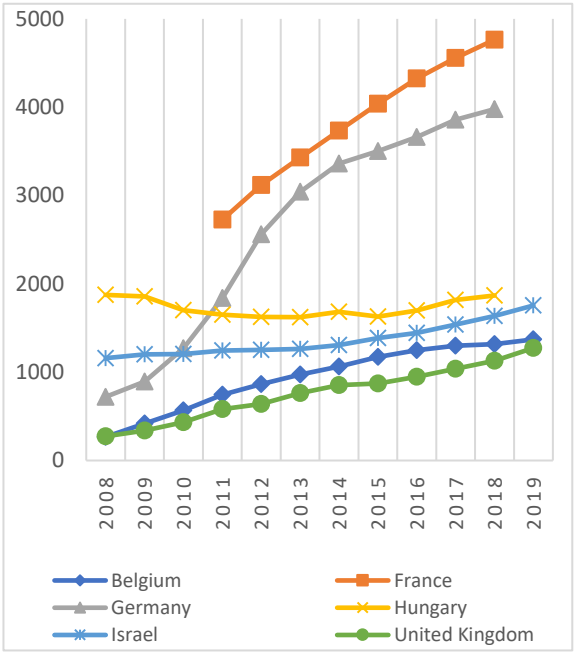
Source: Author's calculation based on Romanian National Institute of Statistics, 2021

However, according to the latest report of the European Commission „State of Health in the EU" the country profiles of the Member States (European Commission, 2019) the Romanian health system still suffers from a lack of sufficient medical staff (doctors and nurses) compared to 1,000 inhabitants. In 2017, there were 2.9 practicing physicians per 1,000 inhabitants, the third lowest value in the EU (EU average 3.6) and 6.7 nurses per 1,000 population (EU average 8.5). And in the context of the COVID-19 pandemic, when the importance of doctors increased even more, 231 medical staff from Romania and Bulgaria decided to go to practice in Austria (Romania Insider, 2020), although in Romania the epidemiological situation was not under control, with many areas of the country where there were cases of infection and death among doctors.

According to the data presented by the OECD, (2021) we notice that the Romanian medical staff is increasing in different destination countries (Annex 1), and among the preferred destination we can mention France, Germany, Hungary or Israel with 4764, 3978, 1870 and 1755 Romanian medical staff, respectively (Figure 2).

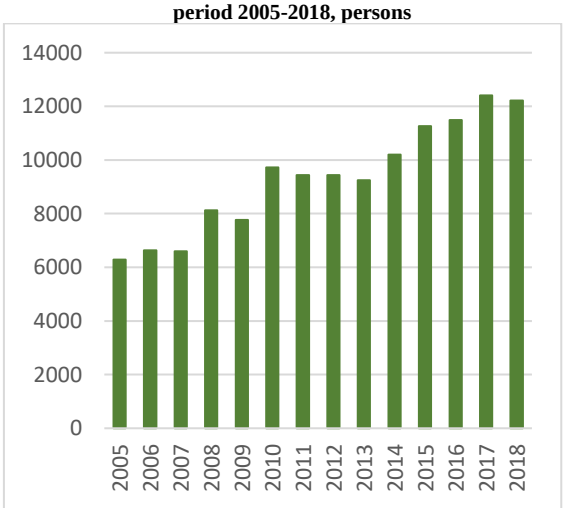
Figure 2. Top countries of destination for Romanian medical staff in 2008-2019, persons

Source: Author's calculation based on OECD data (2021)



As we can see from the existing research on medical staff in Romania and especially young graduates in the field of health, the migration trend has existed since the student years. Thus, it is important to analyze the trend of the number of graduates of medical specializations at the national level (Figure 3). Thus, we find an increase in the number of medical graduates throughout the analyzed period, which means that this specialization is in high demand by young high school students.

Figure 3. The evolution of health graduates in Romania in the period 2005-2018, persons



Source: Author's calculation based on Romanian National Institute of Statistics, 2021

Comparing with the data from figure 1 it is found that: a) the dynamics of the number of graduates is more accentuated than of the employment in the health sector, the field of professional specialization being of interest for young people.

a) the annual contingents of graduates, which represent about 10-15% of the annual staff of medical staff are found in the staff increases only in very small proportion, respectively less than 1/3 of the number of graduates, which cannot be justified only by replacement rate by age (at retirement), but especially by migrating for a job abroad;

b) if we associate the available data on the applications for Current Professional Certificates issued to work abroad with the aspects mentioned above, although we cannot make an accurately statistical determination, we can still conclude that we have much enough cases of graduates who, after completing their studies, do not works in the medical sector, migrating to other activities in the business environment, capitalizing on the specialization acquired through school or even giving it up.

5. Results and discussion

In order to determine the impact generated by health graduates on the shortage of medical personnel in Romania and on the Romanian medical staff abroad, we decided to apply a linear regression model on the research data.

Table 1. Impact of health graduates on medical staff in Romania using linear model regression

	Coefficient	Standard error	t test
Intercept	39143,58	1812,38	21,59
Health graduates	2,94	0,18	15,53
p-value 2,6057e-09			

Source: Author's calculation

According to Table 1, we find that the independent variable - medical graduates of higher education institutions in Romania - shows a statistically significant influence. Thus, the regression equation has the following form:

$$Med\ staff\ Ro_i = 39143{,}58 + 2{,}94 * health\ grad_i + e_i$$

Therefore, we notice that with the increase of the number of graduates in the medical field, on average the number of employed medical staff in Romania increases. The obtained results allow us to ascertain the fact that some of the medical graduates stay at home and practice in the hospital units in Romania, thus contributing to the reduction of the shortage of doctors.

Table 2. Impact of health graduates on Romanian medical staff abroad using linear model regression

	Coefficient	Standard error	t test
Intercept	-9560,00	2296,93	-4,16
Health graduates	2,01	0,24	8,36
p-value 2,37955e-06			

Source: Author's calculation

Applying the same method of quantitative analysis, we observe a similar result in the case of the relationship between the impact of health graduates and the number of Romanian medical staff abroad, with the following mathematical representation:

$$Med\ staff\ abroad_i = -9560 + 2{,}01 * health\ grad_i + e_i$$

Even if the influence is statistically significant, the overall generated impact is negative. Thus, the increase in the number of health graduates determines on average an increase in the Romanian medical staff who practice in hospitals abroad.

The results allow us to conclude that young graduates are not only assimilated by the domestic labor market, but also, many of them tend to migrate to other countries of destination for various economic, social, family etc., reasons, results also supported by other research in the field.

6. Conclusions

Most Romanian medical graduates consider migration an alternative for continuing their professional activities and an opportunity for future career advancement. The results of this study are important in terms of supporting the shaping future migration of Romanian doctors and have implications for both policy development and future research.

During the first year of pandemic crisis the health system in Romania faced with the challenge of retaining the graduates for decreasing staff deficit. According to last OECD report on doctors migration Romania has the highest number of Romanian-graduates who have emigrated and carry out their professional activity abroad (about 1/3 according to OECD, 2021[1]), and in countries like Germany the highest number of migrants doctors are Romanians. Although salaries in Romania for doctors have increased significantly since 2017, "OECD member states have taken decisions that have facilitated the recognition of the professional skills of foreign doctors and their rapid entry into the national health system"[2], making the migration option an important alternative for graduates.

In order to reduce the propensity for migration of graduates from health professions, public authorities must ensure an articulated reform and finance the health

[1] http://www.oecd.org/coronavirus/policy-responses/contribution-of-migrant-doctors-and-nurses-to-tackling-covid-19-crisis-in-oecd-countries-2f7bace2/.

[2] https://www.g4media.ro/raport-ocde-o-treime-din-medicii-romani-au-emigrat-record-absolut-in-lume.html.

system (health financing in Romania is about half of the EU average). Romanian authorities must develop a comprehensive national health workforce employment plan to mitigate the migration of medical staff. The recovery of the health system through technology / endowments and working conditions will attract graduates and probably some of the migrants who have left their families in the country. However, the shortage of doctors on Romania's labour market still cannot be covered, health sector being confronted with a critically short of nurses and doctors in general and in particular for the specialisations related to pandemic crisis. This issue remains equally important as investments in health sector for equipments, technology in order to shift the working condition and significally improve the efficiency of health services, both from the client (patients) and health staff perspectives. Retaining graduates to work in Romanian health sector is the mail challenges of the public authorities in the context of commitments undertaken by Romania to implement the Millennium Development Goals.

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Appendix

Table 1. Evolution of Romanian medical staff abroad by country of destination in 2005-2019, persons

Year	Austria	Belgium	France	Germany	Hungary
2005		7		500	1898
2006		9		534	1895
2007	4	135		619	1883
2008	6	267		721	1875
2009	13	420		895	1858
2010	16	566		1269	1701
2011	22	744	2726	1840	1652
2012	23	866	3118	2559	1624
2013	31	975	3431	3042	1623
2014	51	1064	3734	3363	1683
2015	53	1172	4040	3503	1630
2016	51	1247	4324	3661	1699
2017	55	1300	4558	3857	1819
2018	62	1319	4764	3978	1870
2019		1371			

Year	Ireland	Israel	Netherlands	Sweden	United Kingdom
2005		1173	13	250	
2006		1156	13	263	
2007		1147	18	313	
2008		1159	28	363	274
2009		1201	35	385	338
2010		1206	43	421	435
2011	226	1245	47	485	582
2012	286	1252	43	564	639
2013	341	1263	45	628	764
2014	487	1308	46	735	852
2015	625	1388	57	568	872
2016	723	1445	60	728	949
2017	733	1539	64	812	1037
2018	715	1636			1129
2019	709	1755			1274

Source: Author's calculation based on OECD data (2021)

LEAN TOOLS TO ELIMINATE LOSSES. TRANSPOSING AUTOMOTIVE APPROACH IN OTHER AREAS

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Abstract

In a competitive environment each company strives to bring higher added value to the customers, while improving the quality of its products and services, diversifying its offer in anticipating demand and streamlining its activity. To achieve market sustainability, companies aim to both map out the progress and use the resources efficiently and economically. During time several methods and tools were developed and used to this end. Lean Management tools implementation has proven to have effects not only in manufacturing sector, but also in healthcare, IT, government, construction, retail and others.

This study presents the steps of implementing the 5S method, highlighting the real impact of Lean tools and the potential to be extended in other activities with at least similar success. Based on case study developed in automotive activity we underlined how these externalities can be economically measured. Moreover, having the automotive example of good practice, we outlined the general framework for adapting the method to other fields of interest, i.e. in companies that provide goods and services for personal healthcare. Designing this framework for improving activity of such essential companies during COVID-19 crisis, we are providing arguments for a market-based approach to social value / social profit creation.

Keywords: *Lean Management, Tools and Methods, Automotive, Medical, Healthcare, Sustainability, 5S tool.*

1. Introduction

As an improvement tool of modern enterprise, the Lean methodology brings advanced management ideas and business processes to companies[1,2].

Lean Management (LM) was developed on the foundation of Toyota Production system and has become a need in the automotive industry and not only. Since it generated a wide range of advantages, the LM has rapidly grown in popularity and it started to be implemented in other sectors than manufacturing, too: information technology, government, retail, construction, procurement etc.

Lately Lean methodology evolved, being linked to „innovation" and „sustainability" approaches. Not by chance, in order to maintain a sustainable business, organizations need to apply solutions in order to reduce the potential risks posed by industry, the economic and political environment and the business environment in its complexity. As the external environment is hardly to be significantly influenced by firm's activity, a flexible internal approach is managers' and entrepreneurs' solution.

Sustainability[3] and Lean methodology are two interdependent components: on the one hand, through Lean actions and solutions, the sustainability of the organization is ensured, and on the other hand, sustainability provides the needed background for new Lean actions and improvements. There is thus a positive relationship between the two. Recent analyzes have determined multiple determinations between LM, industry 4.0[4] and the circular economy[5].

Because Lean is based on identifying and eliminating waste as a continuous process, the business remains efficient and able to adapt to the changing external environment on a long-term basis. Manufacturers have experienced increases in

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[1] Bo Zhang, Zhanwen Niu, and Chaochao Liu, "Lean Tools, Knowledge Management, and Lean Sustainability: The Moderating Effects of Study Conventions," *Sustainability* 12, no. 3 (MDPI 2020): 1-20, https://doi.org/10.3390/su12030956.

[2] Amir Honarpour, Ahmad Jusoh, and Choi Sang Long, "Knowledge management and total quality management: A reciprocal relationship," *International Journal of Quality & Reliability Management*, 34, no. 1 (Emerald 2017): 91-102, https://doi.org/10.1108/IJQRM-03-2014-0040.

[3] Savindi Caldera, Cheryl Julia Kiran Desha, and Les Dawes, "Exploring the role of lean thinking in sustainable business practice: A systematic literature review," *Journal of Cleaner Production* 167 (Elsevier 2017): 1546-1565, https://doi.org/10.1016/j.jclepro.2017.05.126.

[4] Leonilde Varela, Adriana Araújo, Paulo Ávila, Hélio Castro, and Goran Putnik, "Evaluation of the Relation between Lean Manufacturing, Industry 4.0, and Sustainability," *Sustainability* 11, no. 5 (MDPI 2019): 1439, https://doi.org/10.3390/su11051439.

[5] Simon Peter Nadeem, Jose Arturo Garza-Reyes, Anthony Anosike, and Vikas Kumar, "Coalescing the Lean and Circular Economy," Proceedings of the International Conference on Industrial Engineering and Operations Management (IEOM Society International 2019): 1082-1093, http://www.ieomsociety.org/ieom2019/papers/279.pdf.

profitability and customer satisfaction as a result of reducing their lead times, improving product quality and eliminating waste[6].

In the last decades, Lean tools application has proven an increased impact and has contributed to achieve consistent results in several fields. When focusing on Lean concept, it's important to be aware of the losses which the organization is accumulating and thus eliminate them. Still, applying lean tools is not an easy process. In order to achieve results the management should show perseverance and commitment.

There are several instruments which harness the potential of a company and its people. Lean tools are used to solve specific problems the company faces. Visual management instruments are used to increase productivity and cleanliness at the workplace, Just in Time concept helps decreasing stocks, waste and costs, Andon facilitates communication and problem-solving, and the list may continue.

This paper focuses more on the 5S Method, as a way to increase productivity, save costs and streamline the activity, knowing that, in the current conditions of the ever faster technology transfer in the business environment, the significant comparative advantages are based on the increase of the productivity of the resources;

5S is a basic Lean tool which includes 5 phases:

1. Sort – sort out needed items and remove items which are not needed at the workplace;
2. Set – put in order the items, objects, furniture which are needed, establish a place for each item, designate labels;
3. Shine – clean everything regularly at the workplace to identify possible irregularities;
4. Standardize – establish standard procedures to maintain the achieved results;
5. Sustain – keep following the established procedures, making 5S part of the organizational culture.

5S tool helps to reduce non-value adding time, increase productivity and improve quality[7], reduce waste and increase process efficiency. The hardest part of the process is to sustain, because in time places tend to clutter again and get back to the initial situation.

As the method has specific and detailed steps to follow, it can be easily implemented in any field.

2. Case study - Hirschmann Lean tools

Hirschmann Automotive is an Austrian company which produces parts for the auto industry and not only. The group has production units in Austria, Czech Republic, Romania, Marroco, China, Mexico, and Germany.

In Romania Hirschmann has 2 production units, situated in Mures County, Transylvania. The activity was established in 2007 and manufactures wiring for parking and battery sensors, wiring for mirrors, automatic gearboxes and motors. 1.950 company's employees out of 5.900 are working in Romania.

The 5S and other Lean tools use is integrated into the production processes and managerial culture, being present simultaneously in all sectors and departments of the enterprise. Hirschmann School offers the new employees a specialized training on the Lean used tools, organizational culture, company's vision and so on.

Hirschmann focuses on eliminating the 8 types of Muda described in the literature as: overproduction, waiting time, transport, extra-processing, inventory, motion, defective products, unused potential.

For eliminating Muda, Hirschmann Automotive Romania uses 2 types of Lean methods:

- Basic methods:
  - 5S method;
  - Improvement ideas management;
  - 7 Muda elimination;
  - Practical methods for solving problems;
  - Process confirmation;
  - Visual management.
- Complex methods:
  - SMED (single minute exchange of die);
  - VSM (value stream mapping);
  - 6 Sigma;
  - TPM (total productive maintenance);
  - TQM (total quality management);
  - Kanban;
  - OPF (one pieces flow).

3. 5S tool implementation and benefits quantification

3.1. Implementing 5S tool in production

For implementing 5S method in the production environment, Hirschmann Romania follows specific successive actions:

1. Select the pilot area for a 5S site;
2. Establishing the team, the members who will participate in the activity;
3. Providing the necessary resources for the development of the site;
4. Training the selected team;
5. Development of the 5S site in Gemba;
6. Closure of actions on site;
7. Achieving the 5S standard;
8. 5S site documentation;
9. Extension of the standard to similar positions;

[6] Paul Resetarits, "The application of lean management principles to fields other than manufacturing," Proceedings of PICMET '12: Technology Management for Emerging Technologies (IEEE 2012): 1705-1742, https://ieeexplore.ieee.org/document/6304189.

[7] Oleghe Omogbai, and Konstantinos Salonitis, "The Implementation of 5S Lean Tool Using System Dynamics Approach," Procedia CIRP 60 (Elsevier 2017): 380-385, https://doi.org/10.1016/j.procir.2017.01.057.

10. Evaluation of 5S level, degree of implementation.

Step 1.

Based on the company's needs, a pilot area for 5S implementation is selected.

Step 2.

For establishing the team, Hirschmann considers selecting 4 to 10 people to participate to the 5S site:

- CIP (Continuous Improvement Project) coordinator in the area - site coordinator;
- workplace operators;
- internal customer;
- the internal supplier;
- process engineer;
- quality engineer;
- segment leader.

Step 3.

The company ensures the following resources:

- Printing of 40-50 pieces of 5S Red tags;
- adhesive tape for gluing the red tags;
- blue, red and green markers;
- Flip chart;
- red and white strip for marking the area;
- standard information label Site pilot area 5S.

Step 4.

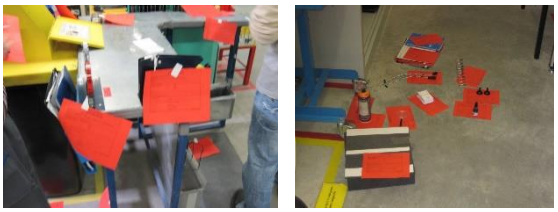
The course material and Best practices in production are presented and trained for 1-1,5 hours.

Step 5.

The implementation of 5S method starts. The Flipchart is filled in with data: Site location, site date, site purpose, participants (team), team expectations.

Sorting implies the identification of unnecessary objects, problem areas, sources of dirt and hard-to-reach areas with red tags. Unnecessary objects are removed from the area and written on the Flip-chart.

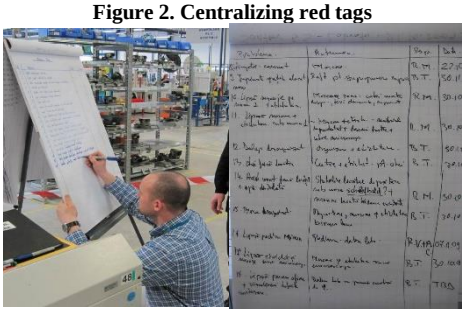
Figure 1. Red tags on unnecessary objects



Source: Hirschmann Automotive Romania

All red tickets are centralized in an Action Plan.

Figure 2. Centralizing red tags



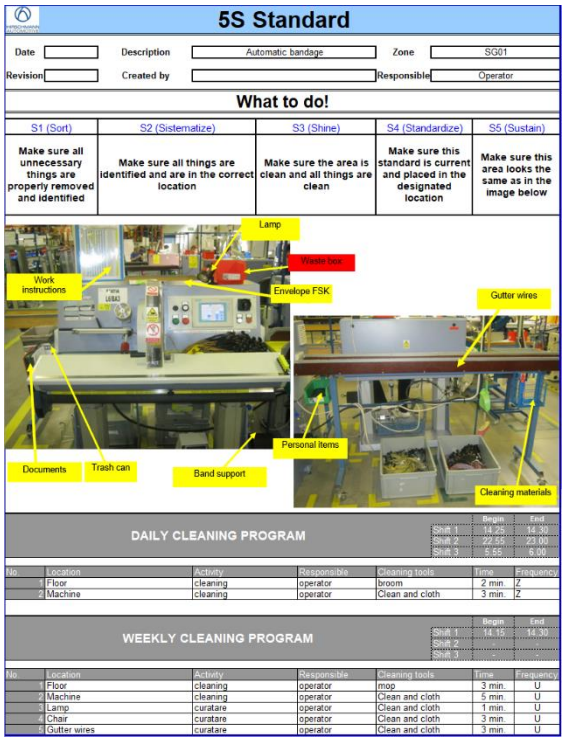
Source: Hirschmann Automotive Romania

The remaining things are put in order, then the space is cleaned to shine. Cleaning is done together with the whole team, so during this time the following necessary things are identified to achieve the standard of cleanliness and 5S:

- Sources of mess;
- Hard to reach areas;
- Required cleaning time;
- Materials needed for cleaning.

To standardize the achieved results, a standard form is used within Hirschmann company, which shows and describes all the objects present at the workplace, but also details the daily and weekly cleaning program in tabular form (see figure 4).

Figure 3. 5S Standard



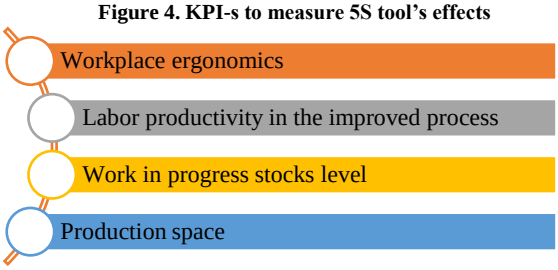
Source: Hirschmann Automotive Romania

3.2. Benefits of 5S tool use

The main effects of continuously using 5S tool are well-known: increased power of concentration, increased labor productivity, improved quality of products and services, clean and productive work environment, improved maintenance and safety, cost reduction, increasing of effectiveness and efficiency in the processes, discipline and better engagement at workplace, improved sense of responsibility and teamwork, better equipment reliability, as well as reduced waste: less space for storage and wasted labor

time, reduced production and set-up times etc[8,9]. But then how do we quantify the benefits in economic terms? It is important to know that the achieved results can be measured also as performance indicators. Four main KPI-s (Key Performance Indicators) will be used to measure the impact 5S implementation had in Automatic Bandage process.

Figure 4. KPI-s to measure 5S tool's effects



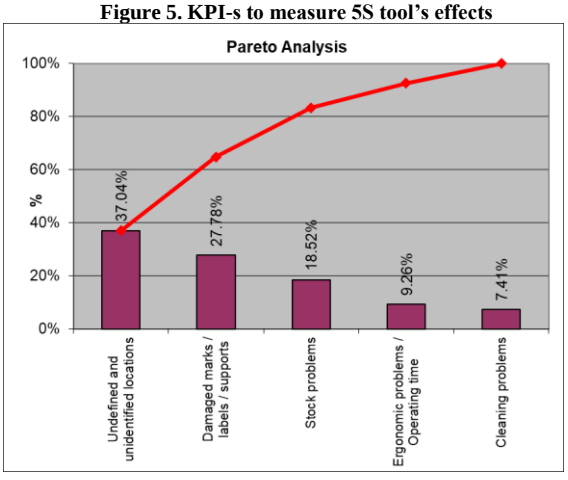
A. Workplace ergonomics KPI

Ergonomics is especially important at the workplace not only for comfort, but also for increasing productivity, minimise risk of injury or accidents.

When measuring the ergonomy KPI, Hirschmann Automotive Romania uses a Motion Economy Chart. The main objective is to ensure to the operators a workspace where the tools are at 2-second distance, can be easily reached at a stretch of hand. Time is measured at a workplace and specific analysis are performed to optimize it.

For example, in Pre-assembly area, at the Automatic Bandaging process a Motion Economy Chart was developed and a 5S site was implemented. 73 issues were identified at the workplace, all of them were classified based on the type of issue. Analysing the occurrences of identified issues, a Pareto analysis was performed (figure 5).

Figure 5. KPI-s to measure 5S tool's effects

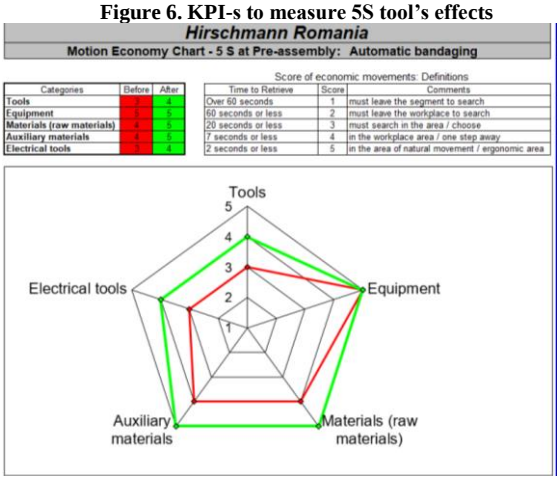


Source: Hirschmann Automotive Romania

The analysis helped to establish 76 actions, 97% of which were implemented at the Automatic Bandaging workplace. Time was measured again and results were introduced in the Motion Economy Chart (please see figure 6).

Improved results in terms of workplace ergonomics can be seen, comparing the green area of the Motion Economy Chart with the red area.

Figure 6. KPI-s to measure 5S tool's effects



Source: Hirschmann Automotive Romania

B. Labor productivity in the improved process KPI

The workplace was optimized as a result of the 5S tool implementation and the analysis performed. By standardizing the objects places (raw materials, tools, etc.) used in the assembly process, it was possible to reduce the Cycle Time from 13 seconds to 10 seconds, i.e. an increase of 23% of productivity. This gain of 3 seconds, transformed into hours, multiplied by the number of products/year and by the cost rate/hour result a gain of 1.856 euro/year. Please consider that this gain is yearly, so the sooner the improvement is introduced, the bigger the cummulated save is.

C. Work in progress stocks level KPI

For the interphase stocks, a minimum and maximum value was introduced. This helped reaching a better control of the material flow and the reduction from 5 boxes to 2 boxes of the stock, i.e. by 60%, meaning 53 euros per year. Several similar actions were introduced in the factory (see examples in the figure 7), which helped to decrease work in progress stocks level.

D. Production space KPI

Due to the optimization of the workstation and the reduction of the interphase stock, it was possible to reduce the space used from 15.6 sqm to 12.3 sqm, i.e. a reduction of 21%, meaning 165 euros per year. Even

[8] Cristina Veres, Liviu Marian, Sorina Moica, and Karam Al-Akel, "Case study concerning 5S method impact in an automotive company," Procedia Manufacturing 22 (Elsevier 2018): 900–905, https://doi.org/10.1016/j.promfg.2018.03.127.

[9] Vipulkumar Patel, Hemant Thakkar, "Review on Implementation of 5S in Various Organization," International Journal of Engineering Research and Applications 4 no.3 vrs. 1 (IJERA 2014): 774-779, https://core.ac.uk/download/pdf/26989504.pdf.

though the amount is not big, several improvements in different areas of the factory increment the saved space.

*Small improvements * Many repeats = Major Impact*

Figure 7. Before and after examples

4. Transposing automotive experience into medical environment

The described 5S approach can be transposed into other fields, such as healthcare, government, IT, retail and others to improve productivity and quality of products and services.

Adapting 5S method in healthcare, for example, should consider the specific medical environment and conditions. As in any other field, health system has several wastes, too.

The 8 Muda in the medical field are different from the 8 Muda in automotive. See table 1 for some specific examples of wastes.

Table 1. Examples of 8 Muda in healthcare

Types of MUDA	Examples in healthcare
Defects	misdiagnosis, incorrect administration of treatment, labels on the wrong tube, mixed analysis
Waiting time	patients waiting for consultation / hospitalization or discharge/ test results / doctor`s stamp; waiting for beds, equipment, information, operating rooms; Blockage of the computer system; time spent searching for a missing scalpel in the surgical kit; any interruptions or blockages
Inventory	inventory for 50 weeks; medications that may expire; too many consumables; pre-printed forms; any medicine, solution, furniture, object in too large quantities
Over-production	discharging all patients at 12 a.m., processing of all blood tests at 10:00 in the laboratory, ordering medications that the patient doesn`t need
Transport	Unnecessary movement of patients, samples, equipment or materials; remote locations
Extra-processing	Extra work, which the patient does not need; requesting and performing unnecessary diagnostic procedures; excessive bureaucracy; forms with information never used; surgery instead of an equally effective medical alternative
Motion	Travel 20 meters to the printer or to take analysis results; accompanying a patient for a NMR; long distance between locations
Unused potential	Loss of ideas, skills, improvements and learning opportunities through lack of involvement, listening and support of employees; putting pressure on people to hide problems

Implementing 5S means following the same 5 steps as in automotive field (follow section 3.1). In hospitals or clinics, Gemba means the place where medical care is offered. The teams are formed of the doctors, nurses, managers and other employees who are involved in creating value for the customers. Patients are the customers in healthcare.

There are several top hospitals and clinics in the world which monitors KPI's.

Applying the described in this paper KPI-s, we should not subestimate the importance of ergonomy in a surgery unit, emergency unit, histopathology laboratory, neonatology, cardiology unit, radioactive laboratory in nuclear medicine, and so on. Seconds matter as we are no longer operating with technical equipment or raw materials, but with human lives. We have seen how the ergonomy of a space can be measured and improved.

Labor productivity is very useful in crowded environment, which cumulate large waiting lists and queues, as well as in the emergency unit, where each minute matters more than elsewhere.

In the actual pandemic situation saving and optimizing space can allow a bigger number of patients to be treated at the same time, a bigger number of drugs to be stored and a more efficient use of equipment to be achieved.

Work in progress stocks level can be also decreased in the medical environment, using the same

approach of streamlining spaces by finding solution to store the same equipment in less space. A medical unit can establish a specific number of drugs to be stored in a particular space, to avoid disorder and time waste.

Figure 8. Before and after examples

Source: www.youtube.com[10]

A simple labelling of boxes helps saving time to search drugs or equipment, making the workplace more "visual".

5. Conclusions

The presented case study highlighted the externalities of using LM, especially the 5S method and the potential to expand the application in other fields of activity. 5S Tool is an appropriate choice to start introducing excellency in health care as the basis for redefining the measurement of quality in health services. In the actual pandemic crisis, when hospitals are facing a very large number of patients, 5S brings simplicity, focus, reduces stress and increases significant KPI-s: Workplace ergonomics, Labor productivity in the improved process, Work in progress and Adding-value space.

Why is it necessary to apply the 5S method in the health system? There are several reasons:

1. Nowadays the medical system is facing an excessive waste. Staff travel significant distances daily, patients wait tens of minutes or even hours in line to be consulted, we face an excessive bureaucracy that forces us to fill in dozens of forms, and so on.

2. Patient satisfaction is strongly influenced by the services provided by medical staff. In addition to patient satisfaction, it is important to increase employee satisfaction. Thus, we must first make sure that we offer our employees optimal working conditions, simplifying and making their work easier.

3. The quality of the health system needs to improve. Only excellence in the medical field is the way to achieve top results.

4. The medical field is constantly evolving and as a result, the staff, the professionals must be continuously adapted to the changes that take place, to improve.

5. The efficiency of routine activities leads to significant improvements, which are imperative in conditions of increasing demand for health care services.

6. Efficient medical management systems are successfully applied and show remarkable results in the top hospitals, being important models and examples of best practice for clinics, hospitals, pharmacies, medical offices, medical departments, etc.

6. Acknowledgement

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ASPECTS REGARDING THE USE OF MARKETING FOR REDUCING CONSUMPTION

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Abstract

Environmental degradation is a reality that we face more and more often. It's been a while since recycling was proposed as a behavioral solution. Recently, however, the limits of recycling as a solution to environmental problems have begun to emerge. On the other hand, efforts to make products in a sustainable way and to stimulate the consumption of organic products is also not a solution given that we continue to exhibit irresponsible consumption behavior. In addition, despite countless initiatives by various companies and other stakeholders to reduce social and environmental impact, the planet's resources are becoming increasingly poor and the land and water are becoming increasingly polluted due to our unsustainable behavior. Humanity has reached the limits of the planet's sustaining capacity and the waste generated by production is more than the ecosystem can bear. In these circumstances, a new behavioral solution imposes itself, particularly one aimed at encouraging the reduction of resource consumption. It is imperative that consumers take into account the common good, including that of future generations, when exercising their buying and consuming behavior.

Although marketing has played for so long a crucial role in stimulating consumption, in the current context characterized by continuous environmental degradation, marketing is playing an increasingly important role in encouraging sustainable behavior aimed, in particular, at reducing consumption. In this context, the following paper reveals some important aspects regarding the necessity of consumption reduction and the ways in which marketing can add its contribution in this direction.

Keywords: *social marketing, responsible consumer behavior, consumption reduction, sustainable marketing, anti-consumption.*

1. Introduction

Environmental degradation is a reality that we face more and more often. It's been quite a while since recycling was proposed as a behavioral solution, which is not a too technologically sophisticated solution for the waste problem of a nation. Unfortunately, Romania is still flunking in this regard[1]. We are still striving to achieve the targets set by the European Union for recycling without much success. We are still at an early stage when it comes to the existence of a recycling-oriented consumer behavior or the consumption of recycled materials.

Recently, however, the limits of recycling as a solution to the environmental problem have begun to appear. The level of recyclable materials saved from landfills remains constant given that there are still materials that cannot be recycled. The recycling process itself also involves consumption of resources (transport of recyclable materials involves the consumption of fossil fuels, etc.). Also, another reason why we can no longer consider recycling as the best solution to the waste problem is market saturation; with the encouragement of recycling, new buyers of materials should be sought in order to process them. On the other hand, efforts to make products in a sustainable way and to stimulate the consumption of organic products is also not a solution given that we continue to exhibit irresponsible consumption behavior. In addition, despite countless initiatives by various companies and other stakeholders to reduce social and environmental impact, the planet's resources are becoming increasingly poor and the land and water are becoming increasingly polluted due to our unsustainable behavior. Humanity has reached the limits of the planet's sustaining capacity and the waste generated by production is more than the ecosystem can bear.

In these circumstances, a solution regarding the change of people's behavior imposes itself, in particular a solution aimed at encouraging the reduction of resource consumption. Few people are aware that the famous slogan „Reduce. Reuse. Recycle" that promotes environmentally sustainable behavior presents a series of actions in the order of their importance and impact[2]. It is quite clear that consumers need to be increasingly encouraged to consider the consequences of their consumption decisions, as the consumer imposes by his purchase or non-purchase decision. It is also clear that consumer choices have different consequences for the environment. The consequences are different if the consumer chooses to travel by car, compared to those

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arising from the situation in which he chooses to ride a bicycle. Thus, it is imperative that consumers take into account the common good, including that of future generations, when exercising their buying and consuming behavior.

R.K. Pachauri, the president of the Intergovernmental Panel on Climate Change (IPCC) at that time, stated in 2014 that although there are many solutions to limit climate change, the first sine qua non element is the will to change ourselves[3]. The common theme of all reports and studies on the environment that is increasingly brought forward is that if human activities are not drastically changed immediately, there is a high probability that life on Earth, including humans, will disappear during the 21st century[4].

It is often stated that marketing activities are, to some extent, responsible for the current environmental degradation, a situation generated by consumption and over-consumption stimulated by these activities given that the success of marketing strategies is measured by indicators such as sales volume, market share, profits, etc. Focusing the attention of specialists only on these types of objectives in the process of formulating marketing strategies has a negative impact on society in terms of sustainability[5].

On the other hand, as marketing also contributes to influencing consumer behavior[6], its activities can be aimed at raising awareness of the consumption impact on the environment and achieving significant progress towards sustainability by promoting concepts such as responsible consumption, consumption reduction, anti-consumption, voluntary minimalism and a sustainable lifestyle. The problem in achieving this goal is to determine how to promote these concepts so that they are assimilated by consumers.

2. Why is it necessary to reduce consumption

Currently, the main sources of concern regarding the environment are:

- **Carbon dioxide emissions** which have already caused significant climate change seeing as these emissions have increased significantly in recent years. According to the International Energy Agency (IEA), carbon dioxide emissions from burning fossil fuels has stabilized at 33 gigatons in 2019, following two years of increases[7]. In 2020, carbon dioxide emissions fell by 7%[8], an unprecedented decline due to quarantine and restrictions to prevent the spread of the coronavirus. These consequences support the idea of the positive effects of reducing consumption.
- **The ecological footprint** is a standardized unit of measurement, which refers to the exploitable land and the sea area needed to produce the resources that human society consumes at a given time but also to absorb the resulting waste, using the available technology. The current ecological footprint both globally and individually, at the level of most countries, is unsustainable, a situation that is deteriorating with each passing day. By 2030, the demand for drinking water could exceed the supply by 40% and the forested areas will be reduced by 13%[9].
- **Consumption growth in emerging economies** (such as China and India) characterized by a rapid population growth rate. The world's population is estimated to reach 9.6 billion by 2050[10] (from 7 billion today), a situation in which the natural resources of three Earth like planets will be needed to support our current lifestyle. Achieving and maintaining sustainability will become an increasingly difficult task, given that demand for food and energy will increase by 40-50% and that for fresh water by 30-40%[11].

On the other hand, the analysis of the environmental impact of the products consumed within households is constantly performed by the European Union. Following these studies, it is always concluded that food and beverage consumption[12], utilities and transport are the categories of products that have the greatest negative impact on the environment. With regard to food consumption, the consumption of meat and meat products as well as milk and dairy products have the greatest negative impact on the environment. We cannot say that significant improvements have been made in these areas in terms of sustainability in recent decades, with global consumption growth exceeding

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[7] *Global CO2 emissions in 2019*, 2020, International Energy Agency, https://www.iea.org/articles/global-co2-emissions-in-2019.

[8] *Global carbon emissions down by record 7% in 2020*, December 2020, Deutsche Welle, https://www.dw.com/en/global-carbon-emissions-down-by-record-7-in-2020/a-55900887.

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most of the improvements made in the field of environmental efficiency. Indeed, the consumption of organic food has increased, but to an even greater extent has increased the consumption of imported food or precooked products, which are consuming a lot of energy and additional raw materials (for example, for packaging). In the field of car production, sales growth of SUV vehicles exceeded the improvements obtained in fuel consumption efficiency offered by the new technologies implemented in the manufacture of engines. Households have become much more efficient in using energy for heating, but this improvement is outweighed by the increase in the level of energy used for countless home appliances. On the other hand, the number of households is increasing, and not necessarily pushed by population growth as much as the number of individual households. All this led to a 2.1% increase in energy consumption in 2017, compared to 2016[13]. In the first four months of 2020, however, global energy consumption fell by 3.8% as a result of the quarantine imposed in many countries[14]. Specialists' estimates of year-round energy consumption place this reduction at 5%. Such a reduction in energy consumption exceeds 6 times the record registered in 2009, due to the global economic crisis from that time. However, specialists fear that in the near future we will register an equally spectacular return to the growing trend of this consumption.

In this context, we can conclude that green marketing has failed in its desire to bring about changes or any significant progress towards sustainability.

3. Marketing for consumption reduction

Marketing was created in order to develop tangible products that meet the requirements and desires of customers in order to make a profit. The field has developed over time in various specializations such as service marketing to allow the realization of marketing in the field of intangibles, tourism marketing to promote visiting certain places or events, cultural marketing to promote culture or relational marketing that aims to build and to maintain long-term relationships with consumers. The common feature that permeates almost all the specializations that have emerged is that marketing aims to stimulate the growth of consumption or at least to change the consumer's purchasing decision in the direction of a particular product or service promoted. The exceptions are few and they refer to the so-called demarketing strategies that involve discouraging demand, such as, for example, placing a higher price during the tourist season to discourage the lower-income tourists, or anti-marketing strategies. One of the marketing specializations that has a significant potential aimed at reducing consumption is social marketing that uses the tools, techniques and concepts of commercial marketing to achieve social goals. Most social marketing initiatives focus on changing consumer behavior in order to increase the well-being of consumers and/or society.

The field of marketing has been flirting for some time with the concept of reducing consumption or even anti-consumption, since the early ’70s, with the advent of green marketing and social marketing. However, this marketing activity was focused on several areas (chemical industry, automotive industry, etc.) or on behaviors of interest (recycling, fuel saving, etc.). Unfortunately, promoting the reduction of consumption and non-purchase for certain products has involved, on the other hand, encouraging the consumption of organic products or encouraging the responsible way of disposing of products after consumption. These changes are indeed steps towards responsible behavior, but placing the emphasis on buying substitute products that are not so harmful to the environment is not a long-term solution and will not contribute substantially to the development of a sustainable economy, green marketing being rather used to create competitive advantages and a certain image in the market, as can be seen from the "progress" made towards sustainability. Thus, in the orientation of the green marketing so far, the concerns for stimulating the non-buying behavior of the consumers should be introduced. In order to achieve this goal, the marketing activity must focus on the positive economic aspects that reducing consumption could bring as well as on the level of well-being of the population in terms of happiness and quality of life.

The development of sustainable marketing strategies is not a simple process given that the contradiction between one of the basic principles of sustainability regarding the conservation of resources and low consumption, on the one hand, and one of the principles of marketing, on the other, regarding the increase of sales, which means the increase of production and consequently the increase of resource consumption, must be resolved.

The marketing aimed at reducing consumption should be based, similar to commercial marketing, on the ***research of the target segment, competition and environment*** and on a consumer approach through the ***marketing mix*** tailored to the characteristics of the field so we can talk about a social product and a social price.

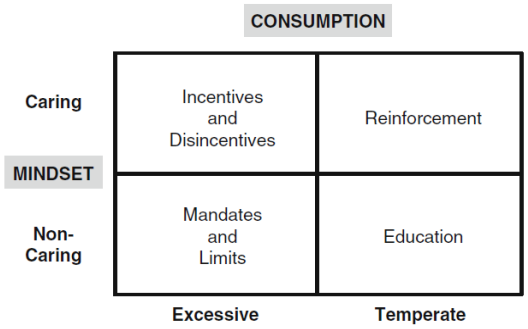
In the concerted effort to limit global material consumption by reducing individual consumption, those who enjoy a high and average level of consumption (compared to a calculated global average), regardless of the country in which they live, play a much more important role than below-average consumption, so efforts should be focused primarily on

[13] *Global Energy & CO_2 Status Report 2017*, March 2018, International Energy Agency, https://www.iea.org/publications/freepublications/publication/GECO2017.pdf.
[14] *Global Energy Review 2020*, April 2020, International Energy Agency, https://www.iea.org/reports/global-energy-review-2020.

this segment[15]. Also, industrialized economies, which represent only 23% of the world's population, consume over 77% of the planet's resources (including 72% of total energy) and generate about 80% of global pollution[16].

Also, a tool that can be used in this context is the one proposed by Sheth et al which is based on the planned social change model and a framework for addressing the discrepancy between attitude and behavior proposed by Sheth and Frazier. Through this tool, four consumer segments are delimited taking into account two criteria (see figure 1): 1. the tendency of the consumption behavior ("excessive" versus "temperate") and 2. the attitude towards consumption or the way of thinking ("caring" versus "non-caring") for each segment being proposed solutions for approaching them in order to reduce consumption.

Figure 1. Solutions for consumer approach taking into account the trend of consumer behavior and the attitude towards consumption



Sursa: Sheth, J.N., Sethia, N.K., Srinivas, S., 2011, *Mindful consumption: a costumer-centric approach to sutainability*, Journal of the Academy of Marketing Science, Vol. 39, Issue 1, pp 21-39, https://doi.org/10.1007/s11747-010-0216-3

Also, an important concept in this context is the one regarding the consumer willingness for change. The model proposed by James O. Prochaska in 1977 to explain how cigarette addicts managed to give them up, a model that was later improved in collaboration with Carlo C. DiClemente[17], can be taken into account in developing strategies aimed at reducing consumption. The mentioned theory holds that changing a behavior is a process that takes place in several stages: pre-contemplation - contemplation - preparation - action - maintenance. During pre-contemplation, individuals either do not want to change their behavior or are unaware of the consequences of their behavior for themselves or others. In the contemplation stage, individuals begin to consider the costs and benefits of changing their behavior. In the preparation stage, individuals are motivated to change so they begin to prepare mentally and practically. During the action stage, the individual is in the process of change, followed by the stage in which the individual maintains the behavior or relapses to a previous state. Considering the mentioned model, we can observe the complexity of the process of changing a behavior taking into account that it takes place in several stages and that the relapse can happen a number of times. In the context of the reducing consumption issue, the model proposed by Prochaska contributes to understanding the availability of the target segment to change and thus to developing marketing strategies appropriate to the needs and desires of consumers. For example, in the pre-contemplation stage, marketers may seek to increase awareness and interest in reducing consumption and may even try to change the system of values and beliefs. In the contemplation stage, the marketer must convince and motivate consumers to perceive an increase in the benefits of the behavior that is to be adopted and a reduction in costs associated with its change (time, physical and money). In the next stages of preparation and action, marketers need to focus on stimulating action and finally, in order to maintain behavior change, specialists should consider reducing cognitive dissonance by consolidation[18].

Another aspect that should be considered in this context was highlighted in a study by Black and Cherrier (2010)[19], namely that consumers' self-interest or concern for the environment is not a sufficient motivation to reduce consumption. Self-interest and the concern for the environment are interrelated and together represent a motivation that determines the reduction of consumption and even the practice of anti-consumption.

Social changes are more likely to occur when communication no longer focuses on the message and the experience of those behind it, but rather on the audience's point of view, including possible barriers it faces to achieve the promoted social changes, given that in the campaigns carried out so far the emphasis has been on guilt, which didn't have not had the expected success[20].

Also, using marketing to reduce consumption can target different segments, beyond the target audience, including groups of media representatives, authorities or related businesses. Reducing consumption must also

[15] Schaefer, A., Crane, A., 2005, *Addressing Sustainability and Consumption,* Journal of Macromarketing. Vol. 25, No 1, June, pp 76-92, https://journals.sagepub.com/doi/10.1177/0276146705274987.

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be transformed into acceptable behavior for policy makers too, given that such behavior contributes to reducing consumer spending with an impact on gross domestic product and, implicitly, on taxes and duties levied.

In addition, the target audience can be approached in different phases of awareness and reaction to a particular problem or behavior of interest.

According to marketers, the effectiveness in overcoming well-established consumption behaviors of marketing programs for reducing consumption lies in the extent to which consumption reduction will become a much more interesting behavior throughout society and when it will be considered a normal behavior[21].

On the other hand, the ***marketing mix*** aimed at reducing consumption has the following dominant features:

- *The product* to be promoted is represented by the idea of reducing consumption. In this context, the marketing activity will be directed towards promoting statements that emphasize the need to consume less ("happiness cannot be bought in the store", "new does not necessarily mean better", "do not be another fashion victim",“walking makes the foot beautiful and the environment healthy” etc.). The idea of reducing consumption has already been addressed in campaigns to raise awareness of food waste, to promote vegetarianism as a solution to protect the environment (environmental vegetarianism) and to reduce the consumption of plastic packaging.
- *The placement* is, in this context, accessibility in terms of access to alternative solutions that bring satisfaction to the consumer following the reduction of consumption (for example, access to bicycles and bicycle lanes when the reduction of the number of cars on the roads is desired), access to repair services or access to information or expertise. One of the solutions that has gained momentum at the moment is collaborative consumption such as car sharing (for example, Get Pony, Zipcar, toy lending library), redistribution of goods (such as the Freecycle program) or social credit (Zopa) proposing the overcoming of individual property and the sharing of possessions[22].
- In this case, *the price* mainly takes the form of time and effort costs (less financial costs taking into account that the reduction of consumption implies making savings) incurred to change the behavior. In this area, the decisions that can be taken by those interested in achieving a change in behavior towards reducing consumption, can take the form of discounts for access to infrastructure, service and information or reducing the risks associated with changing behavior (secure parking for bicycles, instructors, etc.). It should also be borne in mind that the price paid by consumers who choose to reduce consumption can also take the form of rather unpleasant social labels ("strange", "idealistic", "gullible", etc.).
- *The communication* will be similar to the one practiced in commercial marketing, having a bidirectional character and aiming at interaction and building long-term relationships with the audience. Promoting consumption reduction aims to encourage the acceptance, adoption and maintenance of this behavior.

Communicating to people that they can no longer drive so much, that they should no longer consume as they see fit, or that they should no longer fly by plane are certainly more than unpopular messages. Reducing consumption must be addressed beyond its rational aspects regarding the benefits and necessity of this behavior, investing the concept of sustainability with an emotional charge capable of leading to this change in behavior. We must not lose sight of the fact that the reduction of consumption will be achieved, first of all, due to our own interest (for example, interest in what we leave behind to our children, care for our health, etc.), and not simply because of concern for the environment. The emphasis should be placed on the countless benefits of reducing consumption for the consumer - financial freedom, less stress, personal integrity and a good life - attributes of the so-called "quality of life" indicator.

The perception over reducing consumption, that of a practice due to insufficient financial resources, can be changed through communication campaigns that give a status to the consumer concerned about the environment. An example of this is the successful campaign conducted in 2015 by REI, a retailer of outdoor products, in which customers were asked to "opt outside" on Black Friday[23]. As a result of this campaign, there are currently over 11 million Instagram posts with the hashtag #OptOutside and over 1.4 million people and 170 businesses committed to doing so on the REI website in 2017 (#OptOutside - Will you go out with us?).

One of the trends that could be promoted through the marketing activity aimed at reducing consumption is the phenomenon of "downshifting" or "voluntary simplicity"[24] with the meaning of giving up a well-paid job and a consumption-intensive lifestyle for a simpler lifestyle, less focused on material rewards but no less satisfactory. The trend clearly expresses a latent demand represented by consumers in search of a life with a lower stress level and a lifestyle less focused on

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consumption, elements that can be the basis of a campaign to promote the reduction of consumption.

4. Conclusions

Given that the available environmental resources are constantly decreasing and the probability of leading the current lifestyle decreases with each passing day, there is also a need to reduce the level of consumption for a significant number of people. Governments, educational institutions, non-governmental organizations and even companies play an important role in achieving this goal. But actual changes in purchasing behavior, defining part of a long process towards sustainable consumption, should take place primarily at the individual and household level.

Unfortunately, in contemporary society, individuals associate consumption with social welfare as an indicator of success and personal preferences. At the same time, the level of consumption has increased dramatically worldwide and, in particular, in developed countries, which reduces the chances of achieving a sustainable lifestyle. In these circumstances, all efforts must be focused on changing social paradigms and the economic system in order to minimize the impact on the environment and effectively reduce the level of consumption. The imperative and urgency of reducing the level of consumption are recognized only theoretically. Unfortunately, however, in reality the measures taken to achieve this goal are ineffective. The theory of punctuated equilibrium suggests that a radical change, in which the premises underlying previous behavior are called into question, usually occurs only if people perceive a significant crisis. Perhaps a more active promotion of the crisis we are in will contribute to changing current consumer behavior. Higher education teachers, pressure groups and the media, among others, can play a significant role in creating a sense of crisis[25].

Particular emphasis should be placed on developing new strategies to change current high consumerism habits and promote a less materialistic mentality. Even if we resort to solutions such as recycling or consuming organic products, consumers need to be aware of what the appropriate level of consumption is and how to reach that level. Creating a sustainable society involves, among other things, that each of us uses only as much as we need.

Promoting the reduction of consumption in consumer societies is a particularly difficult task, a move against the tide created by the predominant consumer-oriented social paradigm. The consumption of a particular product is much easier to represent in the media and advertising compared to the joys brought by the savings obtained by reducing consumption and a simplified lifestyle. In other words, it is much more difficult to turn reducing consumption into an attractive behavior in the eyes of consumers.

Also, the consumer segment is not the only one that should be targeted by the marketing aimed at reducing consumption. Important in this context is the transformation of consumption reduction into an acceptable behavior for policy makers. A step in this direction is to promote the level of population's happiness as a metric system for measuring the progress of a state in exchange for traditional indicators of economic growth.

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THE ROLE OF LEGAL INSTRUMENTS AND MARKETING EFFORTS IN ENSURING A HIGH DEGREE OF SATISFACTION FOR BENEFICIARIES OF MEDICAL SERVICES

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Abstract

The right to health is part of the second generation of rights, outlined after the Second World War, based on its features and socio-economic and cultural nature. Respect for human rights with regard to health care providers is a growing and ongoing concern aimed at increasing the satisfaction of the beneficiaries of the services provided by them. The protection of human rights in the field of health and the prevention of their violation can be done by establishing legal protection mechanisms and marketing actions available to the beneficiaries of health services, in the context of medical care. Legal instruments and marketing efforts for ensuring a high level of satisfaction for the patients is scientifically viable and can be implemented in the health market. The economy of medical services addresses three fundamental questions: what health care services are needed, in which manner must the medical units provide those services and to whom the services must be delivered. In terms of managerial implications, the conclusions support the importance of providing health care by deeply focusing on the patient. The activity of medical units, both public and private owned, can be continuously improved by adapting to the needs and desires of consumers.

Keywords: *fundamental rights, quality standards, patient satisfaction, marketing, adaptation to patient requirements.*

1. Introduction

Referring to the well-known categorization into three generations of human rights, rights presented by the Czech law professor Karel Vasak at the International Institute of Human Rights in Strasbourg in 1977, the right to health is found in the second generation of rights[1]. Outlined after the Second World War, based on their economic, social and cultural nature, it includes: the right to work in fair and favorable conditions, the right to social security and unemployment benefits, the right to housing, care and health care, at school, etc.

Human rights publications in general are numerous, but few study the observance of human rights by health care providers to protect their legitimate interests. The protection of human rights in the field of health[2] and the prevention of their violation can be done by establishing protection mechanisms and legal actions available to the beneficiaries of health services, in the context of medical care.

Participants in the medical act, both health care providers and patients, by knowing the rights and responsibilities, contribute directly to improving the health of the population and medical services, with direct implications on protecting the legitimate interests of patients.

The improvement of health care is truly achieved when the consumers drive it, becoming both better and cheaper[3]. Under the modern conception of providing quality medical services, the allocation of resources and all the efforts are inevitably focused on the patient's best interest, as the ultimate purpose of all the medical enterprises, both public and private. In that context, medical unit's management must routinely evaluate the level of patient's satisfaction because having satisfied consumers demonstrates that the achieved quality of services is higher[4]. The European Union, as some authors[5] point out, has adopted a leading position on the international stage regarding the subject of consumers' rights, health care included.

The convergent approach involving legal instruments and marketing efforts for ensuring a high level of satisfaction for the patients is scientifically

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[1] Corresponding to art. 22-28 of the Universal Declaration of Human Rights and art. 12 of the International Covenant of 16 December 1966 on economic, social and cultural rights.

[2] Human rights specialists draw attention to the shortcomings encountered in the field of the right to informed consent for medical treatment, violations of the right in the context of medical care, inequalities in the doctor-patient relationship exacerbated by differences in knowledge and experience and gender differences, ethnicity, social class, economic and social factors, or other vulnerabilities. To be seen Ludo Veny, *Patients Rights : the Right to Give Informed Consent to Medical Treatments from European and Belgian Perspectives*, In *Health Law*, Ed. Pro Universitaria, 2018, p. 348–367.

[3] Regina Herzlinger, *Why We Need Consumer-Driven Health Care* in Herzlinger edition, Consumer-Driven Health Care: *Implications for Providers, Payers, and Policymakers*, San Francisco, 2004.

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[5] Fabrizio Esposito, Anne-Lise Sibony, In Search of the Theory of Harm in EU Consumer Law: Lessons from the Consumer Fitness Check, in Springer, Consumer Law and Economics, 2020.

viable and can be implemented in the health market. Based on the findings of another authors[6], the introduction of elements from expert domains like law and marketing is able to determine changes within a practical domain like health care and subsequently its desired framework becomes progressively updated.

2. The rights of Romanian patients to high quality medical services

The protection of human rights with regard to patient care is guaranteed by a series of international treaties[7], to which Romania is a party, ratified, having binding legal force, to which is added the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 Contrary to the fact that the declaration does not have the character and legal force of a treaty, scholars of international law argue that it has attained the status of customary international law, and its provisions are accepted as obligations by all states, becoming universal standards[8] over time.

Respect for the rights deriving from the relevant international treaties rests with the UN bodies, which issue documents interpreting the content of the treaties for the guidance of states in order to implement their content.

Ensuring the rights of persons who have the quality of patient or benefit from medical services is a continuous concern of both the legislator and the public administration designated with the organization and concrete execution of public health. The economy of medical services addresses three fundamental questions: what health care services are needed, in which manner must the medical units provide those services and to whom must the services be delivered[9].

Individuals, either patients undergoing medical treatment or persons who are about to enter into legal relations with a medical entity, have the right to a series of concrete actions and measures by the state, which ensures a high degree of satisfaction of the beneficiaries of medical services in general, in conjunction with the fulfillment of obligations by providers of this type of public service. As demonstrated in 2008 by international specialists[10], there might occur specific situations when, despite the fact that a medical unit provides an excellent core medical performance, the patients report a low satisfaction because they evaluate the services mainly based on non-medical elements.

The European Charter of Patients' Rights, hereinafter referred to as the Charter, drawn up in 2002 by the European network of consumer and patient civil organizations - Active Citizenship[11], although not a legally binding legal instrument, is the most comprehensive statement of patients' rights. The cornerstone for the realization of the European Charter of Patients' Rights is art. 35 of the Charter of Fundamental Rights of the European Union, called health protection, according to which "*everyone has the right of access to preventive health care and the right to receive medical care under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities*[12]. "

The charter begins in the second part with the definition and explanation of the 14 rights of patients[13], first referring **to the patient's right to preventive measures** entitled, "*every individual has the right to adequate services to prevent the occurrence of diseases*." As referred on art. 1 of the Charter rests with the public and private network health services a number of obligations: firstly to raise the level of information of the public on preventive procedures that are carried out at regular intervals free of charge; secondly, the obligation to carry out those procedures with priority for those high-risk population groups; thirdly, it is the responsibility of the health services to ensure that everyone has access to the results of scientific research and technological innovations in the field of health.

With the inclusion in the constitution of most countries, the right to health has become a fundamental right, in our country **the right to health care** being guaranteed by art. 34 of the 2003 Romanian Constitution. From the corroboration of the provisions of art. 34 and art. 35 which stipulates with the title of fundamental right that citizens have the right to a

[6] Katy Mason, Luis Araujo, Implementing Marketization in Public Healthcare Systems: Performing Reform in the English National Health Service, British Journal of Management, 2020.

[7] International Covenant on Civil and Political Rights - ICCPR, 1966; International Covenant on Economic, Social and Cultural Rights - ICESCR, 1966; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - CAT, 1981; Convention on the Elimination of All Forms of Discrimination against Women CEDAW; CRC Convention on the Rights of the Child; International Convention on the Rights of Persons with Disabilities ICRPD; International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families ICMW.

[8] Louis Henkin, The Age of Rights, New York, Columbia Press, 1990, p. 19. Christina Cerna, Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts, Human rights quarterly, no. 16 (4), 1994, p. 745.

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[10] Imad Baalbaki, Zafar Ahmed, Valentin Pashtenko, Suzanne Makarem, Patient satisfaction with healthcare delivery systems in International Journal of Pharmaceutical and Healthcare Marketing, 2008, p. 48.

[11] www. activecitizenship.net/patiens-rights.html.

[12]https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:ro:PDF.

[13] The right to preventive measures, the right to access, the right to information, the right to consent, the right to free choice, the right to privacy and confidentiality, the right to respect patients' time, the right to respect the quality standards of medical services, the right to safety , the right to innovation, the right to avoid unnecessary suffering and pain, the right to personalized treatment, the right to file a complaint, the right to compensation, other patients' rights. Generically called other patients' rights and being derived from European legislation, they are divided into: the right to dignity, the right to non-discrimination.

healthy environment, outlines measures to prevent diseases.

National legislation[14], by Law no. 95/2006 on the reform in the field, republished, stipulates that among the main functions of public health, there are also preventive measures: "*epidemiological surveillance, disease prevention and control*" - at art. 5, lit. c; "*Prevention, surveillance and control of communicable and non-communicable diseases*" in art. 48, para. 1, lit. a; „*The provision of preventive medical services is an objective of the ambulatory medical assistance*" regulated by art. 134, etc.

Achieving a high degree of satisfaction of patients and beneficiaries of medical services can be done by informing the public of their fundamental rights under the law and their responsibilities in the legal relationship with the entities responsible for ensuring public health.

The provision of medical services at quality standards is a fundamental right, provided by the Charter but also by art. 2 of Law no. 46 of January 21, 2003 on patient rights. The quality level indicated by the legislator refers to the highest standard available to the company, taking into account the human, financial and material resources available.

Based on the **right of access to high quality standards of medical services**, insured patients have the right to travel to a third country to benefit from medical services covered by CNAS based on the tariffs provided by law. The expenses occasioned by the cross-border medical assistance are made based on the Government Decision no. 304 of 2014.

According to law no. 554/2004 on the Law on Administrative Litigation, the insured may address the court of administrative litigation in the following situations found in art. 913 of Law no. 95 of 2006 on health care reform:

- *The unjustified refusal of the health insurance companies regarding the reimbursement of the expenses occasioned by the cross-border medical assistance;*
- *The level of health care equivalent is not in line with the rates covered by the insured;*
- *Failure to approve the insured's claims regarding the reimbursement of the cross-border healthcare value.*

Individuals are recognized the right to access high quality medical services based on concrete standards and criteria established by public authorities. It is appreciated that the level of technical performance, comfort and interpersonal relationships must be at least satisfactory.

The notion of **quality standard** is not properly defined in Law 95/2006 on health care reform, although it often refers to the quality of medical services in general. Art. 5, lit. g), m) of the mentioned law are detailed that among the main functions of the public health care are targeted: *ensuring the quality of public health services; evaluating the quality, efficiency, effectiveness and access to medical services*. The ambiguity and inaccuracy of establishing a level of appreciation of the quality standards of medical services generate both practical problems and litigious or health situations for cases of malpractice[15], related to the liability of health units.

Malpractice occurs as a result of an individual act that takes place during the process of prevention, diagnosis and treatment or as a result of exceeding the limits of legal and professional competences. The reasons behind medical malpractice, malpractice, are recklessness, negligence, error and insufficient training and preparation, generating harm to the patient. The Code of Medical Deontology of the Romanian College of Physicians provides in art. 9 and art. 53-55 the obligation of the doctor to show maximum diligence "*in establishing the diagnosis, the appropriate treatment and avoiding the foreseeable complications in the patient in his care*." In regard, as demonstrated in a specific research[16], the medical services are certainly generating an essential contribution to the wellbeing of the population, but the risks of errors and complications cannot be completely eliminated. The modern diagnostics and therapies are complex and the treatments might involve delivery by specialists from different medical units, requiring a high degree of collaboration and a quick transfer of the relevant information.

In order to assess the quality of medical services, aspects related to the endowment of medical service providers with the necessary equipment and medicines, the existence of specialist doctors and legal qualifications or accreditations, etc. must be taken into account.

[14] With regard to the right to prevention, the National Legislation includes, together with Law 95/2006 on health care reform and other normative acts intended for certain sectors of activity or socio-professional categories, including: Law 319/2006 on safety and health at work aimed at preventing illness and accidents by introducing measures to eliminate risk factors at work; Law no. 138/2008 for a healthy diet in pre-university education units aiming at the prevention of diseases caused by unhealthy nutrition, with applicability in the communities of children and schoolchildren; Law 104/2011 on ambient air quality; Law no. 487/2002 on mental health and the protection of persons with mental disorders.

[15] Decision 337 / R of 29.09.2016 of the Court of Appeal of Târgu Mureș, Malpractice, Compensation under the conditions of art. 998-999 Civil Code, art. 653 of Law 95/2006. Compensation for non-pecuniary damage. Decision of the Oradea Court of Appeal no. 777 in 29.10.2019, Delinquent civil liability for bodily injury through fault - Medical malpractice. The damage suffered by the patient is often a permanent disability, with consequences for quality of life and a radical change in lifestyle, so the doctor is required to take all necessary steps to ensure a high degree of patient satisfaction.

[16] Luke Slawomirski, Ane Auraaen, Nicolaas Klazinga, *The economics of patient safety: Strengthening a value-based approach to reducing patient harm at national level*. Organisation for Economic Cooperation and Development, Paris, 2017.

3. Patients' requirements for satisfactory medical services

As part of the marketing efforts to provide scientific support for the higher adaptation of health care providers in Romania to the demands and expectations of the patients, a direct study was employed, based on the quantitative approach. The survey sought to provide relevant data about the mechanisms of satisfaction formation among the patients, as well as the factors that influence it and the practical implications. The study was conducted on a number of 385 patients above the age of 18 that had voluntarily used health care services at least once within a timeframe of 12 months, provided by medical units located in Bucharest and the surrounding district of Ilfov, with a sampling error within the margin of ±5%. In terms of sample structure, the gender and age distribution of frequencies were similar to those officially provided by the National Statistics Institute regarding the general population and therefore the collected data did not require additional measures of ponderation for representativity. The collection of data took place in the field using three waves of distribution of self-administered questionnaires to patients and that instrument was built on the funnel-approach paradigm in terms of required effort from the participants, while the sampling technique's nature was proportional.

In line with the fulfilment of the objectives of the present paper, the following results represent a proportion of the content of the mentioned survey, whose scope was broader in terms of marketing implications regarding the creation and the consumption of health care services. In that regard, two relevant objectives of the quantitative research were determining the ranks of some relevant aspects that are having an impact on satisfaction, as conferred by the patients, and also the ranks of the central reasons for trusting that a medical unit can best serve patients' best interest.

The survey results are indicating that the leading factors for satisfaction in terms of importance granted by the patients are the attention that they are receiving from the medical unit (its score averaging at 8.35 out of a maximum of 10), closely followed by the performance of the medical staff (with a score of 8.30). Also, a high position in terms of importance was conferred to the respectfully behaviour of the health care provider (placed at 8.14). The middle group in term of importance could be built from the patients' request to be informed about the benefits as well as the risks of every possible option regarding the treatment (averaging at 7.67 on the scale from 1 to 10), the logistics base (with a level of 7.54) and the waiting time (its score being 7.26). The group of factors with lower relative importance was comprised of the amiability of the staff (placed at the level 6.78), the thorough information regarding the medical procedures (scoring 6.43 points) and finally the price and the auxiliary staff's performance (with average scores of 6.21 and 6.04 respectively). It is also relevant that all the ten proposed criteria for satisfaction received absolute ratings of importance above 6 on a scale from 1 to 10, indicating that the choice of items for researching was relevant for the participants regarding the evaluation of satisfaction for the medical services.

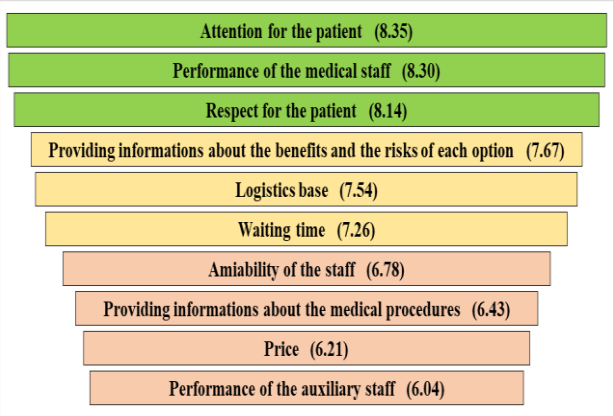

Figure 1: Patients' ratings on the importance of some relevant items for satisfaction

Source: Author statistical survey

Regarding the topic of patients' trust about the best defending of their interest, the most appreciated approach from the health care services providers is to provide the medical practice at the highest level of quality, regardless of costs, with 36.4% of the respondents indicating it as the most important reason for trusting a medical unit. The second option in terms of preference was the one focusing on making the health care as accessible as possible, while fulfilling the promises stated in the offer, with 33.2% of the participants favouring it. A possible middle way, in terms of expecting the medical units to provide a decent quality of service while adapting to the needs, with translates in neither top performance nor highest accessibility but on the overall average, was placed on the third position, gathering 30.4% of the patient's options.

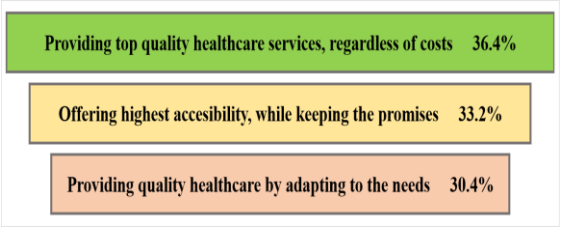

Figure 2: The main reason for patient's trust in a medical unit

Source: Author statistical survey

The patients, as revealed by the study, have manifested a tendency for considering their interest best served by the health care providers that build their management orientation either on providing the top quality of services, or on providing the highest accessibility, while the middle option seemed to have been less favoured.

4. Conclusions

This research paper's aim was to explore the convergence of the roles of legal instruments and marketing efforts to support the achievement of higher patients' satisfaction.

In order to assess the quality of medical services, aspects related to the endowment of medical service providers with the necessary equipment and medicines, the existence of specialist doctors and legal qualifications or accreditations, which are the responsibility of the competent public institutions, must be taken into account.

The most important attributes for the patients regarding the quality of medical services were the attention that they are receiving from the medical unit, the performance of the medical staff and the respectfully behaviour of the health care provider. A high proportion of the study participants also indicated that in order to gain their trust, health care providers must provide at the highest level of quality for the medical practice, even if that would imply higher costs.

Individuals are recognized the right to access high quality medical services based on concrete standards and criteria established by public authorities. It is appreciated that the level of technical performance, comfort and interpersonal relationships must be at least satisfactory. Among the main functions of public health care are: *ensuring the quality of public health services; evaluating the quality, efficiency, effectiveness and access to medical services.*

In terms of managerial implications, the conclusions support the importance of providing health care by deeply focusing on the patient. The activity of medical units, both public and private owned, can be continuously improved by adapting to the needs and desires of consumers. In that regard, the legal instruments are effective and their implementation in convergence with the marketing efforts based on consumer research will also increase the efficiency of the allocation of resources, resulting in a higher and durable level of satisfaction for the patients and further supporting wellbeing of the society.

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ONLINE EDUCATION – IMPROVISATION OR INNOVATION

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Abstract

Online education has been widely available since the internet started to play an important part in everybody's life and its benefits for all stakeholders are unquestionable. Since the pandemic struck, online education has become the watchword for an audience wider than the one envisaged before, as, at all levels, be they primary, secondary or tertiary, teachers, students and parents have pinned all their hopes on it, expecting it to be the appropriate solution, so that educational standards could be kept at least at a minimum/ satisfactory level. But, were they ready to turn to this somewhat new teaching and learning paradigm? Did they have the necessary digital skills? Could they successfully adapt to a whole new approach? Considering that online teaching has been more or less exclusive in most parts in Romania for the last two semesters in primary and secondary education, our paper aims to tentatively answer these questions from the teachers' perspective, by pointing to both the positive and negative aspects entailed by this unforeseen situation which does not seem to end any time too soon. Even if our investigation is limited to a relatively small number of primary and secondary school educators from only one county of Romania, our conclusions might shed some light on the challenges that these specific actors have had to deal with so far, given the circumstances. Moreover, we might also be able to indicate whether the balance was tipped in favour of improvisation or innovation for those willing to participate in our survey.

Keywords: *online education, primary and secondary education in Romania, teachers, digital competences.*

1. Introduction

Approaching education by exclusively using digital devices and an internet connection has become the only way possible to ensure participation in the teaching learning process in Romania, starting with March 2020. The entire student population enrolled in primary, secondary or tertiary education in Romania, as well as the teaching and management staff, not to mention parents, had to quickly internalize the requirements of the new educational paradigm so that satisfactory results could be achieved. This sudden change has made considerable demands on all stakeholders, be they financial, technical or psychological, and the gap between those situated at the high and low ends of the educational continuum has unfortunately deepened.

Continuing to build up the key competences in students, especially those in primary and lower secondary education, was put to a hold or significantly slowed down when the lockdown measures came into force in Romania, in March 2020. No overnight miraculous solutions could be envisaged so that the educational objectives set for the 2019-2020 school year could still be attained. It was the more difficult as nobody could roughly estimate how long the pandemic was going to last/ when the pandemic might possibly come to an end.

Under these circumstances, this paper aims at investigating whether Romanian teachers were able to adapt or change their teaching abilities so that curricular objectives could be partially or totally met. In point of structure, the first part of our paper provides a diachronic perspective on the regulations put forward by the Romanian Ministry of Education regarding online education in the primary and secondary educational system, during March 2020 – January 2021. In part two, we give a brief outline of the recent reports on online education published by Romanian education specialists, giving special attention to the teachers' opinion. Part three covers the methodology employed in our study and in part four we discuss the findings of our small-scale research. The final part deals with the conclusions of our investigation.

2. Online Teaching Regulations in Romania: March 2020 – January 2021

Regular school activities were suspended starting with March 11, 2020, as a result of the Decree no. 195[1] of March 16, 2020 regarding the establishment of the state of emergency on the Romanian territory and the Decision of the National Committee for Special Emergency Situations no. 6[2] of March 9, 2020. Taken by surprise, Romanian education stakeholders expected that the unperformed activity (for 8 working days)

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[1] Published in the Official Gazette of Romania no. 212 of 16 March 2020 (Chapter VII - Other measures, Article 49: 'During the state of emergency, activities in all educational units and institutions are suspended.').

[2] Art. 1 specifies the suspension of courses in state and private pre-university education units for the period March 11-March 22, 2020, with the possibility of extending this period, depending on the evolution of the situation.

would be recovered in the near future, when activities were to be resumed, very similar to previous situations that had existed (caused by strikes, unfavorable weather conditions, etc.).

On March 9 and 10, the Romanian Ministry of Education (RME) made their first recommendations, underlying the fact that the guidelines provided were not meant to replace the activities that used to be performed in schools on a regular basis. The official document included the following:

- the necessity to create technology-assisted resources (RME Notice no. 79 / 10.03.2020, to the county school inspectorates);
- teachers were recommended to access the educational applications offered under free licence by Google and Microsoft, being indicated that they would get support from the Teaching Staff Resource Centers[3] and e-learning experts within the CRED project[4];
- teachers were suggested that they could keep in touch with their students through any means of communication;
- the schools' boards of directors were to decide how suspended educational activities could be recovered.
- This endeavour could be interpreted as an attempt to create a framework to regulate educators' activity in the short term. Moreover, the solution envisaged by the Romanian educational authorities, at that point, was the recovery of the classes.

On March 18, RME came back with more clarifications (RME Notice no. 8731 / 18.03.2020), requesting the county school inspectorates to analyze alternative solutions for continuing online education. Thus, the suspension of the regular teaching activities until further notice was anticipated and the RME evinced their concern to support students and teachers in the efficient use of tools and educational applications useful for distance learning, along with their planning of training teachers (made by experts of the CRED project, underway at the onset of the pandemic) between March 19-25.

On March 30, the RME addressed an open letter to teachers, mentioning that:

- the Ministry was aware that there were students and teachers who did not have the necessary technology to continue the teaching-learning process;
- the Ministry encouraged teaching and learning, creating educational context through any means of communication, using any available resources to motivate students to stay connected to education;
- the Ministry announced the identification of digital tools and resources, grouped on the DIGITAL educred.ro platform[5];
- activities (revisions) meant to reinforce already acquired competences are suggested (therefore no teaching and assessment activities are to be performed);
- the Ministry urged teachers to keep a balance in the volume of resources transmitted, so that individual activity and participation in online activities would not be a pressure for students;
- the Ministry stated that they were working on scenarios to compensate for the effects of the crisis.

The following months (until the end of the 2019-2020 school year) were also under the sign of improvisation from the point of view of the actual organization of the educational activities. In this period, the regulations put forth by the RME focused on the administrative part: the management of the student records, the organization of national exams.

As the beginning of the new 2020-2021 school year was approaching, clear specifications were necessary, so new RME orders were issued (RME Order no. 5447 / 31.08.2020 on the *Approval of the Framework Regulation for the Organization and Functioning of Pre-University Education Units*; RME Order no. 5545 / 10.09.2020, on the *Approval of the Framework Methodology regarding the Organisation of Teaching Activities through Technology and the Internet, and the Processing of Personal Data*). Thus, by means of these regulations, it was indicated that various educational activities could be carried out online, by electronic means of communication (videoconferencing), whenever objective circumstances (such as the pandemic) can be identified. The latter RME order produced badly needed clarifications for the first time since online education became the watchword:

- the list of terms associated with online teaching and their definitions (teaching activity through technology and the internet; virtual educational environment; digital educational platforms to be used for the teaching/learning process or necessary to create and share open educational resources, applications for communication through technology and the internet, digital resources; forms of communication through technology and the internet – synchronous, asynchronous, mixed);
- the applicable principles, as well as the aspects regarding security in the virtual educational environment and the management of personal data;
- the stages of implementation of the teaching-learning activities through technology and the internet, at the level of educational units;
- the specific roles of the stakeholders involved in organizing and carrying out teaching activities for learning through technology and the internet (ministry, school inspectorates, management of educational units, teachers, students, parents),
- the methodological aspects on organizing and carrying out teaching activities through technology and the internet in pre-university education units,

[3] Each county in Romania has such an institution.
[4] An Romanian educational project, co-financed by the European Social Fund.
[5] The same CRED project, aforementioned in this paper.

– how to carry out teaching activities in disadvantaged communities where teachers and students have limited access to technology.

Based on the methodology put forth by the RME, the schools developed their own procedures regarding the teaching activities performed through technology and the internet, as well as for the processing of personal data.

Approved just a few days before the start of the 2020-2021 school year, on September 14, the *Framework Methodology for Organizing Teaching Activities through Technology and the Internet, and the Processing of Personal Data* was a first step towards normality, considering the period we were going through: the normality of the online school/ education. It is hard to believe that schools had the necessary respite to carry out the necessary procedures, to make the necessary acquisitions, to instruct the teachers and students, etc. However, the gains this official document brought on were significant, because it created a framework in which online activity could grow. Starting with this moment, the schools proceeded to activate their licence for a free platform within the RME partnership with Google and Microsoft, to create personalized accounts (on the school domain) for all the teachers and for all the students, thus having the possibility to benefit from a free service for online activities.

This *Framework Methodology* also shed some light on the most difficult problem to solve: ensuring the necessary resources for students. Art 11 included, among the competences / obligations of the management of the educational units, the necessity to ask the local authorities to ensure the proper digital devices as well as the internet connection for the preschoolers / students who did not have the necessary means to carry out the activities through technology and the internet; the distribution of devices connected to the internet, to preschoolers / students who did not have these means (art. 11, paras d, f)), by concluding a loan agreement. The obligation of school units to provide resources for students was also included in subsequent regulations (RME Order No. 5972/2020 of 8.11.2020 and RME Order No. 3090 of 8.01.2021, both regarding the suspension of activities that involved the physical presence of preschoolers and students in the units of pre-university education): the county school inspectorates / the school inspectorate of Bucharest and the pre-university education units had the obligation to provide educational resources for students who did not have access to information technology and the internet.

We could not overlook that this obligation did not include teachers as well. Nothing was mentioned about teachers who did not have access to technology / internet. We do not know the exact situation at this point, but there are still students without the necessary technical means and most teachers use their personal resources. The issue of teachers' competences to carry out online activities appropriately also remains open; it is an issue that our investigation is trying to throw some light on.

3. Recent Online Education Reports in Romania: A Brief Overview

Shortly after students and teachers stopped their regular activities, Romanian education specialists grasped this wholly new research opportunity and started investigating it. Two reports were published, one in May 2020 and the other one in August 2020, both of them trying to evaluate the new teaching and learning paradigm, as knowledge of the situation could offer valuable insight to all stakeholders.

Even if they share a common goal, the differences between these research projects are obvious: the May report focuses exclusively on the teachers and their (in)ability to deal with the sudden change which occurred in March (the survey was made available between March, 25-31), whereas the August report considers the multiple stakeholders involved in the educational process for the rest of the second semester (the respondents could participate in this survey between May, 27 – June, 12). Moreover, the research teams are also different: behind the May report there is a team of academics from several Romanian universities (Bucharest, Iași, Cluj, Timișoara), accompanied by two researchers from the Romanian Institute for Education and one online education specialist; the August report was ordered by the RME and is the product of the Romanian Institute for Education. No other information is available to identify the actual researchers involved in this project – we could assume that one of the departments within this research institution initiated and coordinated the project, and, subsequently, drafted the report. In addition to that, the samplings differ as well: only 6436 teachers participated in the March survey vs. 6166 principals, 65309 teachers, 219073 students and 316492 parents, who took part in the other survey. So, in point of representativeness, obviously, the August report supersedes the one from May; due to the resources the Romanian Institute for Education has at its disposal, as the institution coordinating education related research at national level, the access to those participants willing to share their opinion on the topic of online education was easier to get.

As far as the teachers' digital skills are concerned, the May report concludes that most teachers have or should have these skills because the RME and its subordinate institutions have either promoted or set up various programmes that have helped them acquire the necessary skills. Nevertheless, the report also points to the fact that the Romanian educational system was not fully prepared to welcome such a change (despite having digital skills, the teaching staff might lack skills necessary for computer-assisted teaching) and, what is more important, the curriculum was not designed in such a way to allow exclusive online teaching. In addition to that, apart from the pedagogical barriers (no

curriculum planning skills for online education; no skills for developing digital learning resources; the difficulty to motivate students and keep them interested in an online educational environment), there were also technical obstacles (poor internet connection, difficult access to students' personal email addresses / no access to digital platforms, inappropriate digital devices, scarce digital resources) that teachers had to deal with. Therefore, according to the May report, in order to be successful in their new endeavour, teachers had to exhibit specific qualities: availability, interest, pedagogical skillfulness and inventivity.

The May report indirectly identifies the problems that students had (from their teachers' perspective). Thus, students had to overcome technical obstacles (no/ poor internet connection; improper digital devices; multiple platforms/ communication channels used by their teachers), become used to online learning (recalibrate their digital competence, attuning it for learning, not entertaining purposes), reach a higher level of autonomy in learning (at the end of March 2020 regular teaching activities were either missing or scarce, so teacher monitoring was no longer in place and there was no real possibility to cover the educational content in a structured manner) or rely on adult/parent support. Under these circumstances, the report makes an ominous prediction: the gap between good/average students and weak/poor students will be on the rise.

Considering that online education is unlikely to end soon, the May report suggests that 'the Romanian curriculum should be reorganized, as well as the manner in which computer assisted activities are delivered, monitored, promoted and rewarded' (p. 50). From this perspective, the report points to the importance of holding on to the long-term opportunity arisen in this context: internalizing the newly acquired digital tools, fully integrating them in the teaching-learning process, no matter the future educational settings (be they exclusively online, hybrid or face-to-face). Moreover, it is proposed that RME should develop a free access website for teachers, which is to include digital educational products and professional support. Also, it is recommended that the quality and relevance of continuous professional development programs should be centrally stimulated and monitored. Given the unknown variables of the new educational situation, teachers are not only expected to be/become self responsible, inventive and exhibit courage when identifying proper solutions, but they should also trust their pedagogical competences and rely on them in order to successfully cope with the obstacles.

Considering the moment it was launched, the institution coordinating the research project and the impressive number of participants, the August report offers a comprehensive perspective on the online education unfolding in Romania, between March-June 2020. In point of the teachers' digital competence, this report reinforces the findings of the report published in May, 2020: having digital competence is usually understood as being able to use a computer/ digital devices and NOT as being able to identify/ develop open educational resources or use educational platforms/ applications (p.15). Thus, during the period covered by this research, many Romanian teachers needed help to carry out their activities and sometimes an ITC specialist indicated by the school principal provided the necessary guidance or, quite often, their more digitalized colleagues gave the badly needed support. What is more important, the teachers participating in the survey mentioned that some students (especially those in primary school) could not autonomously cope with the requirements specific to online education.

The August Report also pointed to both the obstacles that teachers had to overcome as well as to the positive outcomes of the new educational situation. Thus, among the difficulties encountered by the teachers, the report includes: no/ poor access to equipment (in some cases, no personal digital device or internet connection existed); more time allotted for the organization of online teaching activities (as compared to their usual routine before the pandemic); insufficient experience related to using digital resources/ tools/ applications; professional discomfort in interacting with their students via online platforms. As for the positive aspects related to online education that teachers could identify, the August Report lists the following: advanced/ enhanced digital competence for teachers (first teachers became capable of identifying appropriate learning resources and then they started creating alternative resources that they could further use in the traditional classroom, as well); better skills at adapting the curriculum to the students' needs (in this case, online education); more parents offering support to their children; increased learning autonomy for students; more opportunities for teachers to exchange ideas, resources, experiences.

As for recommendations, the teachers who took part in the May-June survey mentioned that, unless traditional face-to-face education is possible (while fully complying with safety measures in force), then the hybrid scenario should be used (combining the traditional and the online systems of education) starting with the 2020-2021 school year. They also proposed that proper digital equipment as well as free internet connection should be made available for teachers and students, as well as schools; teachers should have free access to online educational platforms and resources (every school should decide on using a specific platform). In addition to that, teachers suggested that there should be more methodological guidelines as to the way in which the curricular content is to be covered (in the online scenario, the activities selected are expected to be more practical and interdisciplinary), as well as to the manner in which the assessment is to take place. As for further enhancing the digital competence, in the teachers' opinion, organizing continuous professional development might prove extremely

valuable, with a special focus on the particular features of online teaching and learning. Moreover, very much in line with the May Report, this report also suggested that students digital abilities need to become more education-oriented, and thus be an effective tool in maintaining/ boosting their knowledge level.

In a nutshell, these reports offered a multifaceted view on the way in which online education unfolded in Romanian primary and secondary schools, from the start of the lockdown measures imposed by the government until almost the end of the school year. The conclusions of these reports helped the RME to consider possible scenarios for the 2020-2021 school year, as well as to start catering for the needs of all the stakeholders, be they material, technical or methodological.

4. Methodology

The hypothesis of our research is that teachers have the necessary skills / are able to adapt to achieve the objectives of education, transposed into the new paradigm – online education. In addition to that, we assume that this new paradigm might help teachers overcome the initial stage of improvisation, providing them with the opportunity to head for a new stage, which could be referred to as didactic innovation.

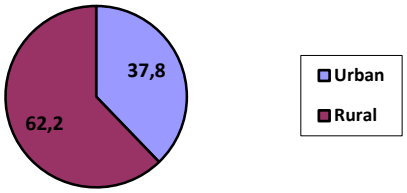
The objectives of our research are:

- to confirm / deny the results of the research reports carried out in Romania during the online school period;
- to identify and emphasize the strengths, but also the shortcomings of online education, from the perspective of teachers.

To conduct our research we used document analysis (research reports, legislation that regulated the period discussed here), as well as a questionnaire-based survey. The questionnaire (created with Google Forms) was distributed online, reaching teachers through social networks (Facebook, WhatsApp) and several (7) principals of schools and high schools in Prahova County, who sent it by e-mail to school teachers . The questionnaire includes 14 items, one of which refers to identification data and categorisation criteria for our participants: the environment in which the school operates, the level of education at which it operates, the discipline taught / teaching specialization, teaching experience / seniority in education. The others items of the questionaire deal with information about the continuous training opportunities related the acquisition of competences compatible with online education (1 item) and 12 multiple choice items that aim at the level of teachers' agreement with: the statements regarding methodological aspects of online teaching and learning (6 items); the existence of technological barriers that teachers and students might encounter in online education (6 items).

The participation was voluntary; the answers we received indicated a group of 166 participating teachers. The group may seem small, but it covers the preschool, primary, lower and upper secondary levels of education, in rural and urban areas, as well as a wide range of specializations, with representatives from all curricular areas. Our subjects work in kindergartens, primary and middle schools, theoretical and technological high schools and have varied teaching experience: from beginners to teachers with over 20 years of experience. We note the high percentage of respondents having over 20 years of work experience (55.3%), to which is added 31.1% with over 11-20 years of work experience in the educational field. As a whole, the vast majority of our group has at least a decade of teaching experience (enough time, for instance, to obtain teaching tenures). It remains to be seen whether the experience is a factor that facilitated teachers' swift attuning to the new approach of the educational process or, on the contrary, as a result of their constant exposure and limitation (in many cases) to classical teaching, it is a factor that blocked innovation.

Figure 1 – The school location of the survey participants



The variety in the group of subjects taking part in the survey gives weight to our conclusions. In addition to that, the area where the research was carried out brings extra validation for the results obtained, as Prahova is one of the counties with a higher standard of living than the Romanian average (which implies better endowment of schools, better preparation of teachers – through continuous training; there are several schools where online education could be carried out in decent conditions), so these respondents could express a well-informed opinion.

Figure 2 – The educational level in which the survey participants teach

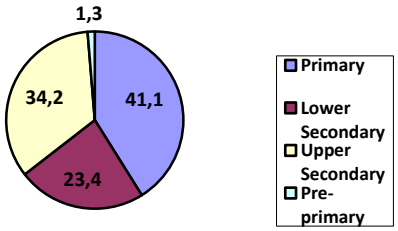
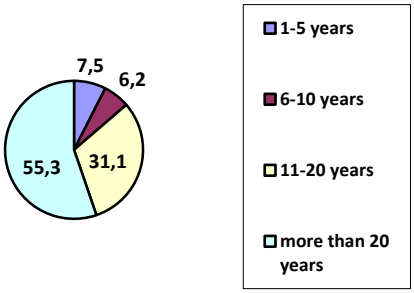


Figure 3 – The teaching experience of the survey participants

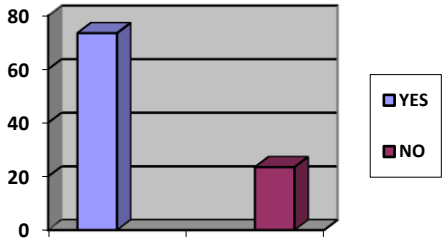


Besides these aspects, we are also aware of the limits of our research: the small group of subjects (the limit compensated by the great variety of their specialisations, as we aforementioned); the impossibility to check whether the subjects really belong to the targeted categories (teaching experience, specialization, level of education, etc.). Moreover, our research exclusively focuses on teachers, which could limit the overview of the problem (for a more comprehensive perspective we should have asked the opinion of the other educational actors – students, parents, managers at the central and local level of education). Nevertheless, we believe that teachers are the most valuable variable: they are the ones who deliver the curriculum (the same for everyone), and the way in which they do it is essential, because it is the way in which it comes to be reflected in their students' acquisitions / competences. Have the teachers in Romania been able to do this in a completely new way as compared to the one in which they had done it before? This is the question our paper seeks to tentatively answer.

5. Findings

Most of the teachers participating in the surveys from the previously analyzed research reports consider that they have the necessary digital skills; by digital skills it is meant the ability to use a computer or electronic device and not the ability to identify / develop open educational resources or use educational platforms / applications. 90% of those surveyed in March and May-June 2020 estimated that their ICT level was *good* and *excellent*, and 40% stated that they used ICT-based activities daily or almost daily. Both reports emphasized that it was difficult to interpret these results, as it was not clear what it meant to have digital skills in teachers' case, from their own perspective. For a possible clarification, the question in our questionnaire regarding this aspect is more specific: *Have you participated in a training course / training program (online or face to face) to acquire the necessary skills to use the necessary applications (such as Microsoft Educator; Google Educator) to carry out the teaching activity in the online environment?* The answers provided by our respondents indicate an important percentage of the teachers who have acquired, through such a course, the necessary competences (73.5%) (Figure 4).

Figure 4 – Teachers' participating in a training course to acquire digital skills

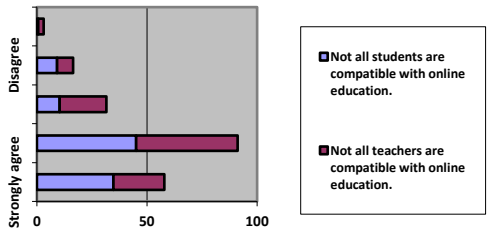


However, it is not easy to identify the teachers' own acceptance of the description of these competences, especially since, given the exceptional situation, most courses took place, mainly through the Teaching-Staff Resource Centres, after the onset of the pandemic, in an attempt to quickly ensure the much needed help, so that teachers could adapt their activities to the new situation. Our subjects seem to be aware of the shortcomings of such training (insufficient time allotted or failure to comply with the demands specific for the new educational context), as this is the inference that results from the answers they gave when asked about the existence of technological barriers (from their own point of view, as well as that of their students). Most teachers received training, but the skills acquired fail to overcome the barriers that (still) exist: 88.5% of subjects express their agreement and total agreement about the existence of technological barriers for students in online learning, and 77.6 % consider that such obstacles characterize their online teaching activity, too.

According to the reports analyzed in the third part of this paper, the obstacles faced by the teachers referred to: difficulties in having access to quality equipment and internet necessary to carry out online activities with their students; more time dedicated to preparing and organizing online activities; insufficient development of the digital skills needed to use various online tools and applications; professional discomfort in interacting with students in online contexts. From the same perspective, that of the teachers participating in the March and May-June surveys, their students had to deal with: technical difficulties; not having the habit of learning/studying by means of new technologies; insufficient level of digital skills; lacking appropriate digital devices; lacking a well-structured program; lacking constant control and monitoring of their activity; limited internet access; lacking support / lacking interest / prohibitions from adults. Even if students have had access to information in digital format, they are not used to learning using digital tools (usually they have used / are using digital devices for fun). The answers of our survey respondents confirm

the difficulties identified in the two reports: they even go further, as most consider that there are students, respectively teachers, incompatible with online education (Figure 5.)

Figure 5 – Students'/teachers' who are not compatible with online education



The opinion expressed by our survey participants raise important questions that cannot be neglected: *What happens to students who are incompatible with online education?*; *How will they catch up with the students who are compatible with online education?; What happens to the students of those teachers who are incompatible with online education?; How will these incompatible teachers make students form the competences targeted by the curriculum?; What results from the meeting between students incompatible with online education and teachers incompatible with online education?* The possible answers cannot be encouraging. It is also necessary to analyze where this incompatibility comes from. In the case of students, is it due to: the particularities of age / level of education? the socio-economic context? In the case of teachers, is it due to: insufficient / inappropriate training? a rigidity of the methods used so far? out of routine, lack of flexibility and adaptation? And, further, we should also investigate what needs to be done for these incompatibilities to diminish / disappear, because, based on the experience gained during the pandemic, we do not know when / if / for how long online education will be an option, maybe the only option. We believe that these questions require definite answers, which could only be obtained through further detailed research.

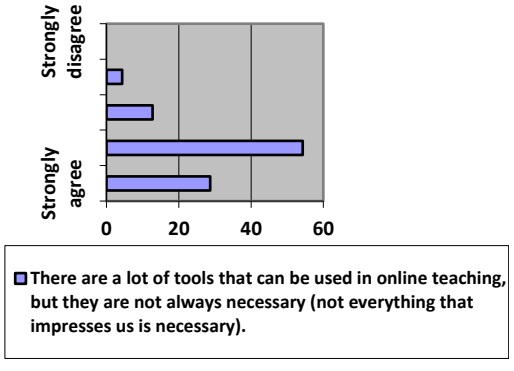
The questions in our survey that targeted the teaching methodology to be used in online education bring into discussion various problematic aspects. The first concerns the time needed to carry out an efficient online activity. Teachers consider that online teaching (such as preparing materials in electronic format, creating new specific activities, learning the characteristics of the application used / using the application, electronic correspondence, assessment) is much more time-consuming than classical teaching; the level of agreement is extremely high: 61.4% of our survey participants express their total agreement with this statement (*Teaching takes more time online*) and along with another 29.5% who express their agreement represent a total that exceeds 90%. It turns out that only a little over 9% of our survey participants did not need more time than before to carry out their teaching activities.

Regarding students and online learning, things are a little different, according to our respondents; their answers are differently distributed: 53.4%, that is a little over half of the group, expresses their total agreement (17.6%) or agreement (35.8%) with the statement *Doing homework and participating in online activities take students more time as compared to the previous situation*. 21.8% of the teachers articipating in the survey adopt a neutral position, and the others, 24.8%, do not consider that students need more time, expressing their disagreement or total disagreement with this statement.

Comparing the opinions about the time needed for teachers to prepare and conduct their teaching activities with the time needed by students to deal with online learning (in their teachers' view), it turns out that teachers' activity is more demanding in terms of the time required – almost unanimous opinion. Therefore, one could infer that our respondents believe that the burden for online teaching and learning lies with them, the teachers.

One of the difficulties that teachers have to deal with refers to the selection of the tools to be used in teaching process. *There are a lot of tools that can be used in online teaching, but they are not always necessary* (*not everything that impresses us is necessary*) is the statement against which the surveyed teachers were invited to express their agreement. The answers are, again, homogeneous. Only 4.35 of the teachers express their disagreement (the percentage of total disagreement is 0) and only 12.8% prefer the neutral option. The rest, 83%, consider that, given the wide variety of available digital tools, the selection of those that are really useful represents the big challenge (Figure 6).

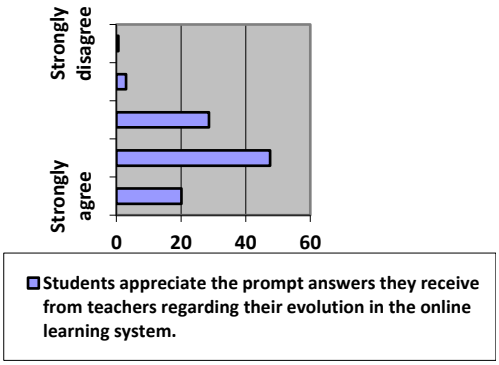
Figure 6 – Teachers'opinion on the usefulness of digital tools available



The difficulty to maintain students' interest is increasing in the case of online education, indicate the two reports sumarised in part three of this paper. This difficulty also emerges from the answers of the teachers participating in our survey, who specify that *students*

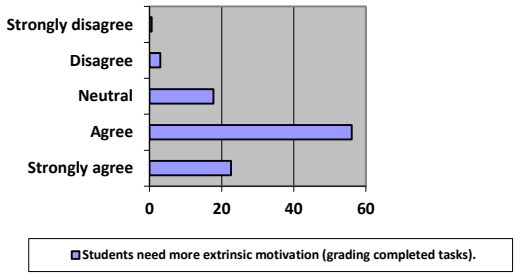
appreciate the prompt answers they receive from teachers regarding their evolution in the online learning system, and that, as compared to the educational paradigm used before the pandemic, students feel more the need for constant feedback (Figure 7) to guide them and help them continue. 67.75% of the respondents agree with this aspect, while only 3.6% do not consider that the constant appreciation of their students' activity is useful for maintaining their interest alive in the online teaching and learning process.

Figure 7 – Students' need for feedback



Developing and maintaining students' motivation for learning is an important and difficult task for teachers, whatever the conditions of the educational process, especially in the new context characterized by so many unknown variables. In proportion of 78.7% (agree and strongly agree), our respondents find that students need more extrinsic motivation (grading the tasks that students accomplish), which shows that online education is still in its infancy. Teachers are expected to identify those strategies that support and increase their students' motivation for learning, so that students could ultimately reach the next level, that of intrinsic motivation, which is an absolutely necessary step for them becoming autonomous in learning.

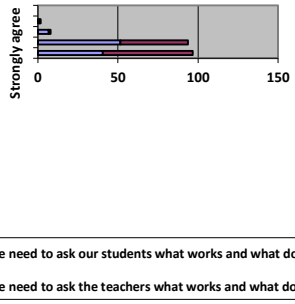
Figure 8 - Students' need for extrinsic motivation



In the same context, related to increasing students' motivation and autonomy for learning, the pace of the proposed activities is also important. In a broad consensus (38.4% strongly agree and 54.3% agree), the teachers participating in our investigation deem that setting clear deadlines for completing tasks / homework assigned to students are useful.

Even if online education has existed for several decades, there is still so much to find out about it, since the targeted audience encompasses the whole school population at this moment. Not only the conclusions of the recent reports mentioned in our paper suggest that investigations should continue, but also the teachers participating in our small scale survey. There is a need for in-depth research to identify what works and what does not in online education. To check this assumption we asked our respondents' opinion. 92% agreed and strongly agreed that *we need to ask our students what works and what doesn't in online education.* To an even greater extent (98.2% agree and strongly agree), the survey participants would highly value the opinion of their fellow teachers on what is to be kept and what is to be disposed of, when it comes to online education, given that personal experience has now become a reality.

Figure 9 – Students' and teachers' need for in/validating the strengths and weaknesses of online education



6. Conclusions

Before the pandemic started, in Romania, innovation in education meant digitalization. It was thought that using digital resources in the teaching-learning process, better, quicker, durable acquisitions could result. Now, as we were forced to undergo this process of digitalization almost overnight and online education has assigned us specific roles that we cannot reject (e.g. digital teacher, digital student, digital parent), because we would otherwise be left behind, we come to realize that digitalization brings along both strengths and weaknesses. As our findings show, even if the teachers may not have been prepared to respond to the challenges of the new educational paradigm, they somehow succeeded in overcoming some of the obstacles, by enhancing their digital competences and adapting their teaching approaches to suit the new circumstances, so that they could make the best of it for the sake of their students. How teachers concretely succeeded in overcoming these obstacles, the exact circumstances and variables which allowed teachers to adapt to the requirements of online education are to be closely investigated in further research, be they ours or other researchers interested in this topic, because there is no doubt that a lot of papers will attempt to dissect the multifaceted 'forced reform' that has characterized

worldwide educational systems during this ongoing pandemic, pinpointing to its positive or negative, long or short-term implications.

Not only the May and August reports, but also our small scale investigation indicated both the drawbacks and the benefits associated with the new educational paradigm that has become dominant since the pandemic started. On the one hand, online education may have a negative impact on young and very young students who lack self-discipline and autonomy in learning. In addition to that, group/pair work is not achievable during online classes on all major applications used and thus one of the good features of face to face education cannot be transferred into the new educational context. Moreover, students' passivity is more difficult to control or question, as they may not want to turn on their camera and mike to fully participate in the activities, or they may not have the proper digital device and/or good quality internet access to do this. Also, the danger of becoming totally dependent on technology for satisfying socializing needs from a very young age has never been more serious and the pressure to resist the temptations that internet-connected devices might entail requires a lot of will and determination that many students might not have. Thus, under these wholly new circumstances, teachers have found themselves in a difficult position, as they are supposed to choose from an almost limitless variety of resources to meet possibly ever-more demanding students.

Our small scale research not only has confirmed the shortcomings associated with online education (evinced by the reports we analysed), which started in March 2020 as an improvisation, as the only possible solution at that time, but it has also pointed to other weaknesses. Our findings have prompted us to ask further questions for which proper answers are urgently needed. We would like to tentatively suggest that these answers might provide the necessary hints to what should be discarded, and, more importantly, to what should be kept and permanently integrated in the teaching learning process from now on; we strongly believe that not being able to make the most of the positive experiences and good practices (that is what proved to be useful and could facilitate teaching and learning in the future) would mean that we have pointlessly gone through an unprecedentedly difficult period and that the efforts made by all stakeholders have been in vain.

Even if further thorough investigations are necessary, at this point, it is important to keep in mind that online education has undoubtedly brought along significant advantages that could definitely boost the quality of the teaching-learning process when schools resume their regular schedule, as teachers and students would be able to turn their digital educational experience to good account. Capitalizing on the strong points of online education (flexibility, possibility to cater for various learning needs, no time dedicated to commuting, direct access to activities organized by the teacher etc.) could represent a long-awaited step forward for the Romanian educational system, which has constantly received criticisms from all stakeholders.

We are very much aware of the limits of our paper and, consequently, our attempt should be viewed as the first step towards analyzing a major problem that education has suddenly and unexpectedly had to cope with. We deliberately confined ourselves to the Romanian experience, considering no other experiences from abroad, so that we could get to the bottom of the problem and subsequently find appropriate ways to approach and deal with it, as this might be a useful endeavour when the time comes to extract the benefits and eliminate the risks evinced by the 'forced reform' that we have been experiencing for a year now.

When it comes to any educational reform, resistance to change is usually one of the major difficulties one has to deal with, which may significantly reduce the chances for success. Given the special features of this 'forced reform', teachers may have exhibited some resistance to change at the beginning, but as online education has continued without any definite indication of its eventual ending, they have embraced the new educational paradigm, turning their teaching methods and strategies around so that curricular objectives could be met. Even though online education started under the bleak auspices of improvisation, the experience gained by teachers is considerable and may prove extremely valuable on the long term. Teachers have definitely acquired new competences and these could represent the onset of innovation, as, at this moment, all premises exist for the traditional approaches to education to harmoniously and inextricably interwine with digitally led ones. From this perspective, we might conclude that there are reasonable chances for Romanian education to somehow leave behind the gloomy past and open the door to a promising future.

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THE IMPACT OF THE 2007-2008 CRISIS ON THE EUROPEAN AND ROMANIAN LEGISLATIVE AND INSTITUTIONAL FRAMEWORK IN THE PROTECTION OF CONSUMERS OF FINANCIAL SERVICES

Monica CALU[*]

Abstract

Inadequate consumer protection, especially in the US mortgage market, has not only resulted in considerable consumer harm, but has contributed substantially to the onset of the global financial crisis. In the EU, the miss-selling of financial products has also led to major damages to consumers. Given the potential significant detriment that financial services can cause to individual consumers and to the single market, it has become clear that consumer protection policy needs to be properly regulated in this area. The global trend is to include the responsibilities of information, financial education, consumer protection and transparency among the duties of supervisory and regulatory authorities. In the EU, enhanced consumer protection has resulted in improved transparency of financial products for consumers and better information regarding retail financial transactions. Stricter regulation of the financial products and services market has resulted in better solutions for consumers and an increased efficiency of the retail financial products market. The improved European legislation was gradually transposed into Romanian internal law.

A number of legislative solutions, recommendations and actions to strengthen consumer protection in the area of financial services are put forward in this study with the aim to demonstrate that one of the aftermath of the financial crisis was an irreversible change of paradigm regarding the end users and consumers of financial services reflected in consumer protection legislation.

Keywords: *consumer protection, financial services, financial education, digitalisation, European regulation, Romanian Law.*

1. Introduction

The global financial crisis has highlighted the need for more effective and efficient measures to protect consumers of financial services in the context where they are facing increasingly sophisticated offers and matching risks. One of the lessons of the 2008 mortgage crisis was that it is essential to protect the rights of the consumer, while admitting that these rights also come with responsibilities on both sides of the financial market.

The field of financial services consumer protection, as we understand it today, is relatively new but is developing rapidly and this will probably be the trend for the following period. In this regard, new approaches to the regulation of business codes of conduct are constantly being developed and implemented, and the major challenge is to implement the best practices and to standardize these approaches, benefiting from the accumulated experiences as well as the results of scientific research on consumer behavior.

The global trend is to include the responsibilities of information, financial education, consumer protection and transparency among the duties of supervisory and regulatory authorities.[1]

At present, international policies and regulatory efforts are increasingly taking consumer protection into account, as companies tend to transfer a broad range of risks associated with the new saving and investment opportunities to customers and households. At the same time we are witnessing a constant increase in the complexity of financial products and the rapid development of the related technical tools. All of these overlap with adverse conditions for consumers, where access to basic financial services and financial literacy are unsatisfactory in many countries around the world.

Basically, technology has developed at a faster pace than consumer education and skills and suppliers are developing their products faster than the market can adapt to them safely.

Rapid evolutions of market conditions, the pace of innovation in the financial field, the emergence of alternative financial services and of poorly regulated or completely unregulated suppliers, generate risk factors for possible market abuses, miss selling of financial products and services, non-transparent and non-compliant activities, financial exclusion for those less digitalised, fraud, money laundering. In particular, lower income or less experienced consumers face additional difficulties in accessing or using financial services and products. There may also be cases where compliant financial products are promoted and sold by authorized agents, at the edge or with the breach of the law, to unsuitable categories of consumers, causing them significant losses due to information and transparency flaws.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0261&from=en, page4.

From the perspective of supervisory and regulatory authorities, at a strategic level, the duties regarding consumer protection and education of consumers of financial services imply the allocation of a sufficient level of authority and resources to the specialized personnel as well as the elaboration and implementation of clear working procedures integrated into a coherent legislative framework. The rationale of this strategy is the recognition that only an integrated approach can contribute to the stimulation of healthy consumer behaviors into the retail financial market, allowing long-term financial plans of individuals and helping to financial stability. At the same time, to ensure robust post-crisis recovery, the goal of not burdening the market with too much regulation has been weighed.

In light of these aspects, consumer protection measures for financial services have to be integrated with other inclusion and financial education policies, thus contributing to achieving a strengthened financial stability.

2. Consumer protection

Consumer protection is usually one of the main functions of any market regulatory and supervisory authority. By extrapolating, we could say that almost all the measures taken by the authorities are, in essence, taken with the ultimate purpose of protecting consumers. However, the term consumer protection is consecrated among authorities to describe the direct and domain-specific measures related to: complaints management, ensuring the transparency framework in the activity of suppliers, compensation of the injured, business ethics, supervision and control of abusive clauses and modalities of selling financial products to the retail market, issuing public communications such as alerts or recommendations, analyzing the impact of niche financial products.

The complaints analysis and the conclusions drawn from their settlement are the main factors generating regulation and control actions in the field of consumer protection. In this context, at European level, there is a tendency to harmonize policies and regulations in the field as well as measures to collect and analyze data on petitions.

Currently, consumers are at a disadvantage in the financial market equation, the balance being inclined in favor of the suppliers. The latter have better access to information, resources and skills to measure. Financial innovation is most often used to differentiate competition providers by competitive advantage, sometimes disregarding the limited degree of consumer understanding, or the potential harms that may arise from the misuse of financial instruments and services. Thus, the prospect of increasing profits can even lead to systemic risks, without strict regulation and supervision of the activity or without implementing clear and transparent ethical rules at the suppliers' level.

In order to understand the present role of consumer protection in ensuring financial stability, we must first analyze the moments in the recent history of the financial mechanism in which the protection measures were either non-existent or improperly applied.

In the context of a relaxed supervisory and regulatory framework in mature markets, this imbalance has led to the rapid spread of the high-risk (subprime) mortgage crisis in the US, which has since expanded to the level of the global financial mechanism and then to the entire economic system, culminating in the state debt crisis. According to the trigger mechanism of the crisis[2], banks have relaxed the security requirements when granting loans, customers without sufficient incomes or guarantees thus being able to qualify for a mortgage loan. With the new money thus thrown into the real estate market, buying pressure was created and the price of real estate increased artificially. The more expensive houses required higher loans, over time. When the price started to fall, the loan installments became too high compared to the daily value of the purchased properties. Clients stopped paying their mortgages and banks were left with properties that could not cover their debts. Initially, banks secured insurance coverage against the risk of non-payment through complex financial products. But the risk does not simply disappear from the system, it being taken over by other financial entities (usually speculators) and sometimes sold indirectly even to those who were insured in the first place, lured by the attractive yields offered and ignoring the risk for the second time. Thus, everything started from the chase after profit, from underestimation and ignorance from both buyers and sellers, who often failed to fully understand the mechanism of the financial products they were selling to ordinary customers. In this context, where the suppliers carry, perhaps, most of the blame, we cannot ignore the failure of the supervision, control and prevention policies implemented by the authorities, but also of the lack of understanding of the risks by consumers.

Nowadays, financial products and instruments are becoming more and more complex, especially in markets with a high degree of competitiveness. High competition, usually a factor for the benefit of consumers, generator of reasonable prices and high quality services, works to their detriment. Studies conducted on both mature systems and developing markets highlight that complex products have higher hidden costs and lower performance for ordinary consumers[3], especially when these tools are promoted to inappropriate groups of customers.[4]

[2] https://ei.com/economists-ink/special-issue-november-2008/financial-crisis-what-went-wrong-by-jonathan-a-neuberger/
[3] https://www.esma.europa.eu/sites/default/files/library/esma50-165-422_trv_-_vulnerabilities_-_investor_protection_corrected.pdf.
[4] https://www.thepriceofbadadvice.eu/static-map/.

The information available to the public in the financial field has evolved not only in complexity but also in quantity and the pace of change, regarding the launch of new services and products, as well as the pace of adaptation of financial services to new technologies, has increased dramatically.

From the considerations set out above, consumer protection has become a term usually associated with the regulatory and supervisory authorities, the only ones able to ensure the impartiality of the regulations and the actions taken to improve the financial mechanism.

For instance, into the Report From The European Commission To The European Parliament And Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS) COM(2014) 509 final, it is provided: „(ESAs) have been assigned regulatory, supervisory, financial stability and consumer protection roles." At part v. **Consumer protection,** is stated: *Consumer and investor protection is one of the statutory tasks assigned to the ESAs, which so-far is perceived as not being given sufficient priority in the work of the authorities*. [5]

3. Financial education

Some authorities regard financial education as part of the broader field of consumer protection, on the preventive side, others treat it separately and complementarily.

It is certain that the recent economic crisis has highlighted the need for adequate information, education and tools to make the right financial decisions in an increasingly complex financial system. The financial difficulties of consumers and of their families can affect the development of communities and of the market as a whole. The crisis has shown that the financial well-being of individuals is fundamental to the financial stability at national level and that the lack of financial education is one of the reasons that can lead to a decrease in the standard of living.

Financial education has become a complementary element to the policies of prudential regulation and supervision of business conduct in the financial field. In many countries of the world, it is considered a long-term priority policy aimed at improving individual financial behavior.

Thus, at the epilogue of the financial crisis, financial education has begun to be recognized as one of the major individual skills in most economies of the world. As in the case of the consumer protection field, the basic reasons for the increasing importance of this field include the tendency to transfer an increasing range of (financial) risks to the population, the tendency to increase the complexity of financial services, the pace of evolution of financial markets, the increasing number of active consumer-investors as well as the recognition of the limits of the regulatory instrument as the only consumer protection tool. The definition of *financial education* developed by the OECD in 2005 and endorsed by G20 leaders in 2012 is used in a majority of countries to refer to: *"the process by which financial consumers/investors improve their understanding of financial products, concepts and risks and, through information, instruction and/or objective advice, develop the skills and confidence to become more aware of financial risks and opportunities, to make informed choices, to know where to go for help, and to take other effective actions to improve their financial well-being."* (OECD, 2005a). In addition, OECD statuates:"financial education is a process that covers and takes into account the varying needs of individuals in different socio-economic contexts. Financial literacy that is the outcome of this process is defined as a combination of financial awareness, knowledge, skills, attitude and behaviours necessary to make sound financial decisions and ultimately achieve financial well-being (OECD/INFE, 2012)."[6]

Another point of view regarding the goals of the financial education is emphasized into the Communication from the Commission COM (2007) 808 final on Financial Education, from 18.12.2007. As a recognition of the economic and social benefits of providing financial education is mentioned that *"financial education should be seen as a complement to adequate consumer protection and to the responsible behaviour of financial services providers. It can in no way be seen as the only solution to remedy information asymmetries between consumers and providers."* [7]

While financial institutions are obviously familiar with the contractual terms and conditions of their own financial products, they may be non-transparent or difficult to decipher by the clients to whom they are addressed. Thus, financial education must aim at rebalancing information symmetry, on both sides of the balance, so that consumers can ultimately make informed decisions. To do this, in most cases, suppliers must be required by law to provide product information in a wording accessible to their customers.

Currently, it is recommended to implement programs only after the clear identification of the needs of the population, of the target groups and of the most efficient ways of transmitting the messages, following surveys and analyzes that can last, according to the World Bank estimates, up to 3 years[8]. In the meantime, pilot programs can be organized which can then be refined and calibrated on a large scale, following a clear plan, preferably set according to a national strategy in the field. The evaluation stage is deemed to be absolutely necessary, allowing policies and programs

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0261&from=en.
[6] https://www.oecd.org/finance/financial-education/G20_OECD_NSFinEd_Summary.pdf, page 11.
[7] file:///D:/My%20Documents/APC/CKS%202021/COM_2007_0808_FIN_EN_TXT.pdf, page 4.
[8] http://documents1.worldbank.org/curated/en/638011468766181874/pdf/296720PAPER0100steps.pdf page 40, page 57.

to be calibrated and adjusted in accordance with the field reality.

4. International context

The change of paradigm started in 2010, at G20 summit in Seoul, where participants called for stronger protection of consumer interests in financial markets. As a result, under the 2010 Dodd-Frank Act, the United States established the Federal Deposit Insurance Corporation, FDIC. After three years, in the United Kingdom was created a separate independent supervisory body to protect the interests of consumers of financial services - Financial Conduct Authority, FCA.

In EU, consumer protection and information also fall within the framework of Community legislation in the field of financial services. The Articles 114 and 169 of the Treaty on the Functioning of the European Union[9] are the legal basis for the protection of consumers in European Union, including consumers of financial services, from which is derive the Community's commitment to promoting consumers' right to information, education and to organise themselves in order to safeguard their interests.

The Cannes Summit, held in 2011 seeking measures to counteract the negative effects of the financial crisis has addressed, among others, the need for better regulation of the protection of consumers of financial services, central bank governors in the G20 states and finance ministers and have appealed to the OECD and the Financial Stability Board (FSB) together with any other relevant international organizations to develop a set of common principles of consumer protection in the field of financial services[10]. An international working group was established, focused on the effective implementation of the three priority objectives set out in the Action Plan, regarding transparency and provision of information for consumers, responsible behavior and business ethics for financial service providers and authorized intermediaries and procedures to manage and settle complaints.

At the time of drafting the strategy, the international working group involved in monitoring the implementation of the objectives was in the process of drafting effective methods and guidelines in this regard, meant to stimulate the implementation at national level. The approaches take into account the best practices identified so far in different states and the circumstances of each financial sector and the materials developed include experiences identified in many parts of the world following consultations with stakeholders: national regulatory and supervisory authorities, employers' associations, the academic environment, and consumer associations. Considering the high level of the works elaborated in this context, we can say with certainty that they represent the current concerns and the global trends in the matter of consumer protection. At the same time, taking into account the secondary intention of elaborating these principles, namely their implementation in a form as uniform and comparable as possible by the states, it is advisable to integrate them in any strategic document in the field, respecting the specificity of the local systems and markets.

Important to mention is the joint statement of the G20 leaders, at the Cannes summit, which shows the level of involvement and importance of this aspect, at international level: "We agree that integration of financial consumer protection policies into regulatory and supervisory frameworks contributes to strengthening financial stability, endorse the FSB report on consumer finance protection and the high level principles on financial consumer protection prepared by the OECD together with the FSB. We will pursue the full application of these principles in our jurisdictions and ask the FSB and OECD along with other relevant bodies, to report on progress on their implementation to the upcoming Summits and develop further guidelines if appropriate."

The need to standardize the practices in this field, in the context of globalization, has led to the correlation between the materials elaborated by the OECD and the existing or planned regulations at EU level, in the field of financial services.

The World Bank has also played a pivotal role in the field of consumer protection and financial education, dealing with these areas in an inter-dependent manner. The institution has issued numerous studies and researches in the field as well as specific recommendations applicable both at international level and in particular, to the states under review. For example, the World Bank has prepared the document Good Practices for Consumer Protection and Financial Literacy in Europe and Central Asia: A Diagnostic Tool. The paper reviewed the good practices and made necessary annotations, being elaborated in order to stimulate the debates in the field. The recommendations contained in this analysis are valuable in the light of the fact that they were not limited to incorporating the principles and recommendations contained in EU directives and European Commission recommendations, but went further with the comparative analysis of good practices used worldwide.

5. European post crisis context of consumer protection

The first aspects of increasing EU consumer confidence and strengthening their position were addressed in the Green Paper on Retail Financial

[9] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT.
[10] https://www.oecd.org/daf/fin/financial-markets/48892010.pdf.

Services in the single market[11]*, which overlaps with the onset of the 2008 global financial crisis.*

The necessity of better regulation of financial market, including the adequate supervision of the retail financial services market for consumers have been reflected in the new Community institutions created in 2011, the European Supervisory Authorities (ESAS) system, which consist of the European Systemic Risk Board (ESRB), the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority, (ESMA). The European financial supervisory authorities, EBA, EIOPA and ESMA carry out activities in the field of financial education and each of them has in their operating regulations similar provisions regarding consumer protection and financial education. "EIOPA has a key role in promoting consistent supervisory practices on consumer protection issues, working together with national competent authorities on the tools they can use and measures them can take to identify, assess and solve consumer protection problems".[12]

„The role and tasks of the EBA related to consumer protection and financial activities include: collecting, analysing and reporting on consumer trends in the EU; reviewing and coordinating financial literacy and education initiatives; developing training standards for the industry; contributing to the development of common disclosure rules; monitoring existing and new financial activities; issuing warnings if a financial activity poses a serious threat to the EBA's objectives as set out in the its funding Regulation; and temporarily prohibiting or restraining certain financial activities, provided certain conditions are met."[13]

ESMA's activity in the field of consumer protection is not limited to legislative improvements. According to article 9 of the ESMA Regulation no. 1095/2010, in Chapter II Article 8, Tasks and powers of the Authority, is provided "(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of financial market participants and on consumer protection".

Also, Article 9, Tasks related to consumer protection and financial activities is stated:

1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by:

(a) collecting, analysing and reporting on consumer trends;

(b) reviewing and coordinating financial literacy and education initiatives by the competent authorities.

Therefore, according to article 9 of the ESMA Regulation no. 1095/2010, consumer protection and financial activity related tasks are delegated to the European Authority.

In coordination with the European Securities and Markets Authority (ESMA) and in specific and well-defined circumstances, supervisory authorities may prohibit certain products, services or practices in the case of threats to investor protection, financial stability or proper functioning of markets ESMA Regulation no. 1095/2010 (12)[14].

In this respect, at 27th March 2018, ESMA, along with National Competent Authorities (NCAs), concluded that there exists a significant investor protection concern in relation to CFDs and binary options offered to retail investors and prohibited the marketing, distribution or sale of binary options to retail investors. Also, imposed a restriction on the marketing, distribution or sale of CFDs to retail investors.[15]

Another European Authority, EIOPA, more recently, pursuant to Article 18(2) of the PRIIPs Regulation, EIOPA announced that partially supports a planned prohibition of some unit-linked life insurance products by the Polish Financial Supervision Authority and calls for coordinated action across Europe, for identified risks for policyholders buying unit-linked insurance products in Poland.[16]

One more example: making use of its active role in consumer protection, the European Banking Authority (EBA) issued a statement in relation to consumer and payment issues in the context of the COVID-19 pandemic, which acknowledges the need to adopt appropriate measures to protect consumers and the orderly functioning of payment services across the EU.[17]

With regard to the European policy in the field of financial education, in May 2012, the European Commission adopted a new European Consumer Agenda[18] to boost confidence and development by placing consumers at the center of the single market concerns. Built around four main objectives, the European Consumer Agenda aimed to increase consumer confidence by increasing security, improving their knowledge, intensifying law enforcement and ensuring the possibility of obtaining compensation as

[11] europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0261+0+DOC+XML+V0//EN.
[12] https://www.eiopa.europa.eu/browse/consumer-protection_en.
[13] https://www.eba.europa.eu/regulation-and-policy/consumer-protection-and-financial-innovation.
[14] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:331:0084:0119:EN:PDF.
[15] https://www.esma.europa.eu/press-news/esma-news/esma-agrees-prohibit-binary-options-and-restrict-cfds-protect-retail-investors.
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[18] https://ec.europa.eu/commission/presscorner/detail/en/IP_12_491.

well as adapting consumers' rights and policies in the field to changes which have occurred in society and the economy.

Consumer expenses, which amounted at the level of 2011 to approx. 56% of the EU's GDP[19], reflects the huge power of consumers (about 500 million consumers at European level) to drive the European economy. And consumers need to enjoy their rights and be confident in order to fully exploit the potential of the single market and stimulate innovation and growth. The agenda replaces the EU Consumer Policy Strategy 2007-2013. According to the Agenda, the Commission aims, among other things, to recognize the importance of the role of national consumer organizations and to support them through capacity building and assistance in the field. European institutions recognize the transformation of the financial crisis into a crisis of consumer confidence.

Nowadays, financial literacy is becoming increasingly vital for individuals, and it should be considered, in the context of the European Pillar of Social Rights, Principle 20 on the right to access to essential services: „Access to essential services: "Everyone has the right to access essential services of good quality, including water, sanitation, energy, transport, **financial services** and digital communications. Support for access to such services shall be available for those in need."[20]

Due to the lack of transparency, the low level of information on risks and the inappropriate treatment of conflicts of interest, consumers across the EU have repeatedly been sold investment and insurance products that were not suited to their needs. Consumer confidence in the financial sector has been shaken here and there. In addition, the existing legislation has not developed fast enough to reflect the increasing complexity of financial services.

The consequences of taking too many risks can be devastating for consumers, since investments are often the essential element of their life-long savings. In the context where the EU retail investment market stands at 10,000 billion euros, buying wrong or inadequate products can quickly become a major problem.

There are three types of financial abuse at European level: (1) the poor performance generated by the incompetence of the providers or the poor quality of the services; (2) misinformation or overselling, i.e. the sale of inadequate financial products in the context of a low financial literacy of consumers, misinformation or abusive sales practices; (3) fraudulent trading, that is, abuse and direct fraud performed by financial service providers. The consequences of taking too many risks can be devastating for consumers, since investments are often the essential element of their life-long savings. In the context where the EU retail investment market stands at 10,000 billion euros, buying wrong or inadequate products can quickly become a major problem.

In order to strengthen consumer confidence and economic growth in the medium and long term, solid, well regulated retail markets that are focused on consumer interests are needed. As part of its reporting activity in 2012, the Commission assessed the need to strengthen current rules on combating unfair practices in the financial services sector and to optimize their application, including for vulnerable consumers.

Thus, in the last decade, the European Commission has focused its attention on taking concrete legislative measures to address deficiencies in consumer protection, while helping to restore the level of trust. That is why, in 2012, the Commission presented a legislative package that tried to raise the standards in the field and eliminate legislative gaps. More specifically, the package was made up of three legislative proposals: a proposal for a regulation on key information documents for packaged retail investment products (PRIPS), a revision of the Insurance Mediation Directive (IMD), and a proposal to increase protection for those who buy investment funds.

With the aims of strengthening the consumer protection and empowering the consumers of financial services, EU Member States have transposed EU directives regarding to the protection of consumers of financial services to their national law, namely, the Markets for Financial Instruments Directive (MIFID), the Consumer Credit Directive, and the Payments Directive. Regarding the protection of investors at European level, the most important ones to mention is the revised Markets in Financial Instruments Directive (MiFID), proposed in October 2011: a revised directive - MiFID II and a new regulation – MiFIR (the Markets in Financial Instruments Regulation).

The new rules contained in MiFID II offer increased protection to consumer which act as investors by imposing requirements for financial institutions and strengthening the rules of professional conduct.

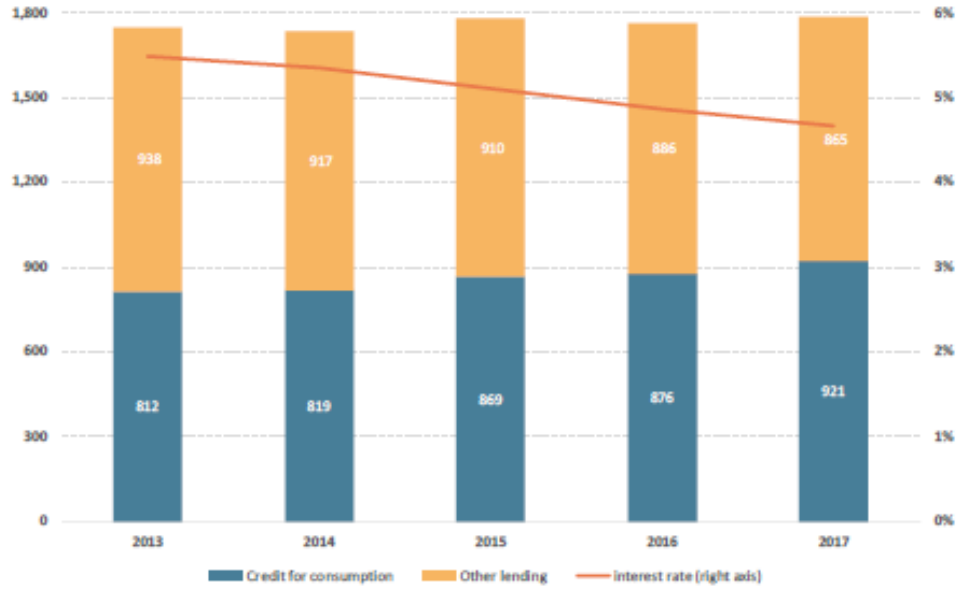
Over the past decades, household debt in Europe increased tremendously: between 1997 and 2017, it increased from 39.3% to 50% of nominal GDP. [21] Main components were mortgage credit and consumer credit. In 2017, the outstanding amount of consumer credit in EU28 was around EUR 1,800 billion, according to EBA Consumer Trends Report 2018/2019.

[19] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0225&from=EN.

[20] https://ec.europa.eu/info/strategy/priorities-2019-2024/economyworks-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights20-principles_en.

[21] https://www.ceicdata.com/en/indicator/european-union/household-debt--of-nominal-gdp.

Figure 4: Consumer credit, 2013-2017 (billion EUR, outstanding amounts)



Source: ECB.
Note: 28 EU MSs.

Regarding consumer credit, the same report found that "the main issues arise from the cost of short-term credit, the misuse of consumer credit, poor creditworthiness assessment and insufficient contractual and precontractual information."[122]

A Commission study[23] estimated that, in 2016, the total financial damage for EU consumers in the market for loans, credit and credit cards was EUR 12.84 billion.

Study on measuring consumer detriment in the European Union

Table 82: Monetisation of time loss and sum of total financial detriment and monetised time loss, EU28

Market	Total time loss (in millions of hours)		Total monetised time loss (in millions of Euro)		Total post-redress financial detriment (in millions of Euro)		Sum of post-redress financial detriment and monetised time loss (in millions of Euro)	
	FTF	Online	FTF	Online	FTF	Online	FTF	Online
Mobile telephone services	244.30	631.05	3,274.41	8,458.07	1,980.53	6,821.83	5,254.94	15,279.90
Clothing, footwear and bags	101.74	286.38	1,363.64	3,838.39	741.74	2,208.09	2,105.38	6,046.48
Train services	42.17	126.73	565.25	1,698.56	811.29	1,895.59	1,376.54	3,594.15
Large household appliances	116.44	272.16	1,560.59	3,647.73	2,822.38	7,162.85	4,382.97	10,810.58
Electricity services	161.84	254.61	2,169.13	3,412.53	1,927.91	6,368.00	4,097.03	9,780.52
Loans, credit and credit cards	131.90	300.22	1,767.83	4,023.84	1,288.81	8,819.29	3,056.64	12,843.13

Source: Face-to-face and online consumer survey, Eurostat (data series demo_pjan, prc_ppp_ind and earn_ses_hourly), and European Commission Market Monitoring Survey 2015.

Among the major drivers of irresponsible lending that may cause consumer detriment are inappropriate product design, misaligned sales incentives, even conflict of interest on credit or financial advice, unsolicited credit offers, risks related to online distribution of credit, inadequate creditworthiness assessment by creditors, product cross-selling, financial products bundle, lack of a harmonised EU personal bankruptcy scheme and lack of effective supervision and enforcement by competent authorities. [24]

In the context of the existence of a high degree of indebtedness of the European population even after a decade of the previous recession, the European Commission considers amending the Consumer Credit Directive 2008/48.

[22] https://www.eba.europa.eu/sites/default/documents/files/documents/10180/2551996/75e73a19-d313-44c9-8430-fc6eca025e8b/Consumer %20Trends%20Report%202018-19.pdf.
[23] https://op.europa.eu/en/publication-detail/-/publication/b0f83749-61f8-11e7-9dbe-01aa75ed71a1/language-en.
[24] https://www.thepriceofbadadvice.eu/static-map/

6. Romanian post crisis development of consumer protection

The economic crisis has led consumers to look more closely at credit agreements and to become more aware of their rights, thus iscovering the benefits of the existence of EU legislation and the regulation of retail financial services. Many of them discovered not only that they were mislead by the banks, by incorrect practices and terms, even from the pre-contractual stages. Credit institutions hide some fees or commissions or by splitting the real percentage of the loan interest so they can advertise offers with a very low interest, while in contracts was provided clauses which introduced the duty for the consumer to pay a certain percentage sum of money to the ballance as a commission under different terms (credit management fee or risk commission). The legal battle started and thousands of them referred their credit contracts to the National Consumer Protection Authority establishing a dark history of the relationship between consumer and banks and creating a litigation culture[25]. The examination in Romanian courts of the applicable legislation of consumer protection though rised issues related to the transposition in national law and interpretation of the directives on consumer protection, which in several cases was asked to the European Court of Justice[26]. In Romania, the major obstacle to the development of an adequate legal framework for protection of consumer of financial services was generated by the great inertia of the authorities regarding the adoption of modern instruments of safeguarding and prevention in the financial field. The Consumer Credit Directive (CCD) was agreed by the Council and Parliament and published in the Official Journal in May 2008. The CCD was designed to harmonise the regulation of consumer credit across Europe and to increase consumer protection. Member States were asked to transpose the Directive into national law before 12 June 2010. In 2010, the EU Directive 2008/48/EC on credit agreements for consumers was transposed in Romania by Government Emergency Ordinance no. 50/2010 on credit agreements for consumers after months of debates, fortunately with an application to a wider array of contracts - including mortgage credit, which has been shown to be a source of relief for the debtors affected by the recession beginning to be felt in Europe. This ordinance is the main regulation on consumer credit protection and implemented EU requirements on the obligations of creditors. Even this Directive was aimed at unsecured lending such as credit for the purchase of consumer goods or leasing contracts, the Romanian Parliament adopted the law with a higher level of protection than in the Directive, providing stronger information obligations, a prohibition post-contractual changes and extended them to mortgage loans. Government Emergency Ordinance no 50/2010 was amended by Law no. 288/2010, published in the Official Gazette of Romania no. 888 of 30.12.2010.

The provisions of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property were implemented into national law through Government Emergency Ordinance no. 52/2016 on credit agreements offered to consumers for immovable property and for amending and supplementing the Government Emergency Ordinance no. 50/2010 on credit agreements for consumers („GEO 52/2016") and it was after passed the transposition term of 21 March 2016 established by the Directive. The new legislation entered into force on 30 September 2016.

In Romania, Regulation No. 32/2006 regarding financial investment services transposed MiFID I Directive, Directive implementing Market abuse Directive, Distance marketing of consumer financial services Directive. Regulation No. 15/2004 regarding the authorisation and functioning of investment management firms, collective investment undertaking and depositories, as amended and supplemented, transposed UCITS Directive.

MiFID II has been transposed into Romanian legislation by Law No. 126/2018 on markets of financial instruments, and by several regulations issued by the FSA and the NBR.

Romania was one of just a few European countries without a personal bankruptcy regulation in place. Law no. 151/2015 on insolvency of natural persons was adopted by the Romanian Parliament in June 2015 after numberless postponement entered into force on 1 January 2018. After the 2008 financial crisis, the stable core of the consumer protection sector in Romania is represented by solid regulations mainly due to transposition of the EU directives into internal legislation. Several central government institutions with continuity in the field, together with some NGOs that have proven a sustained and consistent activity in the field of financial services carried out programs and actions of financial education and popularization of consumer rights. As regards financial education, in the first stages the initiatives came mostly from the civil society and private sector, but sometimes their actions were with a strong commercial character, promoting credit cards or investment plans, for instance. Among the public institutions the programs developed by the National Bank of Romania and the financial supervisory authorities of the non-banking sectors stood out. Especially with regard to public information, efforts towards the transparency of financial institutions and dully informing consumers have often been regarded as a burden or a mere obligation to align with European standards without fully understanding the usefulness of these measures for society in the long term. Thus, the divergent views of the leaders of financial institutions and national competent authorities

[25] https://www.digi24.ro/stiri/economie/capcanele-creditelor-bancare-eliminarea-clauzelor-abuzive-destul-de-greu-de-pus-in-practica-124366.
[26] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261915.

on the usefulness of financial information, retail market data or regarding competition and sanctions for the breach of legislation on consumer protection has often created lack of trust on behalf of consumers and users of financial services.

7. Conclusions

The financial crisis of 2007 began with a failure to protect consumers of financial services, especially those with mortgage debts. A growing number of member states, like Austria, Belgium, Czech Republic, France, Hungary, Ireland, Lithuania, the Netherlands, Portugal, Romania, Spain and Slovakia have already developed national strategies in order to clarify the roles, competences, mode and level of involvement of each player, in order to identify and prioritize the needs of different social groups and in order to rationalize the available resources. Despite of measures taken both locally and at the highest international level, since 2007 there has been limited progress in most Member States in Europe in ensuring a sufficient level of financial capacity and education and an adequate response to the problem of financial illiteracy in Europe that prevents people from understanding basic financial services and products and making informed and knowledgeable decisions. This somewhat limited progress and effect of the programs so far in the field is widely accepted at international level and officially recognized by the Report of the Directorate-General for Internal Market and Services of the European Commission of March 2011, Review of the Initiatives of the European Commission in the Area of Financial Education. Numerous international surveys have demonstrated consumers' generally low level of understanding of financial matters and of basic economics and shows that even under conditions of full disclosure, many consumers of financial services are unable to make adequate and reasonable decisions. Therefore, these explains somewhat the limited progress and effectivity of the financial education programs so far in this field. Among the first conclusions of the 2007-2008 crisis, the European Commission said[27] that economic and financial education should be complementary to legal and regulatory measures aimed at providing consumers with relevant information and adequate protection.

Another conclusion of the previous recession is that a well-functioning consumer credit market is beneficial to households, not just producers and sellers of goods and services, and stimulates economic growth. But if credit is misused and the debt burden becomes unbearable, it harms not only debtors but also creditors, endangering economic stability. Consumer confidence in a well-functioning financial market creates the premise of financial stability and is a trigger for continuous development and improvement of the efficiency and innovation characteristics for the entire financial system.

Without supervising and effectively enforcing regulations, consumer protection of financial services risks being superfluous. It is essential to ensure that national and EU public authorities in the field are well equipped with clear competences, the ability to monitor, investigate and sanction in order to effectively supervise the business behavior of financial service providers and tackle consumer protection issues.

Consumer protection is generally considered to be a regulatory response to a market failure. (Eisner, Allen, Worsham & Ringquist, 2006). In the context of the new Covid-19 crisis the review of EU consumer protection legislative framework and the transposition into the respective national member states law may address early a foreseeable financial failure of the European housholds by providing alleviating measures to repair or restructure the economic situation of the concerned persons, and allow them to return to a financially sustainable or sociably acceptable situation. Therefore, regulators need to timely understand the consumer perspective in order to establish effective regulation and supervision regimes.

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[27] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52007DC0808.

CHANGING MASCULINITIES? DADFLUENCING IN ROMANIA: BETWEEN FEMINISM, CONSERVATISM AND CAPITALISM

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Bogdan ȘTEFAN[**]

Abstract

Despite all controversies, men and women are also social concepts that changed over time as well as the power relation between men and women changed over time. Different forces have impacted this change and some cannot be omitted when talking about how masculinities are reshaped nowadays and here we think at the feminist movement and in counterpart - the conservative one, but also the neoliberalism and its principles and values (mainly the pressure of extending markets and selling goods). In this broader context, in this paper we first look closer at the concept of care and how men can be and become over time caregivers, especially as fathers, why this is important, what are the figures regarding sharing care responsibilities between men and women. Second, we discuss the way in which connecting men with care is represented in a broader arena that we call the popular culture, and here we focus especially on a relatively new phenomenon called "dadfluencing" – as men that are fathers, that are communicating about this experience especially on social media and that are trying to have an influence on their audience/public. Last but not least, in this paper we will present the findings of a small qualitative research that we have done on two Romanian "dadfluencers", namely on their Facebook pages, field research that we conducted in order to give a possible answer to the following research questions: What kind of masculinities are promoted by the two influencers? Can the content promoted be connected to any kind of feminist discourse that engages critical changings in traditional gender roles or it remains mainly a conservative one? Or in fact we are facing a new way of selling goods in a neoliberal world of markets and consumers that uses the image of the caring father in order to increase profit?

Keywords: *masculinity, care, influencing, dadfluencing, feminism, Romania*.

1. Introduction

Our aim in this paper is to discuss some aspects regarding the reconstruction of masculinity by including care and caring as defining elements. Therefore, our first intention was to investigate the mainstream-dictionary definitions of care, which have a high degree of social acceptability, and to see if we can find there those elements that reflect what we, as gender studies researchers, recognize from various scientific investigations and statistical data to be gender inequalities, power imbalances, discriminations, stereotypical representations and prejudice[1]. As a result, we found that care implies altruism, solidarity, empathy, loyalty, which are general human attributes, used without any gender bias.

Nevertheless, if we were to associate gender or sex with care, and particularly gender roles, then the result is dramatically different – the researcher is suddenly sent to a different conceptual field, one of starch dichotomies, stereotypes, prejudices and, last but not least, of inequalities. From this standpoint, Otilia Dragomir and Mihaela Miroiu (2002) approach care and caring by exploring the power relations between men and women and the way in which they are shaping women's preeminent role as main carriers of children, seniors, men, sick, homes, streets and so forth, and how this specific state of affairs tends to perpetuate. Laura Grünberg offers a broader perspective, based on the dynamics of gender roles in Romania as it was presented by the last Gender Barometer (2018), compared with the one released in 2000: "71% of the responders considered in 2000, that both parents should take part in childcare (and 28% were pointing out the mothers as the main caretakers), whilst in 2018 the ratio grew significantly, to 80.3%" (Grünberg, 2018, p. 19). Grünberg continues by stating that there can be identified a permanence in regard to the perception of the complementary and unbalanced distribution of the household chores. In the year 2000, at least 80% of the respondents considered that cooking, house cleaning, clothing and dishwashing and so forth are mainly feminine activities, while home repairs are seen to be men's responsibilities. With little fluctuations, these numbers are the same in 2018" (Grünberg, 2018, p. 18). The same 2018 Gender Barometer shows that there is a long way from wishing to practice in regard to gender roles distribution in family care. Thus, the respondents considered that "both parents should be involved in childcare, but also that men are unable to provide equally good care as women – 80.3% (80.7% women

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[1] "The provision of what is necessary for the health, welfare, maintenance, and protection of someone or something; Protective custody or guardianship provided by a local authority for children whose parents are dead or unable to look after them properly; Serious attention or consideration applied to doing something correctly or to avoid damage or risk; Feel concern or interest; attach importance to something" Lexico, UK Dictionary, accesat în 08.04.2020, la https://www.lexico.com/definition/care.

and 79.7% men). At the same time, 48.9% of women and 49.2% of men think that men are unable to raise children as well as women can (compared to 31.9% of women and 33.8% of men that said the contrary) (Grünberg, 2018, p. 20).

Therefore, care and caring are essential components in the perpetuation of gender inequalities and therefore we think that is important to have a critical discussion about them. Esplen identifies the main issues that need to be approached:

- Offering care and caring produces a major impact in people's livelihoods, and this impact is more substantial in the case of people living in poverty;
- Many young girl drop out of school in order to be able to help with domestic chores in the household, particularly when their mothers are sick or are employed;
- When they are unable to pay for care work, women are forced to give up their jobs, their careers, and pushed towards low-paying inferior part time jobs, thus being deprived of various empowering instances
- Therefore, their capacity to save money for a later period when they themselves would be needing care and caring, or their ability to have a decent retirement fund drops dramatically, therefore increasing their long-term insecurity;
- The double day-work performed by women brings most women on the brink of burnout;
- The burden of caring and household chores limits dramatically the time and resources that women have for civic and political participation, thus depriving them of access to power and to enter mainstream debates regarding public policy;
- Even when they are paid, their work is usually under-evaluated, jobs in care and caring are feminized and underpaid;
- Most of the time the working conditions are precarious and the work tends to be informal, implying a lack of work protection (Esplen, 2009).

Also in 2019, Promundo released their third *State of the World's Fathers* report, discussing the way in which men getting involved into care work and fatherhood could impact the inequalities resulted from the disproportionate distribution of care work. Several of their findings are worth mentioning:

- In 2018, 606 million women worldwide declared that they are unable to enter the workforce due to their burden represented by care work. Also, in countries where women perform twice as much unpaid care work as men, their medium income is approximately two thirds of their male counterparts (van der Gaag, Heilman, Gupta, Nembhard, Barker, 2019, 8)
- In medium and high-income countries, the difference between unpaid care work performed by women and that of men has dropped only by 7 minutes in the last 15 years (idem);
- Young girls spend 40% more time than boys on doing unpaid work (idem);
- On average, women spend approximately 4 hours per day performing unpaid care work, while men spend only 2.5 hours doing so (idem, p. 14);
- Globally, at least 16.4 billion hours per day are invested in care work, which is the equivalent for 2 billion people working 8 hours per day, producing 95 of the PGB for minimum wage (idem, p. 17);
- Actually, no country in the world has managed to reach an equilibrium between women and men regarding the levels of unpaid care work produced (idem);
- Globally, 18% of men benefitted from various forms of paid leave for childcare work, and it's relevant to stress out that here we also have arrangements involving 1-2 days per week, a week or a month, the tendency in the OECD countries being that men tend to take the minimum amount of paid leave (idem, p. 33-34);
- As a matter of consequence, the idea that women should have the responsibility for rising children still persists in both the ranks of men and women (idem, p. 45);
- At the same time, the Ipsos MORI research reveals that 75% of the respondents think that staying at home dads ale somehow "less manly" compared to those holding a job (idem, p. 47);
- Similarly, the data collected through the Helping Dads Care Research Project shows that almost 85% of dads say that they would be interested in doing anything in order to be more involved in their child's first months after birth (idem);

The authors also offer a list of solutions aimed at reducing inequalities in this area, perhaps the most relevant being the "4RModel" (idem, p. 18):

- Recognition – increased attention towards the social value of care work;
- Reduction – investing in programs and policies that would reduce the difficulty and time spent on care work – water, sewage, transportation infrastructure, public care infrastructure;
- Redistribution – the state, boys and men all together should get involved more in taking over part of the burden of care work currently placed on women;
- Representation – supporting women in participating in decision making processes in trade unions and other relevant instances.

2. Men should care and do care

Veronika Wallroth (2016, pp. 33-56) considers that the involvement of men in care work should be based on the several aspects. 1. Intergenerational/biunivocal solidarity, that involves devotion, affection, intimacy, love, empathy and altruism and which should come from parents to children and the other way around. The intergenerational theories usually underscore the positive aspects of intergenerational links, such as solidarity and consensus, but are criticized for being too normative and for having the tendency to reflect family interactions in a very dichotomous manner, as being

either positive of negative (idem, p. 36). 2. Assuming the caring roles and their relation with various types of power is an element that brings out several aspects involving the way in which roles and statuses generated via identities such as cared/carer are producing and reproducing power structures for women, men, brothers and sisters (idem, p. 41). 3. Societal and cultural motivations, that usually refer to the pragmatic, demographic aspect of population ageing and bring into light religious aspects that involve personal sacrifice and family obligations and accentuate the dominant expectations regarding children that will eventually have to care for their parents (idem, p. 45). 4. The idea of exchange relates to the help and support between family members based on reciprocity and continuity, sustained by generational links. The exchange can be emotional, economical, continuous or intermittent, and implies a transfer of knowledge and wisdom (idem, p. 50). 6. The idea of choice/lack of choice. The role of caregiver can be the result of a multiplicity of factors that can manifest simultaneously or separately:

A. *The personal attachment to the act of caring* – caring is a choice;

B. *"legitimate excuses"* – the situation in which there are justified situational reasons for not offering care (work, distance etc);

C. *"Caring by default"*, when there is no one to do the care work, therefore it is attributed to the person performing the work without the possibility of choice (idem, p. 53).

Are these motivations manifesting themselves more intensely for women (who are, as we had shown above, the main caregivers)? Are these motivations disconnected from men and their experiences? How can we still integrate men in this discussion regarding care and caring? What role plays in this context the construction of masculinity, and also the need for a deconstruction of toxic, patriarchal masculinity that perhaps kept men for far too long away from their own children?

A short review of the main bodies of literature on masculinity presents the benefits of paternity for men, bringing forth several very interesting issues. First, the relationships men develop with their children are making them more mature, responsible and contributes significantly to their development – their thinking, feelings and general behavior can be characterized as long-term qualitative changes (Palkovitz, 2005, p. 59). Second, men that are actively involved in their children rising and care tend to have a better health and a higher life quality. Paternity contributes towards the strengthening men's links with their families and communities (Eggebeen et al, 2013, p. 352). Third, reing a father leads to men attaining their highest psychological development stages, as Erik H Erikson's model of psychosocial development shows – "the attainment of generativity" (Randon, 2015, p. 12). And those are only few of them.

Nevertheless, men continue to have very little involvement in the rising and caring of their children, to this respect Ranson's explanation for men's distancing from care being very interesting – conceptualizing care as being profoundly linked to the body and corporeality (the embodiment of care). Thus, a plausible explanation regarding men's absence from practicing care work relates to "normative assumptions regarding gender, bodies, spatial distribution and regulation, and misery. *Masculine dignity* is much more dependent on phantasies about the body as closed and bounded, therefore men find care work as being mentally challenging and to be feared" (idem, p. 20).

Thus, we are referring to a traditional construction, mostly cultural, of the male body as being linked mostly to violence, physical force, war, sexuality, and this state of affairs is perhaps most visible in the case of male athletes or male bodies featured in various lifestyle magazines. Another very important distinction regards the capital brought by the (male or female) bodies in the relationship with children and particularly with the newly-born. From this perspective, we can identify a sort of biological advantage held by women, due to their specific maternal experiences of gestation and lactation (idem, p. 40), but this does not mean that we cannot identify similar advantages in men's case. Moreover, in patriarchal cultures (or at least in the vast majority of them), this biologic capital was undoubtedly used to constraint and subdue women in their role of caregivers (which implies much more than giving birth and nurturing children).

Investigating how men's bodies add value and benefits in their relationship with children and in care work, Ranson discusses several aspects which we wind to be relevant for the aims and scopes of our paper (idem, p. 40-2):

- *Post-partum fitness* – by not giving birth, men have the distinctive advantage of being able to get involved in the caring relationship with an intact body, fully available. Thus, men have the advantage of not having to go through a complex and major process of recuperation (physical and psychical) when the children are the most vulnerable. In this sense, one of the participants in the study said ironically that "I had a baby five months ago, and I am in perfect physical shape".
- *Size and shape* of the body also matters when it comes to childcare. In this respect, men have bigger bodies, bigger hands and a wider chest. These characteristics matter in care work and are perhaps most evident when it comes to washing the babies and putting them to sleep. The wider male chest is the perfect place to sleep for a toddler. Also, longer hands can prove to be helpful while multitasking, such holding the baby and cooking.
- *Strength* – children spend much of their time hugging their parents, thus they frequently need to be carried and usually not only them but also luggage, toys, food and so on. These things are made even more

difficult in countries with a poor transportation and urban infrastructure such is the case for Romania. In these particular contexts, physical force matters.

3. Masculinity, care, pop culture and dadfluencing

We undeniably live in a world in which patriarchal hegemonic conservative masculinities are being more and more examined and contested by various movements, of which the feminist one is the most vocal. Male parenthood is not spared of this critical scrutiny, their role within the family and in the wider social groups being continuously remodeled. Elizabeth Podnieks asks a very legitimate question: if the dad of today is no longer the income provider, and is also less emotionally involved as the mother, isn't there that he tends to be more disconnected and lightheaded, then who is he? (Podniek, 2016, p. 1). Off course, the authoress does not limit herself to simply asking the question, but she tries, along various other authors, to investigate contemporary representations of male parenthood in 21st century pop culture. In this context, a relatively recent phenomenon deserves our attention, from the standpoint of the construction and projection of masculinity in pop culture – dadfluencing. This phenomenon refers to dads who, using the information technologies available (such as Facebook, twitter, Instagram and so on), bring into the spotlight the much-needed changes in traditional gender roles, presenting themselves as involved dads, partners, dedicated to care and household work, thus challenging the dominant stereotypies and gender prejudices at the same time proposing new ways of masculinity construction, oriented towards care and caring. In an article published by wired.com in 2009, "In Praise of Dadfluencing", we can find some very interesting facts and numbers regarding the magnitude of the dadfluencing phenomenon: for example, on Instagram, there are over 3.700.000 posts with the hashtag #dadlife and over 2 million posts with the hashtag #fatherhood.

Romania is also part of this phenomenon and its analysis is the main objective of our paper. Our aim is to identify if and how men's visible involvement in rising and caring for the children is also considering contesting the traditional gender roles and producing a different discourse, aimed to combat gender inequalities.

4. Case study: the "dadfluencing" phenomenon in Romania

Starting from the theoretical framework presented above, we aim to present the findings of our qualitative research regarding the dadfluencing phenomenon in Romania. Our approach is centered around the need to redefine family gender roles on a more partnerial basis, and the fact that social media instruments have proven to be highly relevant in terms of behavioral change. Dadfluencing is centered around the capacity to influence, trough social media, vast numbers of people in order to change their opinions, attitudes and behavior. The Oxford English Dictionary defines influence as being "the ability to have an effect on someone's character, development or behavior"[2].In relation to social media, influence usually refers to the way in which ordinary people can create content with notable impact on their followers, the basis of influence in this respect is the process of sharing content with a high personal character.

Our main research question is – what kind of content is promoted on two Facebook pages, *Taticool* and *Cel mai bun tata* (The best father), and how this content critically addresses traditional gender roles? Subsequently, we also devised several additional questions:

- Which are the main issues addressed by those two dadfluencers?
- What is the frequency with which specific issues are addressed?
- What are the gender roles promoted?
- What is the generated impact in relation with the addressed issues?

5. Methodology

The method used in our research is qualitative content analysis. This type of analysis, even if it brings up frequencies and absolute numbers (e.g. number of followers, number of likes or shares and so on), these are used only in order to give perspective in relation to the researched items, but not in a *stricto sensu* statistical representativity. We have analyzed the two abovementioned paged in terms of posts during January of 2021, but also the general information presented on them. The content analysis involves on one hand the text, and on the other the visual components. Also, we have used two scales with which we categorized the content:

1. The positive/negative/neutral scale with which we approached the content posts on the two pages;
2. The emotions scale – with which we observed the emotions triggered by the analyzed posts. We used the emotions categories already present on the platform: like, love, haha, wow, sad, angry and share.
3. Thematic analysis – we used a category set aimed to collect the most relevant data in relation to the research question(s):
   - Commercial content;
   - Men's expertise/authority;
   - Women's expertise/authority;
   - Critical content in relation to gender roles/inequalities;
   - Conservative content;
   - Neutral content.

[2] OED, accessed in 05.01.2021 at https://www.lexico.com/definition/influence.

6. Research findings

6.1. The best father (Cel mai bun tata)

The best father is a Facebook page assuming the identity of a personal blog and that, in its description, briefly states that its main focus is "stories about the most beautiful job in the world". One can immediately notice that childcare is associated with a job, as an activity having social value, productive, signifying a masculinized symbolic dimension. The page has approximately 26.500 likes and 28.000 followers. From the description, the page seems to have been initiated in March of 2014, and its personal image is an impersonal design, resembling more a business logo. This is very interesting, because it appears to be in conflict with the classic communication style for influencer, who are putting a big accent on the personal information that could generate emotions and thus enhance the page's impact. Moreover, we also noticed that the logo is shaped like a competition trophy, which again suggest traditional masculine attributes – competition, power, energy, hierarchies.

Our content analysis of the page's covers produced the following data:

- 52 covers used throughout the time;
- 27 of those (approx. 50%) have a social theme: they illustrate the way in which the page's main character got involved in various social causes (funding for a children's hospital etc);
- 13 present various events that had invited Mr. Alexandru Zamfir (aka *The best dad*) to speak: events where he talks with other dads – 6; financial education – 3 events; couple relations – 2; digital children and the access to technology – 1; healthy lifestyles – 1;
- Covers with messages assumed by the author – 7: "Sooner or later we will all fail"; "I know that, if you are judging by the screaming it doesn't seem so, but parents really love their children"; "Dad is like a mother that is unable to differentiate between body oil and hydrating cream. And he doesn't want to, either.";
- Commercial covers, promoting events or products – 3;
- Pictures of his own child – 1;
- And one image with his award received for best blogger.

So, what can we say about the way in which *Cel mai bun tata* manages its content in relation to the communication instrument, the Facebook cover? Firstly, that Alexandru Zamfir **communicates by underpinning his quality as an expert in parenting**, and as being an inspirational source for other dads. Secondly, he underscores his involvement in various social causes regarding children, fact that in our analysis reflects a reproduction of the classical traditional gender roles due to the fact that the accent is always put on the authority and visibility of the page's owner.

The conservative-traditional trend present on this blog is further illustrated by the abovementioned cover stating that "Dad is like a mother that is unable to differentiate between body oil and hydrating cream. And he doesn't want to, either." The covers transmit a lot of information about Alex Zamfir in his role as an expert dad and in couple relations, in a framework that preserve traditional gender roles, and the focus is mainly on authority, expertise, getting involved as a influencing factor and, last but not least, leadership, and not on care, partnerial relations or deconstructing gender roles.

Content analysis of January 2021 posts

During January of 2021the page had 27 posts. Firstly, we investigated them by using the positive/negative/neutral scale and secondly, we also grouped the posts by following the second scale regarding issues. We need to mention here one particular aspect related to the posts we branded as negative – we did so due to a tendency of the main character, that manifested throughout his January postings, to complain about the roles generated by the status of involved father. Thus, the negative category mainly consists of postings that, although Alex Zamfir is trying to be ironical and jovial, he is complaining of being tired, overworked, of lack of intimacy, that his kid had a tantrum, that his kid sees him as an old man overwhelmed by various situations, that the child is giving him orders or is screaming at him and so forth. Overall, there are 9 posts of this sort, reflecting a 30% of the whole content posted during January.

Of these posts, the one that reached the biggest audience for its class (negative/complaining) is the following: "My child asked me who is getting vaccinated in this stage. I said that old people and the sick. He then asked if that means if I can therefore get a vaccine. I changed his wifi password". This post clearly illustrates a conservative stance, based on authority, following the classical way of constructing gender roles and masculinity: the authoritative father deciding to refuse to answer questions because he can.

An analysis of postings placed in the *neutral* category (10 out of 27) brings to light classical themes of parenting, such as nutrition, children and pets, online schooling. The posts are short and present content without a visible emotional involvement of the author. Many of these are actually commercial messages, promoting games for example. The post in this category that received the most reactions (actually having most reactions of all January postings) deals with the discussion regarding the need for acceptance and the pressure that parents are frequently putting on their children to better perform in school. The post got 2400 reactions, of which the majority of them were Likes and Loves, thus confirming clearly the concept of dadfluencing - here we have the well-known recipe of personal stories turned into inspirational postings that aggregate emotional responses from the public. Also we have observed that this posting departs from the usual scheme adopted by the author, which involves irony, humor and short texts. We chose to place this post on the neutral category because the author does not

explicitly assume the need to produce value judgements or setting trends.

On the *Positive* category (8 out of 27) we find postings that reflect an optimistic attitude in relation to the issues discussed – here there are texts regarding couple relations, father qualities, how good it is to be a father, but also several commercial posts promoting products endorsed by the host.

The posting that had the most reaction in this category is one in which the author is praising his own qualities as a father: "quality parenting is when the kid goes outside to play in the snow and you give him a shovel and tell him that you believe no one would be able to clean the snow from the yard in less than 30 minutes". From the gender roles perspective, we tend to put this one also in the conservative-traditional category – the men's expertise in determining children to do as they are told, but also the value as a lesson – how to teach your child to be more competitive.

Thematic analysis

Commercial content	Men's expertise/authority	Women's expertise/authority	Critical to gender roles/inequalities	Conservative	Neutral
10	9	1	0	0	7

But perhaps the most interesting classification in our research is the issue based one, because it's designed to answer the research question "can we identify in the posted content of the two pages relevant a contestation of traditional gender roles and the promotion of more partnerial gender roles?". The issue-based analysis offers a blunt answer to our question – no, *Cel mai bun tata* page is not attempting to be critical towards gender roles and inequalities and is not trying to promote gender equality. Our main conclusions raised after the thematic analysis are the following:

- That, at least in January, most of the postings are commercial, the author promoting various products such as games, vitamins and so forth;
- That the second most important issue present in the postings is the men's expertise /authority, particularly that of the owner, who is The Best Dad. This is fully in accord with the observations made when analyzing the covers, where we noted the same thing happening;
- That there are 7 posts out of 27 that are mostly neutral.
- There is only one post promoting women's expertise and authority, but the author does not use it in order to provoke a discussion regarding gender inequalities. Alex Zamfir limits himself to noting that women have excelled too in several areas.

In conclusion, the analysis of the posts on the "*Cel mai bun tata"* page reveals that the best parent is the father due to his expertise and authority which are most of the time presented in a humorous/ironical manner that "sweetens" a bit the overall discourse. On the other hand, the owner is complaining a lot in relation to his lived experiences as a father and also we find that he is interested in selling his own products through the page.

6.2. Taticool - Dan Cruceru

Taticool is also a Facebook page assuming a personal blog identity, but also as a community. On contradistinction from the *Cel mai bun tata* page, here the influencing towards a less conservative approach to gender roles is more visible starting with the page's description. We have also noted in the description that the focus of the owner appears to be on breaking gender stereotypes and contesting traditional gender roles, bringing a new light to the way in which men should involve themselves in parenthood.

The page has over 50.500 likes and almost 60.000 followers. The first profile image was posted back in October 2015, therefore one can conclude that the page has approximately 5 years of activity. Comparing with *Cel mai bun tata*, where we have just one abstract profile image, *Taticool* chooses a different strategy to communicate with his followers: he appears in the profile pic almost exclusively with his children: out of 19 profile photos, 15 are with his girl, one with the whole family and 3 having no characters in them.

Content analysis of the cover photos

There are a number of 38 covers in total, of which:

- 8 with the *Taticool* logo;
- 11 with the family – 4 of which are with the spouse and the children, most of them illustrating family and household depictions;
- 9 with Taticool in his quality as an expert, invited at various events;
- 7 holyday messages;
- 1 with the hashtag #Colectiv
- One message with Safer Internet Day 2017;
- One with the message World Children's Day Unicef.

Taticool communicates differently than *Cel mai bun tata*, by being more personal and closer to his family, including his life partner. Also, the psotos featuring him on the page are predominantly with his children and not featuring him as an expert, leader, influencer. His cover photos do not appear to be biased towards promoting the traditional gender roles. Moreover, *Taticool* frequently appears in household depictions – playing with his children, thus breaking in a way the classical construction of rational, detached and problem-solving masculinity, again in contrast with the cover photos found on *Cel mai bun tata*.

Content analysis of postings in January of 2021

Taticool has 13 postings in January, of which 3 we placed in the *positive* category. One of these

postings refers to product characteristics, another features him as an avid reader and the last one promotes a vitamin brand, along an expert on parenting. This last post is also the one having most reactions on the *positive* category amassing 314 likes, not far from the second one regarding reading. These, as it's easy to note, are posts without critical content, aimed at keeping the public linked to the page's activity.

In the *negative* category we placed 5 of the 13 postings, these being more variated in content, some of them indicating revolt or others, just as in the case of *Cel mai bun tata*, where the owner complains about his status as a father, in a similar conservative and masculinist stance. Thus, we have postings regarding Disney's decision to remove several cartoons which were deemed racist and sexist, postings where the main character is depicted as a growing girl's father who needs the police to protect his daughter from boys, another post is criticizing the lack of sexual education in schools and, last but not least, the post where he complains about being his children's toy.

The posting who got the most reactions was the one where Dan Cruceru posed as the revolted father of a girl that needs defending. Reactions are divided between likes and haha's, a clear sign that the public is in consonance with the conservative position expressed by the author, him being either understood, either ironized with stereotypical messages regarding fathers of girls: "My 9 years old daughter: Daddy, don't you think that my eyebrows are a bit too thick? I am thinking to trim them a bit. Helloooo! Call the police, the army, Santa Claus, everybody! Stop the time, because I feel that I am going to do some damage soon at my door!"

There are also 5 neutral postings, being similarly variated, from images of children to new year's wishes or discussions regarding school/kindergarten. The post that generated most reactions is a self-ironic one, dealing with the fact that the father has to keep a cure to lose weight. We could consider this posting through the lens of the way in which the author assumes perhaps a less conservative stance – that of a man preoccupied of his own image – but we chose not to put it under the *critical towards gender roles and inequalities* category. Our argument is that a more suited variable to explain this redefining position in regard to men's image relates less to gender and more to class and social status, in the sense in which they are explored by Ietza Bojorquez and Claudia Unikel in *Body image and Social Class* (2012).

Thematic analysis

Commercial content	Men's expertise/authority	Women's expertise/authority	Critical to gender roles/inequalities	Conservative	Neutral
3	1	0	1	2	6

Differently than *Cel mai bun tata*, which had most of his January postings dominated by commercial products, the thematic analysis shows that *Taticool* has mostly neutral posts in January. Commercial posts are fewer than on the other page (only 3 of 13, but in percent the difference is not that high – 23% commercial content for *Taticool* and 37% for *Cel mai bun tata*). The differences continue – we also have two posts we labeled as having conservative content, and one which we labeled into the *critical towards gender roles/inequalities*.

The conservative posts discuss two issues of which one – being a father of a growing girl – was already analyzed above. The second one is particularly relevant for our research question(s), because it addresses the issue of screening policies of several Disney animated movies, which were labeled by the company as having racist and/or sexist content. Here Taticool takes an explicit critical conservative position, not limiting himself to just having a short post, but writing an entire article. After apparently accepting and promoting the anti-racist and anti-sexist discourse, Dan Cruceru switches to conservative critique: "this is already getting to be absurd: for example, movies that depict specific instances of white history suddenly introduce a non-white which, simply put, has no way to be physically, temporally, logically, there". These arguments further illustrate a superficial understanding of these issues and the reproduction of the mainstream discourse which reflects racist and sexist stances which are strongly internalized.

Nevertheless, *Taticool* is the only of the two pages that has a posting which is critical towards gender inequalities, in a text discussing the need for sexual education. This is a long post, that appeal to aspects such as "My body, my rights!", several NGO's active in the field (such as SECS, minor mothers and so forth). The author clearly assumes a position of support for the introduction of sexual education classes in schools, by both analyzing the issues faced by this project but also by trying to provide solutions.

To conclude, *Taticool*'s relative low number of postings and their distribution in a much-varied categories brings up the need to further research this page in order to reach more solid results. This recommendation also comes after noticing that his posts (in the About section, but also in other posts, as shown above) tend to be more personal and focused on family, children, play, which are not at all conservatively biased and focused on male expertise and authority (as is the case for *Cel mai bun tata*). Also, we tend to find in his posts at least the intention to try to promote more gender equitable and partnerial models. Nevertheless, it is hard to affirm that the page is critical of traditional gender roles, due to the fact that we can clearly find conservative clichés and stereotypies. Also, when the author has to prove that he has a reasonable understanding of the way in which

gender and race inequalities are constructed, he proves time and again that he is unable to overcome his own internalized racism and sexism. Also is important to note that the commercial endorsements are usually linked to the *Taticool store* that sells children's products, therefore rising the question of if (like in the *Cel mai bun tata* case) the page is not simply a vehicle using the fatherhood image in order to promote his own business.

7. Instead of conclusion

Care and caring undoubtedly are one of the core concepts of feminist political theories. No human being is completely independent of care and, unfortunately, due to the dominant constructions overtime, care became a gender biased concept – being more associated with women seen both as givers and receivers – and therefore pushed towards the private sphere and consequently depoliticized. The emergence of the new mediums for communication, such as the various social platforms from Twitter to Instagram has engendered the new phenomena of *influencing*. In this sphere, and correlated to the increasingly anti-gender inequality discourse and for a more partnerial family and men's involvement in fatherhood and childcare, *dadfluencing* appeared.

In this context, we tried to see how does this concept functions in the Romanian sphere, how two of the dadfluencers are dealing with the issue of combating gender inequalities and promoting a more partnerial family model. Unfortunately, perhaps as it was to be expected, the answer tends to reflect a negative relationship. Thus, the two protagonists are both focusing in product promotions, and they put forward a conservative worldview that focuses on male expertise and authority but that also complains about the various situations encountered during fatherhood. Postings that address gender issues are scarce and they usually give the impression that the authors are completely disconnected from the power-centered discourse, the construction of inequalities or their causes. At the same time, they are placing themselves easily in conservative stances – the father of a daughter that cries for the police to stop him from hurting the boys at the door when his daughter has grown up (*Taticool*) or the stereotypical stance regarding men that are clearly the only ones able to offer parenting advice and guidance (following the cultural model according to which the best cooks are always men).

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CONSUMERISM VERSUS THE CULTURE OF EXISTENTIAL INTELLIGENCE

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Abstract

The present study aims to investigate the possible difficulties that human beings (especially young people) face in finding the existential meaning in consumer society. It tries to outline answers to the following questions: Does consumerism feed the crisis of meaning in contemporary society? Do consumerist ideologies and lifestyles meet the fundamental needs of the human being or do they rather induce false needs? Doesn't it propose false clues in search of meaning, in search of happiness? Maintaining the illusion that by purchasing goods, services, experiences (as many and as expensive as possible) we gain self-esteem and respect for others, consumerism can induce a dangerous sense of self-sufficiency, self-satisfaction. After the job, or even before it, the feverish, compulsive rush for shopping has become the main concern of hyperconsumerists. Under these conditions, do they still have time and energy to search for self, otherness, the purpose of life? Isn't consumerism a real obstacle in cultivating existential (spiritual) intelligence? If consumerism through (pseudo) values, the behaviors it cultivates, supports and maintains the existential crisis, then what is to be done, how can we get out of the impasse? Could the increase of the preoccupation of the society, of the socialization factors, of each individual for the development of his own existential / spiritual intelligence be a solution?

Keywords: *consumerism, existential meaning, crisis of meaning, existential intelligence.*

1. Introduction: What is consumerism?

The Larousse dictionary defines consumerism as lifestyle focused on consumption and characterized by a tendency to systematically buy new goods[1].

Consumerism is the dominant ideology and ethos of a consumer society, or market society, in which the whole of social life is penetrated, even structured by the economy. A culture of consumption is a culture in which the consumption of goods (tangible or intangible) is constitutive of social relations and social meanings[2]. In other words, consumerism is a certain way of thinking and lifestyle based on excessive consumption of goods, services, real or digital life experiences. It has infiltrated everywhere, leaving its mark on our everyday life.

It is a fact reported, more than a decade ago by Jonathon Porritt, in an article published in *The Guardian* ("Stop shopping or Planet go pop"): "Fascism. Communism. Democracy. Religion. But only one has achieved total supremacy. Its compulsive attractions rob its followers of reason and good sense (...). More powerful than any cause or even religion it has reached into every corner of the globe. It is consumerism."[3] In this article, Jonathon Porritt draws our attention to the traps that both the individual and the society might fall into due to consumerism, as well as to the consequences it causes on the environment.

2. The Traps of Consumerism

In this type of (consumerist) society, according to Galbraith (1986, p. 169), production creates the needs it wants to satisfy, and then fills the void it has created. Under these circumstances, the individual begins to believe and feel that his fundamental and primary need is consumption. Lipovetski finds that the influence of consumerism on the individual and on society is remarkable: 'There are very few social phenomena that have managed to change so profoundly the lifestyles and tastes, aspirations and behaviors of adults in such a short period of time, as consumerism has.'[4] He notices that today's consumption has acquired a truly existential dimension, coming to be used even in the pursuit of individual happiness. Lipovetski concludes that in 'the hyperconsumption society, consumption is radically divided, being ordered around two antagonistic axes: on the one hand, the practical purchase of products, the necessary services; on the other hand, the hedonic buying (for pleasure).'

Goods have completely invaded our lives, becoming the accessories of a merry show, this is what Debord (1996) outlines in his paper *La société du spectacle*: 'I would rather call this *show* grotesque. Consumption becomes the new reason to live, a way of life focused on material values, excess, comfort, the satisfaction of pleasure. A (pseudo) nonethical culture of the unnatural is born, promoter of ultramercantilism

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[1] https://www.larousse.fr/dictionnaires/francais/consum%C3%A9risme/18532

[2] François Gauthier, *Les ressorts symboliques du consumérisme. Au-delà de la marchandise, le symbole et le don*, in Revue du MAUSS 2014/2 (n° 44), pp. 137-157.

[3] theguardian.com/politics/2007/apr.8.

[4] Interview with Gilles Lipovetsky, 2013, https://www.millenaire3.com/interview/2013/la-dimension-existentielle-de-la-consommation.

(everything is for sale!), of the quantitative (much, more and more!), of ignoring otherness; a reductionist lifestyle that excludes or ignores everything that does not enter the narrow sphere of one's own interests and pleasures. I would say that this principle of hyperconsumption tends to be extrapolated to the level of experiencing human relationships. We notice an increase – rather among young people – in the preference for as many friends, relationships, life experiences as possible. The preference for this kind of superficial, undigested, thoughtless relationships (they don't have time to reflect on them) does not bring them anything good, on the contrary. In their haste, they do not realize that, in fact, it does not matter how many relationships (experiences) you have, how many conquests you have ticked, it matters what you learned from them, after you reflected on them. Going along the same lines, Lipovetsky (2007, p. 13) suggests that 'we are only at the beginning of the hyper-consumer society, nothing is currently able to stop or even slow down the progress of transforming experience and ways of life into a commodity.'

To be effective, consumerism needs a strong ally: advertising. It could not exist without advertising. Advertising is a faithful and unbeatable instrument of consumerism. It models the needs and aspirations of people, it stimulates greed (more) and grandiosity (more expensive), it forms conditioned reflexes, it acts on the subconscious through subliminal perceptions, it induces false needs etc., its 'disinterested' goal being the perpetual increase of the sales volume. Its purpose is achieved: we buy more and more and not only because we need it but also for pleasure, to feel good, to have fun. We buy more and more expensive goods in the hope that our self-esteem will increase and we will enjoy more respect from the others. We buy because buying gives us the illusion of happiness! (Shopping therapy!) In conclusion, we can say that advertising does not only sell products, but it sells the illusion of living, of having a purpose, of being happy. The private sector, consumerism, advertising 'want to create the individual who seeks compensation for his needs and disappointments not in the quality of his life and his profession, but in consumer goods (...).'[5]

Children and teenagers can become the easiest victims of the commercials and advertising programs to which they are exposed. Under the influence of publicity, before acquiring the necessary discernment for their choices, they move towards values with material connotations, towards displaying a socio-economic status as high as possible; they channel their interests in the direction of purchasing company clothes, the most hi-tech and expensive devices; they select their friends according to the material values to which they have adhered. Those who cannot buy such goods become frustrated, risk developing symptoms of anxiety, depression; they can even become aggressive. If we take into account the effects of excessive use of the smartphone, the Internet (social media in general), a phenomenon very common in this age group, we complete the picture of the possible risks teenagers face. Numerous psychosociological studies have shown that excessive digital consumption generates addiction, depression, isolation, loneliness; live contact with others is diminished, and the creation of an ideal and false image of oneself is encouraged. We cannot ignore Jules Henry's remarks about advertising as an expression of an irrational economy centered on a high standard of living.

In conclusion, I would like to point out that this kind of hyperconsumption pseudoculture, apparently paradoxical, has found a favorable ground in the troubled anomie societies, characterised by multiple transition (economic, political, social) settling quickly and even more successfully than in developed societies. This is also the case of Romania. I would also like to point out that, beyond the negative influences on the individual, society, the environment, consumerism also contains positive elements that are not negligible. We must not fall into the trap of *radical demonization of consumerism*: 'Let's recognize that, among the positive elements of consumerism, the most important is the autonomy of the individual. Consumption is able to bring real satisfaction. Harmful excess consumption is not enough to reduce the phenomenon as a whole. The search for pleasure, comfort, entertainment, escape, is consubstantial with human desire.'[6] Probably intending to show the bright face of consumption, the role it played in reducing poverty and hunger, Noah Harari noted that: '... today, hunger affects fewer people than obesity. In 2017, 124 million people died of starvation, but many more (over a billion) were suffering from obesity.'[7] I wonder if these figures are the expression of the benefits of the consumer society. From my point of view, they are false indicators, irrelevant for measuring prosperity, development and quality of life. They rather reflect the greed, irrationality and injustice that exist in the world.

3. The crisis of meaning in the society of 'hyperconsumption'

Existential crises, also known as existential dreads, are moments when individuals question whether their lives have meaning, purpose, or value, and are negatively impacted by contemplation[8]. It may be commonly, but not necessarily, tied to depression or inevitably negative speculations on purpose in life (e.g.,

[5] Robins, 1999, p. 112, apud. Ar. Gör. Baris KARA, Les valeurs de la société de consommation : une analyse sémiologique des publicités de presse, http://iletisimdergisi.gsu.edu.tr/tr/download/article-file/82747).

[6] *La dimension existentielle de la consommation*, interview with Gilles Lipovetsky; https://www.millenaire3.com/interview/2013/la-dimension-existentielle-de-la-consommation.

[7] Noah Harari, *21 de lectii ale secolului 21,* Polirom, 2019, p. 29.

[8] Richard K. James, *Crisis intervention strategies*, https://en.wikipedia.org/wiki/Existential_crisis.

'if one day I am to be be forgotten, what is the point of all of my work?'). Lipovetski (1983) was one of the first philosophers to draw attention to the deepening of the crisis of meaning in consumer society. He felt this wind of 'emptiness', the risk of the materialism inherent in today's world that makes existence lose substance and verticality. The existential void takes strange contours for many of the individuals in society. There is 'a diffuse and ubiquitous discomfort, a feeling of inner emptiness and the absurdity of life, an inability to feel things and beings.'[9] Around the same time (1992) and in the same register, Emil Cioran pointed out that: 'today's man is the expression of a deep crisis, of great (soul, moral and spiritual) complexity. Today's man is alone and empty; he lacks landmarks; he is the *object of manipulation* and that of *anti-models* that deepen the crisis of values; he no longer recognizes himself; he is deceived by the illusion of false values; the world no longer offers him authentic values, nor does man have anything to ask of this world; what to build or project ideals for.'[10] Moreover, Adorno pointed out that: 'In modern societies dominated by consumer ideology, excess consumer goods have become harmful and destructive. As the population is surrounded, if not suffocated by goods, the chance of the individual to find his way, his purpose in life, his meaning, becomes more and more difficult and even impossible' (Adorno, 1998, pp. 122-123). In Bauman's opinion (1999, p. 43), the individuals who make up the consumer society are in a constant situation of lack of content, dissatisfaction. Consumers are oriented towards meeting new needs, with constant exaltation and enthusiasm. Trapped, they can (apparently) get rid of their dissatisfaction only through consumption.

Today's society lacks landmarks, it is a society of 'the present moment, of urgency, of the visual, of the individual lost in the crowd', a society in which individuals are 'saturated with information', but for whom the loss of earlier constituted social *fabric* has become apparent' (...), it is a consumer society 'in which consumerism and narcissism intertwine with frustration and a sense of insecurity', 'in which individuals are fascinated by advertising and seduced by the populism of their leaders', a society that 'prepares and orients individuals so that they can function in the realm of the imaginary and the virtual'.[11]

Consumerism seeks to create an individual focused on wealth and comfort, not on the search for 'the reason to live' and on increasing the quality of life. Thus consumerism projects an individual who neither intends nor has time to pose the problem of an intelligent existence, of a meaningful existence. Time is one of the greatest problems of the individuals of this society. Increasing consumption often involves increasing time spent working. We consume more, we work harder. We exhaust ourselves by working and consuming. Fatigue, overwork, stress affect our physical and/or mental health. We no longer have enough time for family, friends, and community, to discover and build the meaning of our own lives. Not only does the lack of time prevent us from discovering our purpose in the world, the reason for living, but the main obstacle is the axiological system itself that underlies consumerism. It is difficult to find the meaning of life in a society whose main stakes are: the excess, the comfort, the pleasure, the tangible, the concrete.

Excessive consumption, whether for pleasure or ostentation, nourishes pride, shakes desires, creates other needs. It does not urge us to existential interrogations, to reflect on inwardness, and otherness. The individual of this world is more concerned with showing that he is above his fellow men than with being in joy and harmony with others. Hyperconsumption expresses the narcissistic pleasure of feeling a distance from the common, enjoying a positive image of oneself (Lipovetski, 2013).

Consciously or not, people are looking for themselves; they are looking for their identity. For many of them, the things, the services purchased represent an 'amplifier of their identity', of their superiority in relation to the others. The psychological effect is even more pronounced in the case of branded goods. Being expensive, they are 'exclusive'. Eckhart Tolle points out that trying to find oneself through things does not work: the satisfaction of the ego is only short-lived, followed by the appearance of other frustrations and dissatisfactions that need to be resolved. Man does not find himself, nor does he see the meaning of his existence. 'Identifying the ego with things gives rise to attachment and obsession with things, which, in turn, ensure the continuity of the consumer society.'[12]

The crisis of meaning finds its explanation in a complex of factors (be them economic, social-political, psychological, etc.) not only in the axiological system promoted by the consumer society. I am thinking, for example, of the effects of accelerating robotization, including the disappearance of a large number of industries and professions; many of the current socio-professional categories will become 'irrelevant' to the economy and not just to it. As already announced – due to robotics – the 21st century could be the 'end of work' in its traditional sense. Under these conditions, the question of man's relationship with his existence will become even more pressing. What will this 'useless, irrelevant mass' (Harari, 2019) do with its life? Given that the key statuses, the fundamental social statuses (profession, family) will be questioned, what will man do with his life? What will give meaning to his life?

[9] Gilles Lipovetski, 1983, p. 108, apud. Jean-Luc Bernaud, *Introduction à la psychologie existentielle*, Dunod, 2019, pp. 15-16.
[10] Emil Cioran, *Tratat de descompunere*. Bucureşti: Editura Humanitas, 1992, p. 224.
[11] Barus-Michel, J. *Criza ca obiect al psihologiei sociale clinice*, in Barus-Michel, J. & Neculau, A. (coord.). *Psihosociologia crizei*. Editura Trei, Bucureşti, 2011, pp. 90-91.
[12] Eckhart Tolle, *Un pământ nou*, Curtea Veche, Bucureşti, 2019, pp. 49, 50.

How will people come to terms with the idea that they are 'useless' and 'irrelevant'? The feeling of uselessness is devastating for the human being: it depresses him, it inhibits his desire to fight and even his desire to exist.

4. The way out of the stalemate: the orientation towards an intelligent existence

Motto:

'Man does not live only on material security, but on the meaning he gives to what he achieves.'

(V. Frankl)

An intelligent existence means, above all, a meaningful existence. Know what you live for! The Japanese believe that every human being has a reason to exist, a reason to live, has an 'ikigai'. 'It is hidden inside us and requires a careful search to reach the depths of our being and find it. (....) Ikigai is the reason we wake up in the morning.'[13] Some have discovered it, they are aware of it, others are still looking for it.

The one who has something to live for can bear almost anything (Frankl, 2009). In Allport's view, for man, the discovery and construction of the meaning of existence, the discovery of a suitable guiding truth represent the foundation for developing resilience, for finding the strength to overcome all obstacles, misfortunes, dramas of life. By discovering the meaning and following it, man can transcend critical situations, can rise even above fate (destiny). 'The search for meaning is the first motivation of man in life' (Frankl, p. 111). 'Meaning differs from person to person, from day to day and from hour to hour. (...) Every man has his own vocation, his own mission in life to carry out a certain task that is required to be fulfilled. The more man forgets himself by giving himself to a cause that he serves or a person he loves, the more human he is and the more he updates himself.'[14] 'When I look for the meaning of life, I want to explain what reality is and what my specific role is in the cosmic drama. This role makes me take part in something above myself and gives meaning to all my experiences and choices (...). To understand the meaning of life means to understand one's unique function, and to lead a good life means to fulfill that function.'[15]

Throughout history, billions of people have believed that for their lives to make sense, it is enough to 'leave something behind' (Harari, 2019, p. 277). It can be a child, a book, a house, etc. The orientation of man towards an intelligent existence presupposes the intensification of his preoccupation for discovering the meaning of his own existence, for rethinking the relationship with the self, with the fellows, with the environment. It also involves reviewing its relationship with goods, with consumption, his orientation towards a 'sober', intelligent consumption. Only in this way will he more easily distinguish between real and false (induced) needs, between values and pseudo-values. He will better withstand the temptation of the superficial, the excess, the useless and the success as life's goals. All these will be perceived as anti-values.

According to psychosociologist Danielle Rapoport, we can only be happy if we choose sobriety, intelligent consumption; only if we become subjects in our consumption, if we lean more towards 'utility, quality, proximity'.[16] Existential intelligence, however, involves more than awareness and fulfillment of meaning and orientation towards intelligent consumption. It represents a new paradigm that we meet in specialized literature, under the name of spiritual intelligence, both names, designating, broadly speaking, one and the same thing. Existential intelligence, as Gardner characterizes it, involves having a heightened capacity to appreciate and attend to the cosmological enigmas that define the human condition, an exceptional awareness of the metaphysical, ontological, and epistemological mysteries that have been a perennial concern for people of all cultures.[17] McMullen noted that 'if cognitive intelligence is about thinking and emotional intelligence is about feeling, then spiritual intelligence is about being' (McMullen, 2003, pp. 43-46).

In the view of Zohar and Marshall, spiritual intelligence (SQ) is the intelligence with which 'we address and solve problems of meaning and value, the intelligence with which we can place our actions and our lives in a wider, richer, meaning-giving context, the intelligence with which we can assess that one course of action or one life-path is more meaningful than another. SQ is the necessary foundation for the effective functioning of both IQ and EQ. It is our ultimate intelligence.'[18]

Spiritual intelligence means 'to be able to discern the real meaning of events and circumstances, and be able to make work meaningful; identify and align personal values with a clear sense of purpose; live those vales without compromise and thereby demonstrate integrity by example; and understand where and how each of the above is sabotaged by the ego, which means being able to understand and influence *true cause*' (Mike, 2006, pp. 3-5). Cindy Wigglesworth identified the spiritual intelligence as the ability to behave with wisdom and compassion, while maintaining inner and outer peace (equanimity), regardless of the circumstances.

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[13] Hector Garcia, Francesc Miralles, *Ikigai*, Humanitas, 2017, p. 15.

[14] Viktor E. Frankl, *Omul în căutarea sensului vieții*, Meteor Press, 2017, pp. 121-123.

[15] Noah Harari, *21 de lecții pentru secolul XXI*, Polirom, 2019, p. 269.

[16] https://www.la-croix.com/Famille/Parents-Enfants/Dossiers/Couple-et-Famille/Famille-et-societe).

[17] Kenneth W. Tupper, in *Entheogens and Existential Intelligence: The Use of Plant Teachers as Cognitive Tools*, Canadian Journal of Education, Vol 27, nr.4/2002, pp. 503-508; https://journals.sfu.ca/cje/index.php/cje-rce/article/view/2843/2140.

[18] Zohar D., Marshall I. *SQ: Connecting With Our Spiritual Intelligence*. Bloomsbury Publishing, New-York, 2000, pp. 3-4.

In *Spiritual Intelligence: A New Paradigm for Collaborative Action*, Danah Zohar considered that Spiritual intelligence can be fostered by applying 12 principles:

1. Spiritual self-awareness. It means to recognize what I care about, what I live for, and what I would die for. It's to live true to myself while respecting others.

2. Spontaneity. To be spontaneous means letting go of all your baggage (your childhood problems, prejudices, assumptions, values, and projections) and be responsive to the moment.

3. Being Vision and Value-Led. Vision is the capacity to see something that inspires us and means something broader than a company vision or a vision for educational development.

4. Holism encourages cooperation, because as you realize you're all part of the same system, you take responsibility for your part in it. A lack of holism encourages competition, which encourages separateness.

5. Compassion. I don't just recognize or accept your feelings, I feel them.

6. Celebration of Diversity. Compassion is strongly linked to the principle of diversity. We celebrate our differences because they teach us what matters. Celebrating diversity means that I appreciate that you rattle my cage, because by doing so, you make me think and grow.

7. Field Independence. It's a willingness to go it alone, but only after I've carefully considered what others have to say.

8. Humility. Humility is the necessary other side of field independence, whereby I realize that I am one actor in a larger play and that I might be wrong. Humility makes us great, not small. It makes us proud to be a voice in a choir.

9. Tendency to Ask Fundamental 'Why?' Questions. 'Why?' is subversive, and people are often frightened by questions without easy answers. Answers are a finite game; they're played within boundaries, rules, and expectations. Questions are an infinite game; they play with the boundaries, they define them.

10. Ability to Reframe. Reframing refers to the ability to stand back from a situation and look for the bigger picture. It brings a variety of approaches to problem-solving tasks and is prepared to let go of previously held ideas when these clearly are not working. It seeks to broaden experience by taking on tasks outside of comfort zone

11. Positive Use of Adversity. This principle is about owning, recognizing, accepting, and acknowledging mistakes. Positive use of adversity is also the ability to recognize that suffering is inevitable in life. There are painful things for human beings to deal with, yet they make us stronger, wiser, and braver.

12. Sense of Vocation. This principle sums up spiritual intelligence and spiritual capital. It's my ideal that business will become a vocation that appeals to people with a larger purpose and a desire to make wealth that benefits not only those who create it but also the community and the world.

The development of existential intelligence presupposes first the knowledge, the awareness of its inherent benefits. It would take an effort of will both individually and socially. The involvement of socialization factors in the education of children and young people in this spirit would be required. At the macrosocial level, the creation of the necessary context for an intelligent existence requires profound changes at political, economic and socio-cultural levels.

5. Conclusions

This paper is a plea for a rational, decent, sober, without excess consumption. The benefits that people enjoy in today's consumer society (the progress of comfort, the multiplication of experiences, 'the satisfaction of having') cannot be denied. On the other hand, it cannot be denied that hyperconsumption does not make it possible to fill the feelings of existential emptiness related to the relationship with others, communication, love, recognition, self-esteem, professional achievement. Moreover, a consumer-centered existence risks favoring the deepening of the crisis of meaning, does not leave time for existential interrogations, overturns the hierarchy of values, in conclusion, is the opposite of an intelligent existence.

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VIEWS REGARDING THE CURRENT ADMINISTRATIVE PHENOMENON

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Abstract

An essential pillar of the rule of law – the principle of legality of the administration, which together with the separation of powers in the state, must guarantee the fundamental rights and freedoms of citizens.

The form of government, as a concept, we appreciate that it specifically designated the use and organisation of state bodies, as well as the characteristics, principles that underlie the relationship between them.

At the same time, the economic and social structure of the state, the principles underlying the organisation and functioning of power, its objectives and forces, the way in which society is reflected in the power and style it imparts to the rulers must be taken into account.

From the point of view of the forms of government, it is spoken in the specialised literature of monarchs and republics.

Within the republic, we find that the position of head of state is performed by an authority that can be either unipersonal or collegial.

We note, depending on the elements considered in the more general concept of state form that a number of notions and derived concepts appear, such as those of form of government, state structure and political regime.

The set of institutions, methods and means by which power is realised represents the political regime, which has much more complex determinations than the relations between the powers and the way they are organised.

The idea of collaboration of powers is used by the parliamentary regime, in which we find the principle of separation of powers – understanding by this, the functional autonomy especially of the legislature and the existence of specific means of mutual pressure.

From the specialised literature of public law, we come to the conclusion that there is no perfect constitutional regime – an opinion that can be criticised – that falls within pre-elaborated theoretical schemes.

Keywords: *separation of powers system, public administration, state of democracy, forms of government, rule of law*.

1. Introduction

1.1. Introductory Notions

Given the rationality of the administrative phenomenon, it is essential to understand the notions in a real, not abstract way of how administrative law is realised in order for the theoretical essence to harmonise with practice.

Thus, from an etymological point of view, the term ”*administration”* has its origin in Latin composed of the preposition *ad* with the noun *ministry*, which could mean in a faithful translation – servant, executor. Next, the first definition of the word administration leads us to the idea of subordinate activity, but in another opinion, ”*administration*” was defined as ”*the act of administering, conducting public or private affairs, managing property*” or ”*administrative power*” or ”*the science and art of governing the state*”.[1]

Therefore, from the presentation of the word “*public administration*”, we will therefore note that it should not be confused with “*state administration*” – the concept of public administration referring not only to government and ministries, but also to the activity and organisational structure respectively through which the application is organised and the law is enforced within territorial and administrative divisions in accordance with the principle of local autonomy and administrative decentralisation, applicable in a state governed by the rule of law.

In administrative law, the notion of public administration is also analysed by referring to other notions: administrative authority, public power, public service, administrative body.

For example, Professor Anibal Teodorescu, a remarkable personality of the interwar period, used the concept of public power, which he defined as ”*the power of the state to command all the individuals who make up its population, united with that of not recognising on its territory any other will coming from outside*”.[2]

Indeed, for the rule of law to exist, the separation of powers in the state is required[3].

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[1] Nouveau Petit Larousse illustré, *Dictionnaire encyclopédique*, Paris, Librairie Larousse, 1926, p. 5.

[2] Anibal Teodorescu, *Basic treaty of administrative law, Ist volume, IInd Edition*, Bucharest, 1929, p. 113. Anibal Teodorescu (1881-1971) he was a Romanian jurist, corresponding member of the Romanian Academy, https://ro.wikipedia.org/wiki/Anibal_Teodorescu.

[3] John Locke, clearly formulated the issue of the separation of powers, his concern starting from the practical necessity of moderating the strength of state powers. The author considers that in the state there are three powers: the legislative power, the executive power and the confederate power. John Locke (August 29th, 1632 – October 28th, 1704), was an English philosopher and politician of the seventeenth century,

Montesquieu[4] theorised the principle of separation of powers which became a dogma of liberal democracies and the essential guarantee of individual security in relations with power.

Thus, the administration is no longer an exclusively etatist activity as it was previously known.

French Professor Emeritus Bernard Chantebout highlights the three functions that the state must perform: the legislative function, the executive function and the jurisdictional function.

Consequently, the former enacts the general rules, the latter is responsible for their enforcement or execution, and the latter has the role of resolving disputes that arise in the process of legislation.

In other words, if in French doctrine we find most theories and definitions of public administration, German doctrine emphasizes the abstract nature of the notion of public administration and concludes that "*administration can be described and yet, not defined*"[5].

On the other hand, the Anglo-Saxon system is examined together with constitutional law under the generic name of "*law relating to public administration*".

Nor do we omit the American theory that uses the following notions to define the term "*administration*": running and guiding business and institutions; government officials; policy execution; the period during which any chief executive holds a position.[6]

Consequently, we emphasize that all European Community countries refer to the executive power, public authority, state power, executive function, as an expression of the consecration of the principle of separation or balance of the three powers of the state.

Of course, we would like to point out that the separation of powers is not allowed in the form of opposition between them, because such a conception is likely to block the activity of the state.2. Contents

2.1. Cooperation in administrative law

First of all, from the research of the notion of public administration it arises out that this represents an activity of execution and organisation of the specific execution of the law.

Thus, it can be grouped into two broad categories:

- executive activity standing for regulations, through which the organisation of law enforcement is realised, the perceptions of ethics of natural persons and legal entities are established, permuting or prohibiting a certain behaviour, going as far as the application of penalties for non-compliance with legal provisions.

The activity in this category involves the decision-making process from the adoption of legal deeds, to committing material acts by public authorities and their functioning, as the main activity.[7]

Subsidiarily, such activities may also be carried out by other public authorities: law giving or judiciary.

- the activity being a provided service, which is executed on the basis and by enforcement of the law or upon the request of the natural person or legal entities of other public authorities (in fields such as: water, telephony, mailing, transport, etc.).

For example, the service activity is carried out through legal acts, but also through material operations.

The state administration, understood either as an execution activity or as a system of state administration bodies, materialises its entire activity in a socio-political and legal context.

Regarding the legal relations in whom the public administration is manifested and realised, it should be noted that they are executed within a social group and up to the whole society, globally viewed.

The specifics of the tasks of the public administration system, also arises out from the particularities of the administrative fact of being the organiser of the political values realisation, in a given social system.

Also, a definition of the position is as[8] "*administrative activity that someone performs regularly and organized in an institution, in exchange for a salary*" or "*degree that someone holds in an administrative hierarchy*".

In other words, in relation to the public administration, the function represents a set of attributions established by law or by acts issued on the basis and in the execution of the law.

They are performed by a natural person employed in a public administration body and who has the legal ability to perform these duties of public administration.

In the opinion of Professor Erast Diti Tarangul[9], starting from the functions of the state, he classifies the public administration, from a formal and material point of view, examining as basic notions of public administration, the public service and the general interest.

As regards of public administration, functions can be described in relation to the main objective pursued by the administration and the realisation of the interests of the citizens.

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especially concerned with society and epistemology. Locke is the iconic figure of the three great traditions of thought at the heart of the spirituality of the modern age, https://ro.wikipedia.org/wiki/John_Locke.

[4] Montesquieu, (1689-1755) was a French judge, a man of letter and a political philosopher. He is the main source of the theory of separation of powers, which is implemented in many constitutions around the world, https://en.wikipedia.org/wiki/Montesquieu.

[5] Antonie Iorgovan, *Treaty of administrative law*, Nemira Publishing House, Bucharest, 1996, vol. I, p. 22-30.

[6] Dictionary of American government and politics, 1998, The Darsey Press Chicago, 1988.

[7] The entire activity of organising the execution and specific execution of the law, involves several stages: the documentation activity, which gives rise to the well-known advisory administration (service) and execution; deliberative activity, or prior to issuing decisions; active administration – materialised in legal acts – administrative deeds, jurisdictional and administrative deeds and even material operations.

[8] Explanatory Dictionary of the Romanian Language, Univers Enciclopedic Publishing House, Bucharest, 1998, p. 404.

[9] Erast Diti Tarangul, *Romanian Administrative Law Treaty*, Glasul Bucovinei Publishing House, Cernăuţi, 1944, p. 49-56.

These could be summarised as execution functions[10], both of the political decisions reflected in the law, and of their activity of current administration under the law, information functions not only to the legislative authority (art.110 of the Constitution), but also to of citizen, (art.31, 78 and art.107, paragraph 4 of the Constitution) and functions of realisation of the drafts of normative acts and of some political decisions.

Administrative relations and law enforcement activity involve the state authority of the subject of law that participates in their implementation – practically a legal framework within which to perform the public administration tasks.

Therefore, the tasks of the administration are classified according to several branches: according to the content of the activity (management and organisation tasks; performance tasks), depending on the nature of the device or provider of the activity (tasks of organising the execution and execution of the law), by the scope of the regulation (tasks of national interest and tasks of local interest).

The clarification of some notions such as society, state, executive power or public administration start from the institutional reality of the moment, namely the existence of Romania in the administrative space of the European Union.

Thus, the adoption of *OUG (Government Emergency Ordinance) No.57/2019 of July 3rd, 2019* on the Administrative Code is almost a bias in relation to the concluded European partnerships, maybe not so imperative and necessary given the current legal provisions.

An interesting remark is the fact that the supreme law, the Constitution of Romania, establishes the terms of – *balance* – or – *cooperation of powers in the state* – and not – *separation*. According to the Constitution approved by referendum on December 8th, 1991, in Romania *the only holder of power is the Romanian people*.

Regarding the object of activity of administrative law, the question was asked in the specialised literature, if it is not, somehow, the same as the object of public administration as a form of achieving state power.

Administrative law consists of the social relations that form the object of public administration in the conditions in which the notion of public administration is also defined by the formal criterion of the law.

Administrative law as a branch of law regulates only certain social relations specific to its object of activity. Regarding the object of activity of administrative law, the question was asked in the literature, if it is not the same as the object of public administration as a form of achieving state power.[11]

It is important to specify, however, that although the object of administrative law is similar to that of public administration, it is not to be confused with it. Public administration consists in organizing the concrete execution of laws and other acts of state authorities based on the law.

The content of the administrative law identifies some social relations that could be the object of other forms of activity of the state, such as, for example, the settlement of jurisdictional administrative deeds that through their procedure can also be the object of the activity of justice.

These activities are located at the confluence between public administration and other forms of state power that can be considered as or not part of the administrative activity and therefore may or may not be regulated by the rules of administrative law in relation to how it disposes. the law, a fact already emphasized in comparative law.[12]

Last but not least, there is a complexity of social relations that manifests itself within the groups of people organised in order to perform the duties of public administration, as well as between these groups of people and public institutions or state authorities.

The organisation and activity of those who perform public administration must be subject to legal regulation.

In other words, the social relations that form the object of the administrative law are those relations that forms the object of the public administration carried out according to the legal norms by the public administration authorities.

It follows that the administrative law consists of the social relations that form the object of public administration in the conditions in which the notion of public administration is also defined according to the formal criterion of the law.

2.2. The principle of legitimacy

The principle of legitimacy is the principle that appoints the bounds of the actions of the public authorities, limiting their power, without injuring their undertaking spirit.

Such a hypothesis comes from the ascertainment according to which the law regulation cannot provide absolutely everything, fact that warrants the public authority to implement the regulation when informed.

Distinction between discretionary power and bound power has a crucial interest, since it determines the legality requirements of the administrative act with regard to the relationship between its object and its motives, therefore having direct consequences in the legal field and that of the jurisdictional control.

As unanimously expressed by all doctrinarians, in the current activity of public administration, it is indispensably required to be achieved a balance between the two types of competences.

Thus, the administration action cannot adjust to a generalisation of the bound competence, which would

[10] Ioan Alexandru, *Administrative structures, mechanisms and institutions*, Ministry of Teaching, National School of Political and Administrative Studies, vol. I, 1996, p. 45.

[11] Alexandru Negoiță, *Administrative law and Administration Science*, Atlas Lex Publishing House, Bucharest, 1993.

[12] André de Laubadère, *Traité élèmentaire de droit administratif*, Paris, 1963.

actually be the equivalent of determining a reflex conduct, based on administrative type automatisms, in applying pre-established rules[13] .

For that matter, most of the times, administration has to permanently adjust to specific and changing circumstances that the rule of law cannot provide[14]. On the contrary, an administration which has very wide discretionary powers, does not offer to the administrated people any security, since it would tend to abuse and contingency. For these reasons, the bottom line is the need of a dosage[15] between the two types of competences.

3. Conclusions

Thus, in order for an optimal functioning of the authorities and public services vital to the organization of the company, the need for legal regulation of the organization and functioning of the public administration under the rule of law derives from the nature of the object of this activity.

No doubt that public administration is a truly interesting topic dedicated especially to scientific research for the importance it shows in the proper functioning of vital public authorities and services.

Research object not only for jurists, but also for economists, historians, sociologists, philosophers, political scientists and even anthropologists, public administration has as main purpose the realisation of political values as a form of expression of the general interests of society, values that are materialised in law.

Therefore, the phenomenon of administration was thus approached in a monodisciplinary way by each of the specializations and the image provided could not comprehend the complexity and nuance of the mechanisms, institutions and structures involved in the functioning of administration.

It is the state itself that must accurately determine the limits of its powers in the form of the law, as it does with regard to liberties, but it is not appropriate to act more than it is within its legal competence.

In this regard, the renowned theorist in administrative sciences, prof. univ. dr. Ioan Alexandru remarks the essential property of the state governed by law, which results from the application of the principle of legality in the activity of public administration which, together with the organized division of state power into three components, aims to guarantee the citizen's freedom from the direct State's intervention.[16]

Consequently, the result of the legal normative activity is represented by the multiplicity and variety of activities and forms of organisation of the public administration system.

An important way to achieve the organisation and functioning of the public administration system that provides an objective criterion for assessing the conduct of persons performing public administration is the legal norm.

If we consider the law execution, the public administration system is the instrument with which the law is realised. In order to meet this mission, the public administration, seen as an activity and as an organisation system, must also be subject to the law.

In this way, the principle of legality of public administration activity is outlined, as a fundamental principle. Unlike the 1991 Constitution, the text of the Constitution revised in 2003 dedicates its superset position as a general principle, placing it at the top of the legal norms pyramid: "*generating constitutional supralegality*"[17]

Thus, law is thus a necessary and binding dimension for the public administration.

The principle of legality is also expressly stated in the "*Code of Good Administrative Behaviour*" adopted by the European Parliament on September 6th, 2001).

As a result, it is imperative that it be interpreted dynamically in the sense of the obligation of public administration authorities to act to enforce the law and to take the necessary measures, including coercive measures, in order to restore the violated legal order.

This explanation derives from the very purpose of the public administration that of being in the service of the general interests of society expressed in law.

In the Romanian legal system with all the opposite opinions supported in the specialised literature we must recognise the thesis of the plurality of norms applicable to the administration of administrative, private law or other branches of public law.

A comparison of European systems highlights two "*types*" of law applicable to the administration in the European space, namely the Anglo-Saxon system (which does not recognise the existence of administrative law as a separate branch of common law, so the administration is subject to common law rules (common-law), as well as administrative disputes settled by common law courts) and the francophone system (present in most European states, based on the recognition of exorbitant law for the state administration, respectively administrative law, with the recognition of the existence of separate administrative jurisdictions common law courts structured in a system headed by a supreme administrative court)

It is important for defining the sphere of administration and the distinction between the public administration made by the state structures respectively by the local authorities and the administrative activity carried out by the other state bodies (public authorities): Parliament, courts, Constitutional Court.

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[13] André de Laubadere, J. C. Venezia, Y. Gaudement, *Traite de Droit Administratif*, Tome 1, 14ed, L.G.D.J., Paris, 2001, p. 643-650.
[14] Jean Rivero, Jean Waline, *Droit administratif*, 17ed, 1998, Dalloz, Paris, p. 86.
[15] Ibidem.
[16] Ioan Alexandru, *Compared administrative law*, Lumila Lex Publishing House, Bucharest, 2000, p. 134-135.
[17] Rozalia Ana Lazăr, *Legality of the Administrative Act*, ALL Beck Publishing House, Bucharest, 2004, p. 52.

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SOME FEATURES OF THE NEW PUBLIC MANAGEMENT

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Abstract

The profound changes experienced by the public administration in the last twenty years, which are closely correlated with the economic and social phenomena, were based on the particularities of the New Public Management, an event of great significance for the practice of public administration, both in industrially developed countries and in the developing ones.

The new concept is underlying on the transfer to the public sector, of management techniques, proper to the private sector, thus producing a move in the operating methods of public sector organizations, element which contributes to reducing divergences between the two sectors.

Characteristic of the New Public Management, is the interaction of the reform procedures, which aim at diminishing the governmental costs, by orienting towards privatization and the competition stimulation in the offer of services.

By the introduction of market processes aims to increase accountability, efficiency regarding services provided and attention paid to consumer satisfaction.

The study tries to present the characteristic elements of the New Public Management, as it appears from the opinions of some specialists and directions of action in implementing reforms, reflected in the emphasis on different coordinating elements, such as: managerialism, disaggregation, competition, performance stimulation, contracting, dissociation, fragmentation of authority and responsibility.

The aim is to highlight the aspects wherethrough the change leads to the penetration of modern management processes, in public administration and the transfer of emphasis from the old form of public organization and provision of public services (based on bureaucratic principles, planning, centralization, direct control and autonomy), towards a market-oriented public service management.

Keywords: *New Public Management, characteristics, directions, reform.*

JEL Classification H11; H44; H83; L33

1. Introduction

One of the events of great significance for the practice of public administration, in the last twenty years, both in industrially developed and in developing countries (Calogero, 2010 pp. 30-54) is the penetration, on a global scale, of the principles of the New Public Management, consequence of the great changes, in world plan, result of the internationalization of the production and the free movement of the capitals, including, the contribution of the computer science revolution. (Androniceanu & Șandor, 2006).

The new concept transfers to the public sector, the management techniques, own to the private sector (Amar & Berthier, 2007), which means a move in the methods of operation of the public sector organizations, attenuating the distinction between the two sectors; the decision-making power of public managers increases, the guidance through rules of procedure transmitted from the center relaxes. (Kalimullah, Ashraf, Nour, 2012)

The process of New Public Management is based on the orientation towards market economy principles and an increased efficiency of public administration, against the background of changes which can lead to an improvement in the use of public resources and an increase in the quality of public services (Świrska Anna, 2014).

The framework of the paper follows the particularities and directions of manifestation of the New Public Management, whose interaction can lead to the achievement of the reform objectives.

There are briefly presented, the main characteristic elements of the phenomenon, as well as the way in which they have been approached by various theorists, in the specialized literature.

2. Features of the New Public Management

The profound changes experienced by the public administration, in the last twenty years, have been closely correlated with the economic and social phenomena, a process that can be followed from several perspectives (Calogero, 2010):

a) *managerial perspective*, by focusing public systems towards the use of new principles and instruments in the process of organizational, managerial and information system change;

b) *political perspective*, through which the public sector is directed towards new forms of legitimation;

c) *legal perspective* through which the public

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sector is oriented towards the introduction of a new legal framework, which should correspond to the new conditions generated by the socio-economic changes in the society.

This reform process is based on the particularities of the New Public Management, as observed by various theorists.

Characteristical, in the case of the New Public Management, is the interaction of the reform procedures, which aim at reducing the governmental costs, by orienting towards privatization and incentive the competition in the offer of services.

The speciality literature refers to *two basic principles* of the New Public Management: the managerialism and market orientation, each with characteristic features.

Managerialism emphasizes the administration authority of managers, the exercise of an effective control of work techniques and, according to Pollit (1993, 2-3)[1] *is characterized* by: increasing efficiency; use of advanced technologies; emphasis on increasing labour productivity, implementing participatory, professional management; managers' freedom to lead.

It, also, seeks to reduce bureaucracy, considered, also, by Weber, as a danger to parliamentary democracy. (Nesbitt 1976)[2].

The principle of ***market orientation*** is based on the indirect control, on the need for adequate managerial motivation (incentives, commitments) and refers to *characteristics* such as: increasing quality; emphasis on devolution, delegation; orientation towards market principles, contracts achievement, competition, measurement of performance dimensions, control fulfillment.

The introduction of market processes means increasing accountability, efficiency concerning services delivery and attention to consumer satisfaction.

Thus, the managerial principle aim at control and correct the growth adjustment of bureaucracy, without rejecting it;

The second principle emphasizes on the market mechanisms and discipline, it forms into an alternative to a hierarchical structure of bureaucratic model.

Thus, by the various market techniques adopted for the purpose of reconsidering the state bureaucracy, based on the business organizations, move from hierarchical authority to contracts, tender procedures and market discipline.

The use of private sector tools in public administration does not assume removing bureaucracy, but only eliminating some elements of it that prove inopportune or unproductive for public administration.

Also, characteristical for the New Public Management is the separation of the political segment from that of management, politicians having the role of decision-making on major managerial objectives and not that to care about the current operational activities.

An approach in which the emphasis is on the business side of public management, called by Van Helden (1994, 11) "making use of business economics principles"[3], is characterized by improving efficiency and effectiveness in the fulfillment of public service, by using market tools, results-based management, decentralization of responsibility.

For Pollit and Bouckaert (2004, 6)[4], the public management reform ensures the fulfillment of several objectives, whereof:

- saving public expenses;
- increasing the quality of public services;
- increasing the efficiency of governmental actions;
- favorable perspective concerning the effectiveness of the implemented policies.

A number of features of the New Public Management have been identified by specialists, in several ***theories and school of thought of public administration***, as seen below (Gruening, 2001):

Budget cuts - expenditure constraints - necessary in the event of scarce financial resources.

Privatization - rational administrative structures - include the theory of public choice, the neo-Austrian school and the theory of property rights, but also in the field of rational management (Drucker, 1968)[5].

The separation of the provision of services from their production is based on the Ostroms' studies on the model of a polycentric administrative system and Drucker[6].

Contracting highlights aspects of a rational and human resources-oriented management. It has as elements of influence, the economics of transaction costs and the theory of public choice (for example, Niskanen)[7].

Taxes applied to consumers are identified, in the opinions of scientists who have studied the theory of public choice, in the elements of consumer marketing (rational management). In the marketing studies there are aspects related to the client concept, whose elements, such as one-stop shops or management of cases, derive from the organic management and the New Public Administration.

Competition is encountered in the *theory of public choice*. It is the result of organic management models, when it has effects of stimulating and motivating departments within an organization (internal

[1] Emile Kolthoff (2007), pag. 14, Ethics and New Public Management: Empirical Research into the Effects of Businesslike Government on Ethics and Integrity quotes Pollit (1993, 2-3).
[2] Emile Kolthoff (2007), pag. 14, quotes Nesbitt 1976.
[3] Emile Kolthoff (2007), pag. 23, quotes Van Helden, (1994, 11).
[4] Emile Kolthoff 2007, pag. 24 quotes Pollit și Bouckaert (2004, 6).
[5] Gernod Gruening, 2001, pag. 16, Origin and Theoretical Basis of New Public Management quotes Drucker, 1968.
[6] Gernod Gruening, 2001, pag. 16, quotes Ostrom; Drucker.
[7] Gernod Gruening, 2001, pag. 16, quotes Niskanen.

competition). Gives managers, flexibility in management decisions.

The separation of politics from administration is present in the progressive thinking and classical public administration, in political analysis but also in some branches of public management.

Decentralization appears in neoclassical thinking, the theory of public choice, the economics of transaction costs and the New Public Administration and its successors.

Responsibility for obtaining performance, present in the school of classical thought, of public organizations, neoclassical public administration, political analysis, rational public management, but also in techniques for performance measurement and accounting. It may also contain elements of reform in the *financial management and performance auditing*, with a focus on rational public management that takes over elements from the private sector.

Strategic planning and management styles that have undergone changes highlight aspects of bureaucratic and rational public management, the emphasis being on the difference between the transition from bureaucratic management to the rational one and from he rational management to that of human resources. These elements are also found in the principal-agent theory.

Legal budgetary constraints are constitutional formulations of public choice theoreticians (Buchanan)[8].

Improved regulation is found in the theory of property rights and the theory of public election regulation (especially, Stigler, 1971 and the Chicago school)[9].

The rationalization of jurisdictions and the streamline of administrative structures can be found in classical administrative theory and progressive thinking, and will be used by followers of neoclassical theory, political analysis and rational public management.

Democratization and increased citizen participation are identified in the New Public Administration and its subsequent approaches.

The OECD Report (OECD, 1998)[10] points out the following ***features*** of the New Public Management:

- *Focus on results* translated by: efficiency and effectiveness in delivering quality services and obtaining real benefits by users;
- *Decentralized management*, whereby to ensure a correspondence between authority and responsibility, wherewith the allocation of resources and the provision of services to be achieved closer to the delivery point;
- *Greater customer orientation*, meeting preferences by forming a competitive framework between the public sector and the private sector;
- *Greater possibilities for cost efficiency* in the delivery of public services and public regulations, use of market techniques (for example: user fees, vouchers, sale of property rights);
- *Responsibility for achieving results* and risks-taking, through risk management.

Calogero M. (2010) groups a number of ***essential features*** of the New Public Management, into three important classes (Osborne and Gaebler, 1993, p. 277)[11]:

- Restoring the borders between the state and the market through privatization and outsourcing.
- Restructuring the public sector, at macro level, by delegating state functions to lower organizational levels (also called institutional decentralization).
- Restatement of the operational rules by which the public sector exercises its functions and achieves the proposed purpose. This side, in turn, includes other elements:
  - making relations between the public sector and the private sector, more concrete, through formal privatization, respectively, the transformation of the state economic bodies into joint-stock companies.
  - functioning of public administration activities, based on some market techniques;
  - competition within the public sector;
  - devolution of functions and competencies from the central level, to the lower organizational levels, within each entity in the public sector (internal decentralization);
  - reforming public administration, by the transition from the traditional bureaucratic model (with formal structure) to the managerial one which requires the efficient administration of public resources (Matei, 2009b, p. 146)[12];
  - deregulation of the functioning of economic and social systems;
  - re-defining the roles and rights of citizens.

The New Public Management transfers the emphasis on traditional public administration to public management (Larbi, G. A., 1999)[13], determining the orientation towards managerialism. Thus, the old form of public organization and provision of public services, based on bureaucratic principles, planning, centralization, direct control and autonomy, is replaced by a market-oriented public service management.

[8] Gernod Gruening, 2001, pag. 17 quotes Buchanan.

[9] Gruening Gernod, 2001, pag. 17, quotes Stigler, 1971 și școala Chicago.

[10] Moraru I.Marilena Ortansa (2012), pag. 116, *New Public Management Elements in Romania's Public Services in the European Context,* 2012; Annals of Faculty of Economics, 2012, vol. 1, issue 2, 115-120, quotes OECD Report, 1998.

[11] Calogero M., 2010, pag. 33, *The Introduction of New Public Management Principles in the Italian Public Sector,* quotes Osborne și Gaebler, 1993, p. 277.

[12] Calogero M., 2010, pag. 33, quotes Matei, 2009b , p. 146.

[13] Moraru I. Marilena Ortansa (2012), pag. 116, *New Public Management Elements in Romania's Public Services in the European Context,* 2012; Annals of Faculty of Economics, 2012, vol. 1, issue 2, 115-120, quotes Larbi, G. A., 1999.

3. Directions of action of the New Public Management

The New Public Management can be considered as an overall change, oriented towards convergence, towards new modes of governance, in a limited variety, in each model, the component variables interacting, respectively (Calogero, 2010):

- specific components that are found in each model, having a certain order of priorities;
- speed of reform propagation;
- the internal and external environment that determines the conditions for achieving the modernization process;
- the form of approach chosen for each model.

According to H. Wollmann[14], the orientation is towards giving up the Weberian approach of the organization of public administration, considered rigid and the implementation of the rules of managerial reform (Świrska, 2014).

The New Public Management paradigm suggests reducing the size of the government and its role, removing bureaucracy, decentralization, privatization, adopting market principles in public service delivery, emphasis on accountability and performance. There are principles that oppose the characteristics of traditional administration regarding the conditions of employment and promotion, their indeterminate nature, excessive bureaucracy, traditional form of accountability, unfavorable elements for achieving performance (Hughes, 2003)[15].

The implementation of the reforms of the New Public Management is supported by a series of practices, expression and consequence of its characteristics, as they were signaled and argued in a series of works of some authors.

➢ The main directions of the New Public Management resulting from managerialism are decentralization, deconcentration and reconsideration of the size of public services (Mellon, 1993; Hood, 1991, Ferlie et. al., 1996)[16]

In the context of decentralization, the tendency to eliminate bureaucracy in the provision of public services (Ingraham, 1996: 255)[17] leads to increase in managerial and economic-financial autonomy.

Among the elements that belong to decentralization, related to the New Public Management, are important (Androniceanu, 2007):

- *Reconsideration of traditional public bureaucracies* of large dimensions, in the form of executive agencies (Pollit, 1994; Pollit and Summa, 1997; Kanter, 1989)[18]. This involves managerial autonomy and skills in developing some contractual relationships with central departments and other agencies, outside the traditional hierarchy. Thus, this create a move away of governement, from public services, as well as a flexibility in the exercise of human resource allocation management and an increase of responsibility in achieving results.
- *Budgeting and financial control* involves the creation of executive agencies, respectively, budget centers or payment units. Managers have the freedom to manage income freely and the responsibility to control their achievement (Kaul, 1997; Walsh, 1995)[19].
- *Organizational division* refers to the replacement of vertically integrated hierarchies with flat organizational structures, considered efficient (Ferlie et. al., 1996; Pollit, 1994)[20].
- *The reorganization* allow for a decentralized public management, through reorganization, rationalization and restructuring of the public sector, so that public services ensure an increase in the degree of satisfaction of customer requirements, from the perspective of quality, price.
- *Distinction between the processes of services fulfillment and that of their delivery ones*. It consists in the delimitation the production of public services - in which the direct supplier intervenes - and the payment of their supply system, through the intermediate provider.

➢ According to the opinions of Dunleavy et al. (2006)[21], the New Public Management *reform directions* emphasize disaggregation, competition, performance stimulation. In this context, Lane (2000)[22] insists on the form of *contracting*, different from the one practiced in the traditional administration. Contracts are short-term, their objectives are in line with market activity, favour the competition and market

[14]Anna Świrska, 2014, pag. 151, *Performance-Based Budget as an Element of New Public Management in the Public Finance System in Poland* quotes H. Wollmann, *Local government reforms in Great Britain, Sweden, Germany and France: Between multi-function and single-purpose organizations, Local Government Studies* 2004, t. 30, no. 4/2004, pp. 639-665.

[15] Nazmul Ahsan Kalimullah, Kabir M. Ashraf Alam, M. M. Ashaduzzaman Nour (2012), p. 10, *New Public Management: Emergence and Principles* quotes Hughes, 2003.

[16] Armenia Androniceanu (2007), p. 157 *New Public Management, a Key Paradigm for Reforming Public Management in Romanian Administration* quotes Mellon, 1993; Hood, 1991, Ferlie et. al., 1996.

[17] Armenia Androniceanu (2007), p. 157 quotes Ingraham, 1996:255.

[18] Armenia Androniceanu (2007), p. 157 quotes Pollit, 1994; Pollit and Summa, 1997; Kanter, 1989.

[19] Androniceanu Armenia (2007), p.158 quotes Kaul, 1997; Walsh, 1995.

[20] Androniceanu Armenia (2007), p.158 quotes Ferlie et. al., 1996; Pollit, 1994.

[21] Dunleavy and colab. (2006) quoted in *Noul Management Public – Premize,* https://www.scritub.com/management/Noul-Management-Public-Premise3274217.php.

[22] Lane (2000) quoted in *Noul Management Public – Premize,* https://www.scritub.com/management/Noul-Management-Public-Premise3274217.php.

mechanisms penetration, a situation distinct from that of the public sector, where contracts are long-term.

➢ Hood (1991)[23] indicates seven *directions of action*, in the implementation of the New Public Management reform.

− ***Professional management*** In the exercise of their activity, the attributions of the managers are distinct from those of the civil servants.

Managers:

− have the authority in decision-making and responsibility for results achievement;

− are invested in function, by the authorities, ensuring the achievement of a managerial program, with objectives and indicators;

− are accountable to the authority that appointed them and ensure the transparent nature of information to citizens, in order to carry out policies.

Civil servants - exercise their function, but they cannot have opinions or decision-making power for the policies they promote.

− ***Establishment of some performance indicators, with clear standards***. The indicators refer to the implementation of programs and the measurement of results, taking into account of standards that establish the minimum or maximum levels to be obtained.

− ***Control of results***, ***foremost and less of procedures***. Agencies can decide on the budget and human resources, with an emphasis on measuring results.

− ***Dismantling the public service and creating specialized agencies*** It refers to the fragmentation of some large departments within the ministries, into small dimensions agencies:

− have leading autonomy, having their own budget within the department;

− may have contractual relations with the hierarchical authority, in the delivery of services.

➢ According to the OECD Report (2002)[24], under contractual relations with the guardianship authority, their accountability is contractual and not administrative.

− ***Introducing competition in the public sector*** Under the conditions of specialized agencies and skilled labor, contracting favours competition achievement, as the government can select the most cost-effective options. Competitions between agencies concerning service delivery and, also, on the labor market, in employee promotion are stimulated. Thus, the market forces regulate the quality, quantity and price of services offered, based on competition.

− ***Management arrangements specific to private management*** Involves the practice, in the classical administration, of organization activities of work, according to the methods of the private sector: negotiating employment contracts, at hiring staff, evaluating results, as well as remuneration depending on performance.

− ***Saving the use of resources*** The optimal use of resources implies the orientation towards the fulfillment of the objectives, so that the expenses to be motivated by the benefits brought.

➢ Other ways of reform, through the New Public Management, according to the OECD Report (1993)[25]:

− Dissociation, fragmentation of authority and responsibility at the local level, as a result of decentralization; the advantages lie in the possibility of reducing expenses, of a better knowledge of citizens' requirements and, respectively, setting targets, dependent on their preferences.

− Privatization of large public enterprises (national companies, autonomous companies), to increase the efficiency of their activity.

➢ Other authors have grouped the directions of action of the New Public Management, in categories of functions, as presented in the table below (Table 1):

Table 1 Grouping, by functions, the directions of action of the New Public Management

Function	Directions for action
Strategic	⇒ Management of results ⇒ Strategic planning ⇒ Privatization of public enterprises, outsourcing of activities ⇒ Achievement of public-private partnerships ⇒ Implementation the separation of political function from the administrative ones ⇒ Deconcentration/decentralization ⇒ Use of information and communication technology ⇒ Removal of bureaucracy
Finance	⇒ Deficit reduction ⇒ Budgeting based on programs

[23] Hood (1991) quted in *Noul Management Public – Premize*, https://www.scritub.com/management/Noul-Management-Public-Premise3274217.php.

[24] Raportul OECD (2002), quoted in *Noul Management Public – Premize*, https://www.scritub.com/management/Noul-Management-Public-Premise3274217.php.

[25] Raportul OECD (1993) quoted in *Noul Management Public – Premize*, https://www.scritub.com/management/Noul-Management-Public-Premise3274217.php.

	⇒ Greater transparency in accounting
Marketing	⇒ Marketing development, in the public sector (markets, polls, consultations) ⇒ Use of information and communication technology
Human resources	⇒ Reducing staff ⇒ Accountability, but also the motivation of officials ⇒ Increasing participation, through employee initiatives

Source: Amar Anne and Berthier Ludovic (2007), p. 4, "Le Nouveau Management Public: Avantages et Limites (The New Public Management: Advantages and Limits)", *Gestion et Management Publics*, vol.5, Décembre quotes Laufer et Burlaud, 1980 ; Hood, 1991 ; Pollitt et Bouckaert, 2000 ; Gruening, 2001.

The diagram above shows that the New Public Management is transdisciplinary, manifesting itself, simultaneously, through the four functions (strategic, finance, marketing and human resources).

The process of the New Public Management determines the state to decide on the role and missions it has, respectively, those that it has to ensure, directly, those that can be delegated or transferred to private agencies or enterprises, as well as those that can be organized in partnership with the private sector (Amar & Berthier, 2007).

4. Conclusions

The new current of thinking meant a new form of approach to administration and public management, an attempt to change and move from the bureaucratic traditions, of hierarchical organization, to fostering of new practices of management, adapted to the requirements of the market economy, with an emphasis on competition, delegation, performance.

There is, thus, a shift in the operating methods of public sector organizations; another form of relationship among government, public service and citizen is created.

The formula of the New Public Management suggests the reduction of the dimension of government and its role, removing bureaucracy, the decentralization, privatization, the adoption of market principles in public service delivery, emphasis on responsibility and performance (Kalimullah, Ashraf, Nour, 2012).

The purpose of the changes is for the methods and techniques adopted, to generate the reform of public sector organizations, increase their competitiveness and efficiency, in the use of resources and the provision of services. (Katsamunska, 2012)

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THE LABOR MARKET DURING THE MEDICAL CRISIS

Carmen RADU[*]
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Abstract

This article aims to analyze the current situation in the light of the way of managing human resources under crisis conditions, on the one hand, and of the way of adapting labor resources to the new conditions, on the other hand.

The national and European welfare depends on the way people adapt themselves or are helped to adapt to the economic and social environment imposed by the new living conditions. We find ourselves in the midst of a crisis imposed by the pandemic that broke out in December 2019 and unfortunately, far from being resolved too soon, given the emergence of new mutations of the virus. Given this socio-economic situation, we intend to sum-up the way in which human resources have been affected and changed and how they have succeeded or not in adapting to the new working conditions.

We will consider the analysis of the evolution of the government policies on the wage system, the conditions of compensation during the non-working period, the health system and the way the reforms in industry, education and health are taken over.

Keywords: *human resource management, structural reform, health system, social security, public policies.*

1. Introduction

The health crisis caused by the COVID-19 pandemic and the impact suffered by a sudden and almost generalized deterioration of the macroeconomic context and the business environment, have severely[1] affected the extremely fragile balance of the global labor market. It can be said that the enablers of supply and demand of labor have undergone unexpected mutations and transformations.

Abolition of global value added chains, total or partial closure of international trade flows and borders, temporary bans on economic activity in most sectors, hygiene and social distancing rules, restriction of the right to leave home, except in well-defined situations, bans on leaving localities and in some cases even quarantine of localities, punctual opening of air and ground transportation lanes for seasonal work and offers that sometimes came unexpectedly from EU Member States, etc. are just some of the factors with significant influences.

These factors have affected, especially in Romania, all members of the society, not only those active with legal forms on the labor market or operating in a "gray" area of it, but also important segments of the population dependent on them.

The Romanian labor market which is not limited only to the processes specific to employee turnover, has also particular features, in addition to the general features of market employment condition. The peculiarities lie, on the one hand, in the structure of the economy and, on the other hand, in the level of its development. In this background, two important aspects emerge, respectively:

- high share of unpaid activities, directly on a contractual basis, respectively of family workers
- high share of wage labor without written and registered labor contracts, namely informal and untaxed wage labor.

Statistics show that these categories of employed persons, along with self-employed workers, are the categories most vulnerable to the crisis, but also the categories often neglected in public strategies and policies to mitigate the effects of the health crisis. In what concerns social services, the opinions expressed by Robert Palacios and David Robalino can also be take into account and by analyzing the ways to reduce labor market distortions[2], who argue that the integration of the social benefits and social services systems is becoming more important given future characteristics of labor market, where jobs will be maintained by requiring a low level of qualification and even subsistence.

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[2] Palacios Robert J., Robalino David A., Integrating Social Insurance and Social Assistance Programs for the FutureWorld of Labor, IZA Discussion Paper No. 13258, May 2020, p. 31.

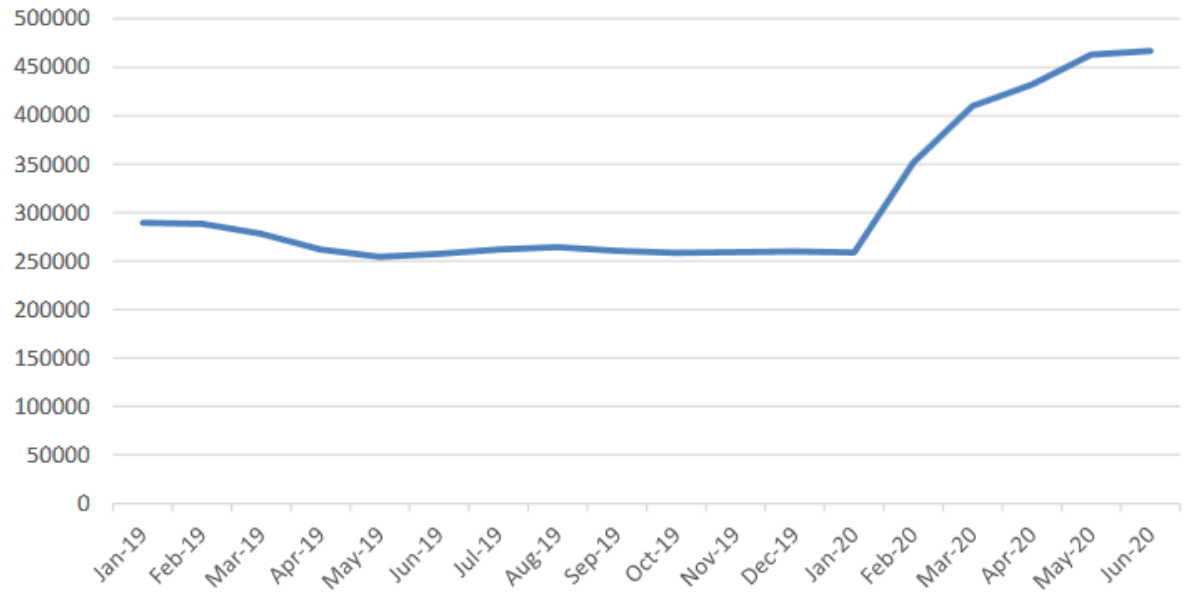
2. The reaction of international bodies and national governments to health crisis. The first lockdown (February – May 2020)

A study of the International Labor Organization shows that concerns are mounting about the disproportionate impacts of COVID-19 on more vulnerable groups, persons with informal jobs, those[3] in occupations and industries most affected. Furthermore, it should also be noted that the classic form of employment, respectively wage labor within companies, entails a variety and complexity that require appropriate approaches to each category.

Furthermore[4], recent conclusions of the European Commission on the impact of Covid19 on the labor market highlight a series of aspects that could also be identified in Romania. Among these, we mention that the following are important from the perspective of future developments on the Romanian labor market:

- it is difficult to make long-term forecasts, especially in terms of adverse externalities on the labor market, due to the fact that the prolongation of the pandemic will exacerbate the shortage of the medical staff;
- the already precarious employment will be increased, especially for the areas of activity with high risk of labor contagion. On the other hand, the space for promoting policies to mitigate adverse effects will be narrowed, especially due to insufficient financial resources.

Chart 1: The evolution of the unemployment index in Romania – January 2019 – June 2020



Source: https://ro.gigroup.com/wp-content/uploads/sites/12/2020/09/Impactul-Covid-19-pe-piata-muncii.pdf

As we can see in the previous chart, if in January 2019 the number of unemployed was less than 300,000 persons, representing 3.32%, it can be ascertained that in June 2020, the number of unemployed increased substantially under the pandemic conditions, by reaching almost 500,000, respectively a percentage of 5.2%.

Throughout 2019, the increase of the unemployment is almost linear, starting from January 2020, a steep increase is recorded in January – March.

Two important aspects[5] are highlighted by the European Commission in this stage analysis, namely: on the one hand, the risk of increasing development/relaunch divergences between Member States if national policy responses are not sufficiently coordinated or if there is no strong common response at EU level, respectively an incomplete recovery in one country would spread to all the other countries and would die out the regional economic crisis; on the other hand, the pandemic period could trigger more drastic and lasting changes in global value chains and international cooperation, which would adversely affect the labor market especially of open economies, less developed and heavily dependent on the international trade, such as Romania.

[3] International Labor Organization, Essential labour force survey content and treatment of special groups, ILOSTAT, 30 April 2020, p. 3.

[4] The Romanian Academy – Department of Economic, Legal and Sociological Sciences, Institute of National Economy - Efectele pandemiei Sars Cov 2 asupra ocupării. Rolul politicilor publice și reziliența pieței muncii în contextul adaptării mediului de Afaceri. Coordinator: ValentinaVasile Collective work of authors: Cristina Boboc, Simona Ghiță, Simona Apostu, Florin Marius Pavelescu, Raluca Mazilescu, Bucharest, May 2020.

[5] Dorine Boumans, Sebastian Link and Stefan Sauer 2020 -COVID-19: The World Economy Needs a Lifeline –But Which One? (EconPol Europe, ifo Institute), https://www.econpol.eu/publications/policy_brief_27.

Table 1 Worldwide impact of health crisis on areas of activity

IMPACT	low	medium - low	medium	medium - high	high
ACTIVITIES	health and social services	agriculture	constructions	art and entertainment	accommodation and food services
	education	breeding	financial activities	recreational activities	real estate and commercial activities
	public administration and defense	fishing	insurances	transport	manufacturing and retail trade
	public services	forestry	mining	communications	means of transport repairs

Source: Organizaţia mondială a muncii, apud – https://ro.gigroup.com/wp-content/uploads/sites/12/2020/09/Impactul-Covid-19-pe-piata-muncii.pdf

According to the International Labor Organization (ILO)[6], the isolation measures that were to be adopted as a result of the emergence of Covid-19 already affected almost 81% of the global labor force, respectively 2,700 mio workers. Notwithstanding, the impact varies greatly depending on different sectors of activity. If we take a look at the report prepared by the International Labor Organization (ILO), the impact of Covid-19 crisis is estimated to be low in the sectors of health, public administration and defense, education and public services; low – medium in agriculture, breeding, fishing and forestry; and medium-high in constructions, finance and insurance activities, as well as in mining. On the contrary, the sectors where the impact will have a high level will be those in connection with arts, entertainment, recreation and transport; while the sectors that will see dramatic declines will be those that include accommodation and food services; real estate activities, administrative and commercial activities; manufacturing industries, retail trade, as well as those dedicated to vehicle repair.

In general terms, this crisis has shown us the importance of the digital transformation and the actual need of all those companies that have not started the digitization processes to start them as soon as possible. The labor world is immersed in a process of irreparable change where the experts of digital marketing, online training, data analysis or experts in cybersecurity and in various areas of health can find a wide range of possibilities. For many others, the time to reinvent themselves has come. In fact, according to the competence forecasts of the European Center for the Development of Vocational Training, in sectors with medium-high and high impact of the coronavirus on the economic activity, between one fifth and a quarter of new jobs expected to be created until 2030 bear the risk of being automated.

According to the data of the International Labor Organization Observatory, young people have been more affected by COVID-19 crisis, by suffering its consequences in several areas: the interruption of the educational or vocational training program, due to the loss of jobs and, consequently, of income and greater difficulties in finding a job. Specifically, as reflected in ILO statistics, a total of 178 mio of young workers worldwide, in proportion, more than four out of ten young people employed worldwide, have worked in the sectors most affected by the crisis. On the other hand, both technical and vocational education and on-the-job training have been severely affected, especially in what concerns younger population. According to a recent joint survey conducted by ILO, UNESCO and the World Bank, approximately 98% of the technical and vocational training centers have partially or completely closed their centers. Although there are some programs that have been able to continue online, there are many others that, either due to lack of resources or impossibility, given the high practical content, it has not been possible to continue their work. A new global survey conducted by ILO together with several partners of the Global Initiative on Decent Jobs for Youth, shows that more than one in six young people interviewed have stopped working due to the employment crisis caused by COVID-19. For youths who kept their jobs, their working hours decreased by 23%.

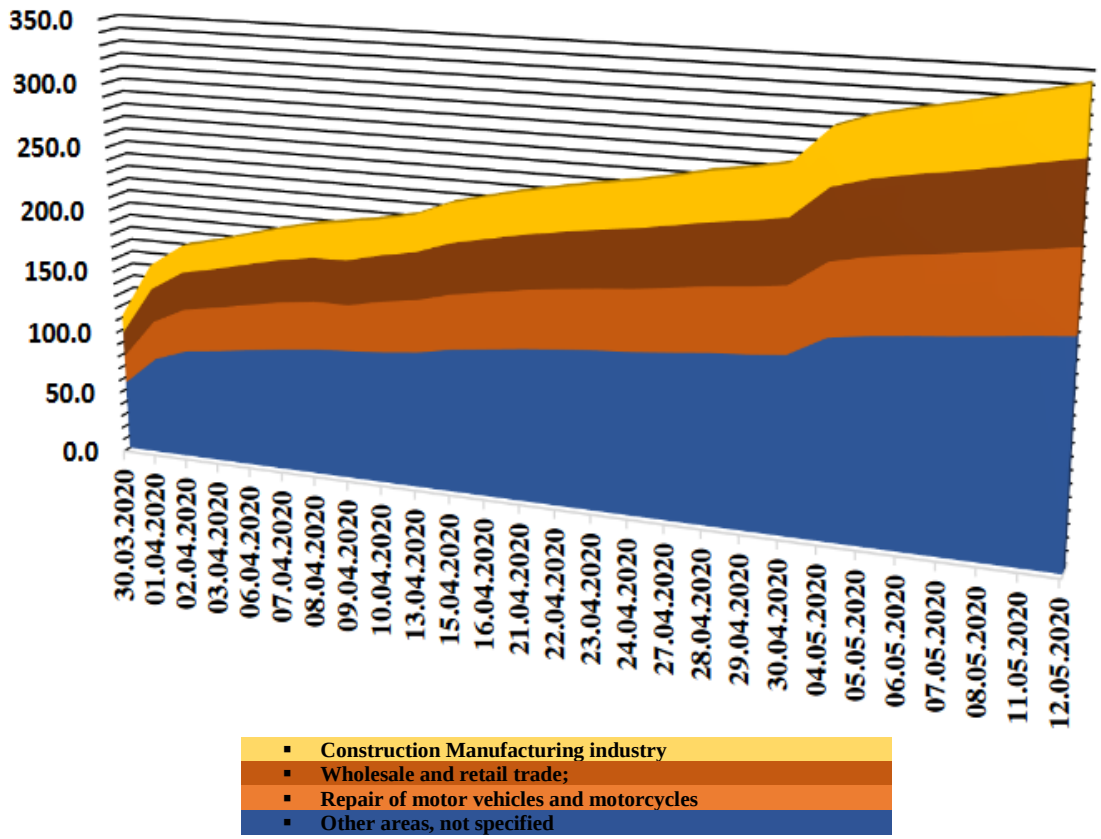
The organizations and professionals face constant changes that require new ways of thinking and acting. In an ever-changing future, the agility seems to be the key to success. But it is important to wonder what agility means for a company? It is not enough to use certain agile techniques or methodologies, the real confrontation goes much further: it entails giving continuous value to the customer, in addition to empowering people to work more collaboratively, efficiently and in a more stable environment. Placing people at the center, making them real managers of change. This implies the need to change the way of

[6] https://ro.gigroup.com/wp-content/uploads/sites/12/2020/09/Impactul-Covid-19-pe-piata-muncii.pdf

thinking within corporate culture. In this background, temporary work companies and service outsourcing companies are real drivers of the economy, as they facilitate the flexibility needed by the organizations which have seen their scenario changed overnight.

According to the analysis performed by ILO, at the international level, the most affected activities were accommodation and food services, while according to the analysis performed by the Ministry of Labor and Social Protection[7], the most affected activities in Romania, between March – May 2020 were construction and manufacturing.

Chart 2: The distribution of terminated labor contracts per sectors of activity, in Romania 30.03.2020 – 12.05.2020 thousands of employment contracts



Source: https://mpra.ub.uni-muenchen.de/101676/1/MPRA_paper_101676.pdf

3. National measures to control and prevent the effects of the pandemic

All the states of the world[8], followed quickly enough by Romania, adopted budgetary, political and liquidity measures to increase the capacity to respond the adverse effects entailed by the pandemic. The main concern was to keep the income of the population at a certain threshold that would not allow a drastic decrease in living standards.

By means of Law Decree no. 18/2020, Italy approved social depreciation measures to compensate income reduced as a result of the downturn in economic activity.

Germany launches the largest package of economic recovery measures, aimed mainly at supporting enterprises. Furthermore, a separate aid fund has also been set up for medium-sized enterprises and self-employed workers.

In Belgium, self-employed workers who can demonstrate that their activity was affected during the pandemic by having their income reduced, they can claim a reduction of the taxes to be paid and can benefit from payment deferral or exemption of social security contributions.

In the US, the aid program includes funds for households, loans for SMEs and large companies. Obviously, in addition to these, substantial funds have been allocated in the health sector. Furthermore, the amount of $ 1,200 was granted to each person earning

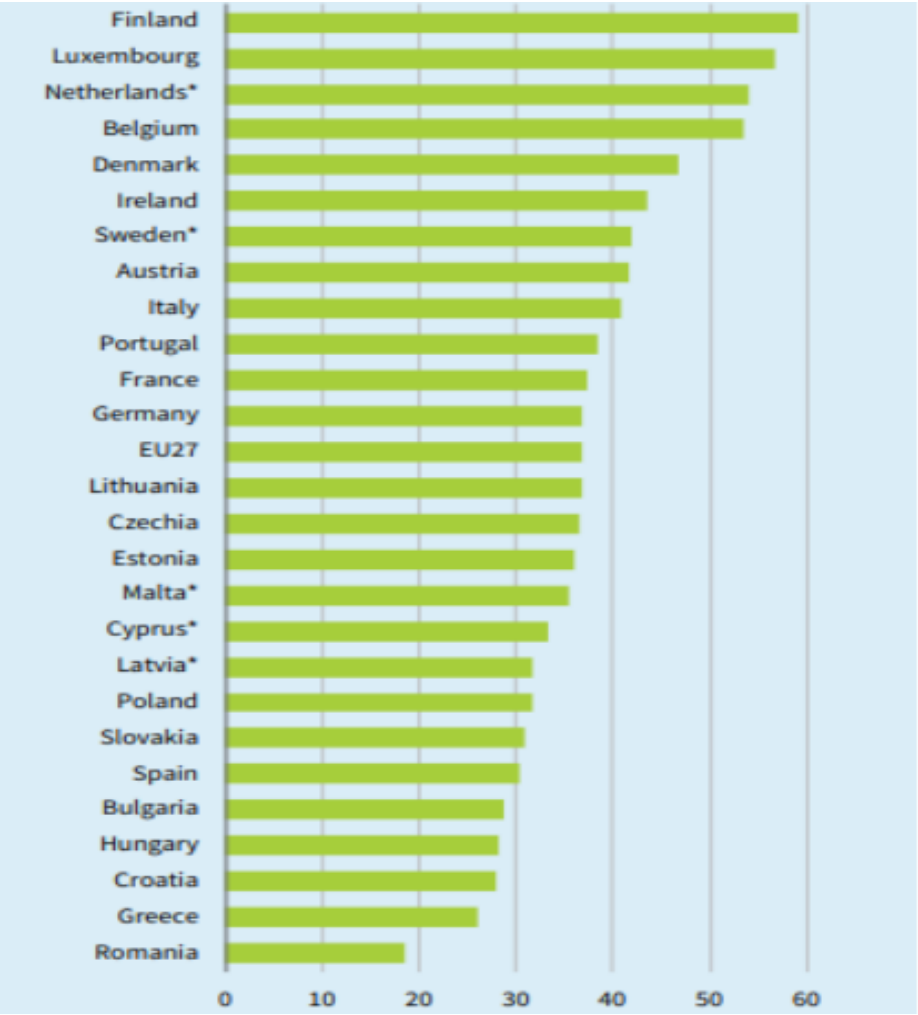
[7] http://mmuncii.ro/j33/index.php/ro/comunicare/comunicate-de-presa/5951-situatia-contractelor-individuale-de-munca-suspendate-incetate,-la-data-de-20-mai-2020.

[8] Labor market vulnerabilities under the COVID-19 impact in Romania, Luminița Chivu and George Georgescu June 2020 MPRA Munich Personal ReEcArchive.

less than $ 7,500 per year. Unemployment benefits are increased by $ 600 per week. In France, 100% of the technical unemployment benefits are paid by the state, and payments for social security contributions and taxes were deferred from payment.

In Spain, a guaranteed minimum income is introduced to compensate for lost income.

Chart 3: Proportion of workers who started teleworking as a result of Covid – 19 by country (%)



Source: https://www.eurofound.europa.eu/publications/report/2020/living-working-and-covid-19

In our country, the way to support technical unemployment both for employees with labor contracts and for liberal professions and self-employed persons was established by means of GEO 30/2020. Furthermore, certain monthly expenses were rescheduled/deferred, mainly those for utilities, such as reduction/cancellation/exemption of budgetary obligations. The Government has adopted the measure of granting tax breaks for those who pay taxes within a certain period of time.

Globally speaking, in relation to the number of active employees on March 30th, 2020, namely 5,569.6 thousand persons, between March 30th, 2020 and up to date, under the impact of the crisis, there is a dramatic increase in the number of terminated and suspended labor contracts. As we have already pointed out, areas such as manufacturing, wholesale and retail trade, construction, vehicle repair and hospitality industry are constantly among the activities with the greatest number of suspended labor contracts, with all the activities related to them both upstream and downstream. Those who have gone into unemployment are constantly suffering from serious financial insecurity, thus entailing increased social protection measures[9].

In Romania, there are 1.5 mio employees without labor contracts. Many of them work either for natural persons or carry out daily work. This category also includes work under the table, undeclared and untaxed work. The lack of labor contracts means that these persons cannot benefit from technical unemployment. In 2017, in Romania, there were 7 million persons at risk of poverty and social exclusion, but after the impact of the pandemic their number increased

[9] Eurofound, Living, working and COVID-19 First findings, April2020.

dramatically. Among those affected, the largest share is represented by young people aged between 25 and 49, namely exactly those who could work. An alternative to the termination or suspension of the labor contracts is represented by the work from home or telework.

Work from home[10], long considered an advantage in the benefit packages of top employees, is starting to gain ground within more and more companies the business of which allows this. But for the employees who, due to the specific of business, cannot work remotely, the impact of the pandemic has added an excess of stress due to health risks. On the other hand, the work from home brings into question the impact on labor productivity, from the perspective of the employer, respectively on the employees' motivation and general well-being. Furthermore, even those who have benefited from this possibility have considered that, over time, labor productivity decreases substantially. On the other hand, the work from home raises a series of challenges.

Eurofound Report "Living, working and Covid – 19" published in April 2020 states that 37% of human resources in the European Union worked from home during the period with the most drastic restrictions in the health crisis (chart 3). On this background, Romania had a percentage of 30% activity from home – below the European average, being very far from the leaders of work from home (Nordic countries – 60% and Germany, France or Italy). This fact indicates that Romania is not well prepared entering the digital era.

Table 2 Flexible working hours and supportive work from home for parents

How will you properly manage workforce planning to continue work during the pandemic[11]?	By flexible working hours and/or work from home	79 %
	By granting leave to less busy employees during this period	38 %
	By alternative leave of employees with children	25 %
	By communicating in advance, for a longer period, the days of leave to be requested by employees	21 %
	By financial incentives to remain totally and / or partially in activity	11 %

Source: https://www.pwc.ro/en/PeopleandOrganisation/Raport-HR-Barometru_Martie-2020.pdf

Along with this, the closure of schools and the relocation of classes into the online environment has added extra emotional and logistics pressure for employees in families with children. The work-family balance was strongly marked by the most common form of challenge, working from home. For employees without children, the lack of social interaction, imposed by the telework, represented the second common challenge. The employers consider and try to compensate for the psychological effects of work transformation by moments of online socialization, well-being and mindfulness programs. Obviously, the great fear of employees is related to the decrease of income due to the severe economic downturn. As the entertainment related fields and HoReCa field substantially reduced the activity and the number of employees, production, logistics and retail jobs began to expand. However, it is wrong to look at the labor market only from the perspective of big cities. For large companies, the process of transferring activities in the digital area is one of the strategic objectives in banks, financial services, FMGC (Fast Moving Consumer Goods), logistics. For these, the location in areas close to the cities but affected by the lack of staff, the pandemic can add extra opportunity by the possibility of getting out of the localization bubble and widening the pool of candidates, already over-requested in big cities. Therefore, companies can expand their recruitment area in small and medium-sized cities. Companies such as IT, BPO or call-center can hire candidates located outside their usual area. Therefore, for employees in small urban area, there may be the opportunity to access large companies, for which it was necessary to change their address to big cities.

At the same time, small and medium-sized companies, the financial flows and domestic processes of which are not as organized as in case of large companies, try to survive by having the advantage of flexibility, but the disadvantage of the employees' lack of experience adds extra pressure on existing employees. In rural areas, the pandemic has rather generated modifications in the field of logistics, due to the need to change transport flows to and from work. The changes in the workflows of companies, caused by digitalization, which is often forced, along with the emotional pressure of health risks already have a strong impact on employees' motivation. On this background, many people working in a certain field are seriously considering changing jobs after a year of pandemic.

[10] Market study conducted by Happy Recruiter.com through Dora, the recruitment robot, on a national sample of over 2300 persons.

[11] HR Barometru – PwC Study (March 23rd -26th 2020), based on data from 91 companies in Romania. The scope was to provide up-to-date data on the impact of COVID-19 virus on human resource management policies.

4. Conclusions

A peculiarity of Eastern European countries, including Romania, is represented by the massive influx of emigrants returning to their countries of origin.

After the outbreak of the pandemic and up to date, workers who went to work in Western countries tend to return home. The austerity measures imposed in developed European countries discourage the desire of those working in the respective countries. In Romania alone, over one million people returned in the first months of 2020[12]. Many of these persons return permanently, not wanting to leave for a long time. If the Romanian authorities succeeded in managing this wave of unemployed people, by directing them to the labor market, we could reduce quantitative and qualitative gaps in human resources. The sectors that require less skilled labor force, such as agriculture or food industry, could absorb the exodus of migrants. Otherwise, there will be great tensions on the labor market with severe economic and social impact.

Alongside these issues, the existing employees faced the obligation to comply with hygiene measures and social distancing, change of work regime (telework) and worst of all, termination or suspension of a large number of individual labor contracts.

In Romania, in addition to the affected employees, the labor market faces three more categories of issues:

- the high share of activities which are not directly paid, namely family workers;
- high share of wage labor without registered labor contracts, namely informal and untaxed wage labor;
- self-employed workers.

These categories severely affected by the crisis, are often neglected by public strategies and policies within human resources.

The persons who have gone to work abroad and returned to the country along with disadvantaged persons are categories extremely exposed to the current crisis. Furthermore, in Romania, as in case of other East-European states, low-skilled persons are not found in state aid schemes. This shock on the labor market will cause resonance waves in all sectors of the national economy. Romania is threatened by the decrease of the country rating granted by the international agencies. A potential transition to the junk category (not recommended for investments) would lead to a sudden and significant increase in the costs of financing the budget deficit and refinancing public debt.

Notwithstanding, according to the study of the Romanian Academy from the first part of the health crisis called „Punct de vedere: România în și după pandemie" (Point of view: Romania in and after the pandemic), considers a series of economic and social recovery measures[13]. These measures focus mainly on the following issues:

- reconsideration of the economic and social role of the state and of the public-private partnership. During the pandemic, it has been demonstrated that the appropriate government intervention can mitigate the adverse effects of the crisis;
- mindful investigation of the issued related to population migration and alarming decrease in the number of jobs in certain geographical areas;
- ensuring the necessary premises for the relaunch of the economy starting with the improvement of the population health condition;
- mindful capitalization of all opportunities granted by the European Union for the economic and social development of the country in the medium and long term;
- commissioning of the national strategy for sustainable development by 2030 starting from the reduction of social inequity and extreme poverty;
- set up a governmental commission for the analysis of the way of managing the bank capital, intended to cover the interest rate, the facilities for the grace period and the repayment of loans, interest subsidy, etc.

These measures emerge on the background of an optimistic situation expected by the European Commission which, in 2020-2021 winter economic forecasts[14] published on 11.02.2021, projects the following:

- the euro area economy will grow by 3.8% in both 2021 and 2022. The forecast projects that the EU economy will grow by 3.7% in 2021 and 3.9% in 2022;
- the euro area and EU economies are expected to reach their pre-crisis levels of output earlier than anticipated in the Autumn 2020 Economic Forecast, largely because of the stronger than expected growth momentum projected in the second half of 2021 and in 2022.

At the time of documenting this material, the world is facing the third pandemic wave. Notwithstanding, the European Commission considers that, after an economic contraction imposed by measures to limit the spread of the virus, the economic growth is to be resumed in summer and accelerated as national vaccination programs advance. The improvement of the world economy perspectives which comes to support the economic recovery is also expected. The economic impact of the pandemic remains uneven from one EU Member State to another, which means that the pace of recovery also varies significantly. In respect of the above, the European Commission has activated, for the first time, the general derogation clause of the Stability and Growth Pact, as part of its strategy to respond quickly to the epidemic

[12] Luminița Chivu, George Georgescu (coordinators) - Vulnerabilități ale pieței muncii și ocupării în contextul pandemiei Covid-19. Posibile soluții. The Romanian Academy – Department of Economic, Legal and Sociological Sciences, "Costin C. Kirițescu" National Institute for Economic Research.

[13] https://acad.ro/mediaAR/pctVedereAR/2020/d0731-Romania-dupa-pandemie-PunctVedereAR.pdf.

[14] https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/jobs-and-economy-during-coronavirus-pandemic

caused by coronavirus. This measure allows national governments to provide a better support to their own economies, as budgetary regulations have been much relaxed. On this background, on 30.03.2021, the European Commission adopted a communication providing EU Member States with general guidance on budgetary policy for the following period. The derogation clause proposed by the European Union is extended until 2023.

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SECTORAL POLICIES IN THE POST-COVID-19 PERIOD

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Abstract

National economies, but also the global economy as a whole, face major challenges caused primarily by the effects of the corona pandemic, to which are added factors that stimulate destabilizing trends in the value chain in the international economy: a new industrial revolution in the digital age; accentuation of nationalism and, implicitly, of protectionism; the urgent need to protect the natural environment, etc.

In a such unstable economic and social situation, the policies and programs developed and implemented by public authorities are crucial both for economic development and for improving the quality of life.

Public interventions of any kind: in the field of public finances; monetary policy; those aimed at investments; technical and technological progress, etc. will have to consider, on the one hand, the increase of the added value in the productive sectors of the national economy that present comparative advantage and, on the other hand, given equally important, to ensure the material, human, capital resources for this development, simultaneously with the appropriate satisfaction of life needs - food, health, education, services, etc. - of the population.

In this sense, the institutional sectoral structure of the national economy has always been, but especially in the present period, a major importance for policy makers, and sectoral prioritization in public policy interventions is a constant concern of the utmost importance for economic and social resilience of any country.

Keywords: *COVID 19 virus, pandemic, economic challenges, economic policies, economic crisis.*

1. Introduction

In each country, the coronavirus epidemic has highlighted weaknesses, sometimes large, in the economy and social life. The consequences of the spread of Covid-19 have manifested themselves not only in the unprepared health field - both in terms of providing adequate drugs and / or vaccines, but also in equipping medical centers with the necessary equipment - to solve the diseases.

All aspects of economic activity: production, distribution and trade, services, etc. - but also of social life: employment, education, social security, etc. - were affected due to the need to limit physical contacts, lockdown, complete cessation of activities.

The role of public authorities in overcoming the consequences of the health crisis and resuming the upward trend of economic growth is crucial, both for coordinating all activities and actors involved, and as the main participant in financing the planned programs.

Economic policies, both at macro, mezzo and micro level, will focus on two time horizons: one operational, respectively in the short term and the second in the medium and long term. Thus, in operational terms, public authorities will seek to eliminate the consequences of the pandemic, and in the medium and even long term will be developed and implemented strategies, plans and programs that lead to economic growth and social development, in conditions of protection and recovery of the natural environment - in a word, sustainable development.

At the macroeconomic level, a accommodative monetary policy is considered in the first place - such as lower active interest rates for individuals and enterprises, a lower minimum required reserve ratio (RMO), etc. - to stimulate domestic credit and, due to it, consumption and productive activity - the most important factors of economic and social development.

The second fundamental instrument of macroeconomic policy - namely fiscal policy - will play a major role in the post-crisis period. In this sense, the entire fiscal system: legislation, administration, control will have to exert less pressure on taxpayers (but not less vigilant), but at the same time increase the accuracy of the implementation of existing regulations, so as to significantly improve the functions of public finances - allocative and redistributive of public revenues - of the respective system.

Budgetary policy will need to be pro-active, with the main goal comprising two priority areas:

- health protection of the population, support of jobs and incomes of the population, prevention of discrimination and exclusion;
- public investments in priority economic and social infrastructure, through subsidies and other financial instruments addressed to specific economic-social and / or institutional sectors (according to the System of Accounts or National Accounts (SNA) , developed by the United Nations Organization (UN)

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and which presents, for each state, the synthesis of the market economy).

It is necessary to specify the notion of sector. In the general sense, by economic or social sector we mean a specific field of activity, for example in the economy: industry, agriculture, construction, transport, tourism, etc., and in the social sectors: health, education, standard of living, etc.

In SNA, where we find the notion of institutional sector, the state of economic development of a country is described by statistical indicators of economic and / or social nature related to well-specified segments:

- the real economy sector (SQS - Companies and Qvasi-Companies), comprising all resident economic agents that achieve added value through productive activity;
- the "Households" sector, through which are registered both the incomes and the expenses made by all the resident families;
- the "Administration" sector, with its subdivisions "Public Administration" and "Private Administration". Very interesting for the analysis of the economic and financial governance being the incomes, the expenses and, obviously, the balance between them, as well as the modalities of covering a possible negative balance, in fact the public debt;
- the financial sector comprising credit institutions, insurance companies, securities exchanges, non-banking financial institutions, their primary activity consisting in collecting temporarily free cash of economic agents and redistributing them to fund seekers, be they individuals, enterprises or public institutions;
- the "Rest of the World" sector presents the commercial and financial relations of the national economy with private and public non-residents.

2. Public policies dedicated to the economic sectors

Public policies, after conducting a diagnostic analysis of the economic situation, based on both statistical information related to economic and social sectors and those provided by the SNA develop proposals for intervention in specific areas, specifying their goals and priorities for the chosen time horizon.

The sectorial policies constitute the individualization of the objectives included in the macroeconomic policy for each economic-social sector, highlighting the contribution of each field of activity to the fulfillment of the global objectives.

The concretization of the public policy for each economic or social sector takes into account the specificity of each field of activity, its weight in the added value at national level, as well as the technical and technological evolutions that must be accessed and implemented to face the exigencies imposed by the international competitive environment. .

The epidemic caused by coronavirus has spread worldwide, and its consequences have been felt not only in the field of health, but also in all sectors of activity, because limiting the spread of the disease has imposed unprecedented isolation measures. The so-called lockdown involved the complete closure of some activities - such as tourism and restaurants, bars, etc. - or partial, especially in industry, construction, transport, etc., which meant a decrease or even a total decrease in income from wages, with dramatic consequences for many people.

In this situation, public authorities are obliged to adopt measures to remove the consequences of the pandemic and, at the same time, to develop and implement appropriate policies to restore economic and social life to the pre-crisis situation and resume growth in all sectors of the national economy.

The impact of the health crisis on the entire economic and social life is wide, and to measure it with the most acceptable degree of accuracy it is necessary to develop studies based on credible statistical information and address the economic and social sectors that make up the national economy in a state. Thus, according to the specifics of each country, the areas that are subject to sectoral economic policies can be:

- energy - production, distribution and consumption - which can ensure the economic independence of a state;
- industry, with its sub-branches: extractive, machine building and light industry, the food industry, these being the ones that bring the highest net added value;
- constructions, a sector in which a large number of people are employed, many of them having a lower qualification;
- road, rail, sea and air transport, which is a vital sector for the economy of each country;
- services, whose importance is constantly growing, as technology and the adoption of the digital economy;
- agriculture, which provides vital products for the population, etc.

To the policies dedicated to the economic sectors are added the sectorial policies in the social fields: health, education, social protection, etc. which are, especially because of the current crisis, in the attention of all public authorities.

In the post-pandemic period, government authorities - which have a key role both in implementing the so-called resilience program, i.e. to counteract the shocks that the community feels in all aspects of economic and social life and return to the situation before the pandemic, and for elaboration and implementation of the macroeconomic growth policy - faces several challenges:

- rapid technical and technological advance;
- correlating the opening of international commercial markets with investment activity, as well as with labor markets - creating jobs and adjusting their

characteristics to the specifics of their services and locations;

- adapting education systems and programs to the needs of the labor market and to the imperatives of local development;
- stimulating the penetration of information and communication technologies (ICT) in the sphere of production and services, favoring research and development (R&D) activities in all fields;
- the increasing globalization of services and activities of manufacturing industries.

The share of services in the national GDP signifies the structural transformations of the national economy specific to a post-industrial period. Although the net added value resulting from services is lower than in productive activities, the competition between service companies, amplified by the expansion of globalization, determines to a large extent the widespread introduction of ITC, the immediate consequence being the increase of labor productivity.

3. Economic sectors of the national economy

3.1. The influence of the sectoral structure on the economic performance before the pandemic

Analyzing the sectoral structure of national economies, the statistical information provided by the World Bank showed at the end of 2019 - ie before the global health crisis - the preponderance of services, measured as added value in national GDP, but with large differences between countries.

The situation differs from one country to another, but a common denominator can be found between some of them and it usually refers to the level of economic development. The World Bank classifies the countries of the world into four categories, using as a criterion the macroeconomic indicator Gross National Income (GNI) per capita per year[1]:

- Low income economies: GNI / head up to USD 1,036;
- Low to middle income economies: GNI / head over $ 1,036, but less than $ 4,045;
- Upper income economies: GNI / head over USD 1,045, but less than USD 12,535;
- High-income savings: over $ 12,535.

Sectoral structure of economies before the pandemic

	Gross domestic product (GDP)		Agriculture		Industry		Manufacturing		Services, value added	
	$ billions / % in GDP World		% of GDP country		% of GDP country		% of GDP country		% of GDP country	
	2010	2019	2010	2019	2010	2019	2010	2019	2010	2019
World	66113.10	87697.50	4.00	4.00	27.00	28.00	16.00	17.00	63.20	61.20
% in GDP	*100.00*	*100.00*	*4.00*	*4.00*	*27.00*	*28.00*	*16.00*	*17.00*	*63.20*	*61.20*
Low income	390.10	521.30	29.00	23.00	25.00	27.00	8.00	..	39.20	37.70
% in GDP	*0.60*	*0.60*	*29.00*	*23.00*	*25.00*	*27.00*	*8.00*	..	*39.20*	*37.70*
Lower middle income	3930.90	6341.10	17.00	15.00	30.00	27.00	16.00	15.00	47.10	50.60
% in GDP	*5.95*	*7.23*	*17.00*	*15.00*	*30.00*	*27.00*	*16.00*	*15.00*	*47.10*	*50.60*
Upper middle income	16216.90	25817.10	7.00	6.00	37.00	33.00	21.00	20.00	49.70	55.70
% in GDP	*24.53*	*29.44*	*7.00*	*6.00*	*37.00*	*33.00*	*21.00*	*20.00*	*49.70*	*55.70*
High income	45581.20	55045.40	1.00	1.00	24.00	23.00	14.00	14.00	69.00	69.80
% in GDP	*68.94*	*62.77*	*1.00*	*1.00*	*24.00*	*23.00*	*14.00*	*14.00*	*69.00*	*69.80*

Note: According to World Bank definitions, the information in the table refers to:

- GDP at purchaser's prices is the sum of gross value added by all resident producers in the economy plus any product taxes and minus any subsidies not included in the value of the products;
- Agriculture includes cultivation of crops and livestock production, forestry and fishing;
- Industry includes mining, manufacturing (also reported as a separate subgroup), construction, electricity, water, and gas;
- Services include value added in wholesale and retail trade (including hotels and restaurants), transport; government, financial, professional and personal services such as education, health care, and real estate services, imputed bank service charges, import duties etc.;
- Value added (as is defined in the International Standard Industrial Classification (ISIC), revision 3 or 4) is the net output of a sector after adding up all outputs and subtracting intermediate inputs.

Sources: https://databank.worldbank.org/source/world-development-indicators http://www.worldbank.org/

[1] https://blogs.worldbank.org/fr/opendata/nouvelle-classification-des-pays-en-fonction-de-leur-revenu-2020-2021

The table presented above shows the sectoral structure of the national economy depending on the labor productivity that is performed - as a weighted average - in each macrosector. This structure greatly influences the performance of the respective economy - performance measured by the indicator of the share of sectoral GDP in the cumulated GDP at the level of the respective country - but it is also an important instrument of economic policy and strategy.

Developed countries make the most of GDP in the services sector, otherwise politicians have said that these countries have entered a post-industrial period, when many manufacturing activities - which use a larger number of jobs, but they are even more polluting - they have been delegated to corporations in less developed countries.

The middle-income countries - lower or upper - get their macroeconomic added value from productive activities - industry or manufactoring - and in order to recover from the crisis Covid-19 must adopt policies of resilience and relaunch of both sectors with the greatest potential, as well as those considered strategic for the economic and social development of the country.

Although included in these broad economic categories, the behavior of communities is greatly influenced by many other factors, among which with an important share the social and historical ones, including such relations with other countries closer or farther away.

3.2. Sectoral factors of economic growth in high and upper middle income countries

The most important growth factors that developed countries - such as the United States, Western Europe, Japan, and Asian dragons, including China - have introduced into the growth policies they have implemented in the modern era have been, in addition to the accumulation of physical capital, of even greater importance, technical, technological and organizational innovations.

Particular attention was also paid to the possibility of increasing labor productivity, so that a corporate profit rate high enough to allow productive activities to be maintained - in the industrial, construction, transport, energy, etc. sectors. - to face the competition, in the conditions of the salary increase, imperative absolutely necessary to use another lever of macroeconomic growth, respectively the internal consumption.

	Gross domestic product (GDP)		Agriculture		Industry		Manufacturing		Services, value added	
	$ billions / % in GDP World		% of GDP country		% of GDP country		% of GDP country		% of GDP country	
	2010	2019	2010	2019	2010	2019	2010	2019	2010	2019
World	**66113.1**	**87697.5**	**4.0**	**4.0**	**27.0**	**28.0**	**16.0**	**17.0**	**63.2**	**61.2**
United States	14992.1	21374.4	1.0	1.0	19.0	18.0	12.0	11.0	76.2	77.4
China	6087.2	14342.9	9.0	7.0	46.0	39.0	32.0	27.0	44.2	53.9
Germany	3396.4	3845.6	1.0	1.0	27.0	27.0	20.0	19.0	62.3	62.4
United Kingdom	2475.2	2827.1	1.0	1.0	19.0	17.0	10.0	9.0	70.6	71.3
Romania	166.2	250.1	5.0	4.0	38.0	28.0	23.0	17.0	46.4	58.2
Egypt, Arab Rep.	218.9	303.2	13.0	11.0	36.0	36.0	16.0	16.0	46.2	50.5

Sources: https://databank.worldbank.org/source/world-development-indicators

Developed countries, such as the United States, the United Kingdom, Germany and other Western European countries, account for more than 60% of their GDP in the services sector - they are considered to have entered the so-called post-industrial era -, but even this proportion highlights vulnerabilities that were perceived more pronounced in the conditions of the pandemic, which imposed the lockdown and disruption of many commercial networks. Consequently, these states are rethinking their sectoral structure of the economy in order to reduce their dependence on supply, as well as the conditions imposed by relocation, especially to South-East Asia.

United States of America

The reverse of this behavior has been felt in the United States, which is facing a large current account deficit due to imports that significantly exceed exports.

Foreign trade indicators in USA	2015	2016	2017	2018	2019
Imports of goods and services (% in GDP)	15,3	14,6	15,0	15,3	14,7
Exports of goods and services (% in GDP)	12,4	11,9	12,1	12,2	11,7

Sources: https://import-export.societegenerale.fr/fr/fiche-pays, Source : OMC - Organisation Mondiale du Commerce; Banque Mondiale , Janvier 2021

Although the former Trump administration and the current Biden administration have initiated and continue a policy of reducing dependence on productive activities or import consumption - mainly from China, the great competitor to the world leader, but also from other trading partners: Canada, Mexico, European Union - this action is greatly slowed by the sectoral structure of the US economy.

Breakdown of economic activity by sector in USA	**Agriculture**	**Industry**	**Services**
Employment by sector (in% of total employment)	1,3	19,7	79,0
Value added (in% of GDP)	0,9	18,2	77,4
Added value (annual growth in%)	-5,5	1,8	2,1

Sources: https://import-export.societegenerale.fr/fr/fiche-pays , Source: Banque Mondiale , Janvier 2021

The country with the strongest economy in the world has an unbalanced sectoral structure: agriculture, although one of the best in the world, has such a small share in both employment and contribution to GDP that it can not ensure food consumption of the population. Also, the manufacturing industry has been largely relocated to other geographical areas - generally in search of cheap labor - favoring multinationals, but not host states, so that national income does not benefit from an increase in industrial activity in an equivalent proportion.

Growth indicators in the USA	**2018**	**2019**	**2020 (e)**	**2021 (e)**	**2022 (e)**
GDP (annual growth in%, constant price)	3,0	2,2e	-4,3	5,1	2,5
Balance of current transactions (as% of GDP)	-2,2	-2,2	-2,1	-2,1	-2,1

Sources:https://import-export.societegenerale.fr/fr/fiche-pays, Source : FMI - World Economic Outlook Database - Janvier 2021

Consequently, the macroeconomic forecasts for the next two years[2] - note that they are developed at the end of 2020, but in the meantime, the third wave COVID-19 has hit several countries, including the US, which requires their adjustment or, in better case, the lag - maintain a current account deficit and, implicitly, the need to cover it, which negatively affects the upward trend of GDP.

Egypt

By comparison, Egypt, which is in the group of Upper Middle Income countries, has a much larger agricultural sector in terms of national GDP - Egypt has a millennial tradition in this field - but productivity here is low and the population employed in Agriculture is more numerous than in developed countries.

Breakdown of economic activity by sector in Egipt	**Agriculture**	**Industry**	**Services**
Employment by sector (in% of total employment)	23,3	28,2	48,6
Value added (in% of GDP)	11,0	35,6	50,5
Added value (annual growth in%)	3,1	6,4	5,0

Sources: https://import-export.societegenerale.fr/fr/fiche-pays , Source : Banque Mondiale , Janvier 2021

In addition, the manufacturing sector, even in terms of food processing, is heavily dependent on imports[3]. Also, in the field of hydrocarbons, exports have decreased in the last two years, with Egypt's energy balance becoming negative.

Foreign trade indicators in Egypt	**2015**	**2016**	**2017**	**2018**	**2019**
Imports of goods and services (in% of GDP)	21,7	19,9	29,3	29,4	n/a
Exports of goods and services (in% of GDP)	13,2	10,3	15,8	18,9	n/a

Sources: https://import-export.societegenerale.fr/fr/fiche-pays, Source : OMC - Organisation Mondiale du Commerce ; Banque Mondiale , Janvier 2021

[2] World Economic Outlook, October 2020: A Long and Difficult Ascent, October 2020, https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020

[3] https://www.tresor.economie.gouv.fr/Pays/EG/commerce-exterieur-de-l-egypte

Thus, the value of Egyptian exports is constantly lower than that of imports, although the quality of Egyptian products is well appreciated in foreign markets, and exported services, which come mainly from tourism, are appreciated worldwide.

Growth indicators in Egipt	2018	2019	2020 (e)	2021 (e)	2022 (e)
GDP (annual growth in%, constant price)	5,3	5,6e	3,5	2,8	5,5
Current account balance (in% of GDP)	-2,4	-3,6	-3,2	-4,2	-2,9

Sources: https://import-export.societegenerale.fr/fr/fiche-pays, Source : FMI - World Economic Outlook Database - Janvier 2021

Consequently, although the IMF forecasts that the Egyptian economy will show a positive trend in 2020, despite the pandemic, the foreign trade balance will continue to be weak, amid declining exports at a slower pace than declining imports. This situation can be explained also by the sectoral structure of the real economy (creating added value), the manufacturing sector being predominant in the industry - the exported products incorporating technical and technological progress in a modest proportion -, to which is added the agricultural sector, from which products with a low or even zero degree of processing are exported.

Romania

Romania is one of the categorized developing countries, even if according to The Atlas Method, by the World Bank it is classified, starting with 2019 in the High-income group category, with GNI per capita of US $ 12,630 - its strategic sectors being the energy, IT, transport, tourism, but mining and agriculture, although neglected and with a very low yield, have a great potential and have a comparative advantage that should not be ignored in future strategies and development policies.

To these domains that are part of the Institutional sector Companies and Qvasi-Societies of the National Accounts System are added the social sectors, mainly: the fields of health, education and research & development (R&D), so that even the sectors with competitive potential to increase their contribution to macroeconomic development.

A special place is occupied by agriculture, which is the economic sector of special importance. The added value of agriculture has a very small share in the GDP of developed countries and a slightly higher share of middle income, but this sector is the one that provides food to the population, and government authorities in all states are responsible for providing it both in terms of quantitative view, as well as in terms of quality and safety food.

Countries that benefit from advantages in this sector - whether favored by geography or have created, such as the Netherlands, an agricultural product industry - improve their current account balances by exporting agricultural products and / or food.

Consequently, agriculture - as a strategic economic sector - must be given special importance (perhaps the greatest) in the development policies created and implemented at national level.

3.3. Germany's sectoral structure - the main factor of economic performance

In Europe and beyond, the way the German economy is run and evolves is an example to follow regardless of the situation, but even more so in a period as difficult as the post-Covid-19 one. According to the billion-dollar GDP macroeconomic indicator, Germany is the third largest economy in the world, although its population is much smaller than that of other countries, such as China or India, which have the largest population, which shows that the performance of the German economy, as measured by the GDP per capita indicator, is undeniably much higher.

	Gross domestic product				Population		
	2010		2019		2021		
	Position in the world	$ billions	Position in the world	$ billions	Position in the world	Number of inhabitants	% of the world's population
World	-	66.113,10	-	87.697,50	-	7.850.000.000	100%
United States	1	14.992,10	1	21.374,40	3	331.352.000	4,13%
China	2	6.087,20	2	14.342,90	1	1.407.130.000	17,5%
Germany	3	3.396,40	3	3.845,60	19	83.190.556	1,04%

Source: World Bank national accounts data, and OECD National Accounts data files;
https://ro.wikipedia.org/wiki/Lista_%C8%9B%C4%83rilor_dup%C4%83_popula%C8%9Bie

Germany's strong economic position in the world can be explained by several strengths that it created and maintained over the years after World War II:

- the importance they attached to industrial development, both in terms of volume and especially in terms of product quality, so that the "made in Germany" brand is highly sought after abroad and the added value incorporated by them is among the highest in the world;
- due to the quality of industrial products, Germany has allowed itself to have an economy with a high degree of openness, so as to benefit from the comparative advantages provided by the gradual reduction of trade protectionism between the countries of the world. Germany is currently the third largest country in the world in terms of the volume of foreign trade, both in terms of exports and imports, and its current account is always in surplus, which gives it a favorable financial position compared to trading partners;

Ranking of the world's leading exporters and importers of goods in 2017as a percentage of the total world

Exports		Imports	
China	12,8 %	**United States**	13,4 %
United States	8,7 %	**China**	10,2 %
Germany	*8,2 %*	**Germany**	6,5 %
Japan	3,9 %	**Japan**	3,7 %
Netherlands	3,7 %	**Great Britain**	3,6 %
South Korea	3,2 %	**France**	3,5 %
Hong Kong	3,1 %	**Hong Kong**	3,3 %
France	3,0 %	**Netherlands**	3,2 %
Italy	2,9 %	**Italy**	3,2 %
Great Britain	2,5 %	**South Korea**	2,7 %

Source: O.M.C.

- industrial performance, as well as from other sectors, was achieved through carefully designed programs to support the development of SMEs first and, after they have gained momentum, of medium and large enterprises that have managed to show their potential both in internal competitive environment, as well as internationally;
- the organization of the productive process - the importance of the approach has been highlighted since the beginning of the twentieth century by the American F.W. Taylor - proposed as a high-performance development solution the concentration of activities with the same characteristics or objectives, in the so-called "clusters", in which to stimulate the implementation of new technologies, digitization, etc. In Germany, dedicated economic centers have been conceived and put into operation, which are a strong asset for the development of, for example, car construction (Stuttgart), the chemical industry (Rhin-Neckar), etc .;
- in order to support performers in a competitive environment, it is necessary for this environment to be known in all its facets and, in order to raise awareness of the level of confrontation, Germany has become one of the major active organizers of trade fairs, exhibitions and international exhibitions, as well as industrial service promotions in Europe and around the world;
- economic development cannot be achieved ignoring the importance of the social aspect. Germany has a very low level of unemployment, the lowest since 1990, the year of the reunification of the two German states, primarily due to the implementation of the reform introduced by Chancellor Schroder's administration on the labor market, social protection system and tax system, through which more competitive wage costs could be applied;
- the careful and responsible management of the public finances, which allowed the diminution of the budget deficit and of the public debt, in the conditions of maintaining some sectorial policies that would support the activity in the respective sector in the sense pursued by the public policy in the field. In this sense, the energy sector is one with important reform problems, as Germany is, in proportion, one of the largest energy consuming countries. Public authorities, both federal and especially state and local, are actively involved, including financially, in reducing the production of energy from fossil and nuclear resources and replacing them with green energy - renewable and non - polluting.

4. Sectoral resilience and growth policies

The health crisis has affected - and continues to affect - many communities, both centrally and territorially: regions, departments, urban and rural localities, albeit in a different way.

The economic impact varies depending on the intensity of the pandemic in the respective geographical area, as well as the extent to which it is involved in the value chains established by globalization, including sectoral specialization - a relevant example is tourism

and catering: restaurants, bars, etc., which suffered huge losses due to the pandemic.

Tourism presented in 2020 the lowest volume of activity ever recorded[4], for example the arrival of tourists in dedicated locations decreased by 74%, and revenue losses from international transport services amounted to over 1.3 trillion USD in 2020, but the decline has not yet ended due to the persistence of the health crisis and the consequent maintenance of restrictive measures.

Given the recent forecasts (March 2021) regarding the end of the pandemic, experts in the field estimate that it will be possible to reach the global level of tourism revenues achieved in 2019 only in 2024. In the meantime, however, this sector, which had marked a very high dynamic before Covid-19, it will face the decrease of jobs and the corresponding decrease of incomes due to the need to respect the restrictions of physical distance, the reduction of the daily periods of operation, etc.

Public authorities at all administrative levels are responsible for maintaining economic and social life within acceptable limits, but as most democratic states have now massively decentralized social services to the public, the legal obligation to provide them to the population lies largely with territorial public authorities, often being shared as a responsibility with central / federal public authorities.

The category of decentralized public services includes almost entirely utilities: water, sewerage, district heating, sanitation, basic administrative services, etc., but also those of a social nature: health, education, protection of vulnerable persons, as well as public transport, order and public security etc.

Although many decentralized public services are financed exclusively by tariffs, their support requires significant public funds - from territorial public budgets - which must be provided, despite the substantial decrease in tax revenues due to the pandemic, which need to be scheduled upstream compared to the operationalization of the sectoral policy instruments considered.

In order to help enterprises - the basic cell of economic activity in any country - the approaches of public authorities responsible for monitoring economic and financial performance at the national level have several solutions in mind:

- guaranteeing the treasury loans that a company in the category of SMEs – i.e. those with relatively low resilience - has contracted or wants to contract them to withstand the effects of the health crisis;
- subsidizing the partial unemployment / technical unemployment caused by the pandemic;
- subsidizing the expenses in order to bear the effects of the sanitary crisis;
- subsidizing maintenance / administration expenses: rent, energy bills, water, etc. of commercial premises;
- total or partial coverage of expenses for the endowment and implementation of digital communication, etc.

The measures taken by the public authorities to stop the spread of the influenza virus have disrupted productive and commercial activities, with immediate consequences on employment and, implicitly, on the income of the population.

The direct impact on domestic demand in all countries of the world has led to a significant decrease in the volume of foreign trade, the entire supply chain being disrupted.

To counter the shock of the health crisis, governments have adopted monetary and / or public spending policies to protect the population - both from virus infection and from deteriorating living conditions due to declining incomes - as well as economic activity as a whole, through various state aid schemes, subsidies, etc.

However, these measures have significantly degraded national public finances, with most countries in the world registering in 2020 much larger budget deficits than in previous years.

In the European Union, a series of rules were imposed by the treaties signed and, consequently, accepted by all Member States to maintain financial stability. Thus, the consolidated Treaty of Lisbon (2007) established the conditions and actions to be taken with regard to deficits considered excessive according to European Union rules[5]:

- the public budget deficit must be within a maximum of 3% of GDP;
- public debt must be below the 60% of GDP limit.

Currently, at the beginning of 2021, regarding the public policies adopted in all European states, they imply two distinct directions, depending on the expected effect:

- short-term interventions, in order to maintain the level of health and quality of life within acceptable parameters;
- medium and long term interventions, in order to protect the existing assets and to boost the resumption of economic activity and to support the pace of development.

The macroeconomic instruments that public authorities have at their disposal in contemporary democratic economies can be divided into two broad categories:

- monetary policies, which can generally be implemented by the monetary authority of each state - or group of independent states, such as the Eurozone;
- budgetary policies, which refer to the measures promoted and implemented regarding both public expenditures and those related to taxes and

[4] https://www.unwto.org/en/

[5] https://eur-lex.europa.eu/summary/glossary/

duties levied on residents and / or non-residents who obtain income on the national territory.

As for monetary policies, they act at the macro level, they are generally not directed towards a certain economic sector of activity.

For the post-pandemic period, actions are planned to influence economic activity:

- decrease of the reference interest rate, which will spread through commercial banks and investments on the active rate practiced on loans to individuals and legal entities, thus stimulating both current operating activity and investment at the macroeconomic level;
- the so-called QE (quantitative easing) instrument, which means the purchase by the central bank - a policy known as "open market" - of government bonds issued for the financial coverage of public debt. Following this operation, the central bank will cause an increase in the liquidity held by banks and, as a consequence, a decrease in the active interest rate granted by them. Also, the interest rate on financing / refinancing the public debt will decrease, which means a lower public debt service, respectively lower public expenditures at national and / or local level.

The approach to budgetary policy is different. Thus, the tax policy and fees Keynesian interventionist type recommends in times of recession - such as the post-Covid-19 period - the reduction of the tax burden, but as the concrete situation this year imposes increased public funds to support economic and social life, it is it is necessary to think of alternative solutions.

In this regard, the public authorities will set priorities for the current year, 2021, as well as for the future. Increased attention to demand - such as the increase in the guaranteed minimum income by law, as decided in the UK - will make this macroeconomic indicator the main factor in the country's development, at least this year.

If, on the contrary, the national public authorities decide to stimulate supply, as the main priority for the future economic development of the country, ie financial interventions will be mainly aimed at supporting investments - of any kind: rehabilitation, modernization, expansion, new investments - in sectors considered by of vital importance at national level, they will receive the largest amounts as budget allocations, in the form of budget appropriations and / or commitment appropriations[6].

5. Conclusions

Analyzing the economic and social situation before the pandemic, as well as the strong impact it produces, state governments propose for their countries models of resilience and resumption of growth considerably different from the models presented and implemented previously. In this sense, it is considered that the State's intervention - both as a public service provider and as the main financier - must be strong, at least in the next few years.

Economic and social developments and the need for public authorities to counteract or at least reduce the effects of the pandemic on the lives of the population require major changes in these conditions, given the macroeconomic policies, but also, especially at the sectoral level, which must be implemented to overcome the impact of the health crisis and be able to restart economic activity and increase employment.

As the public finance situation is not expected to improve significantly in 2021 due to successive waves of epidemics, EU policymakers have proposed maintaining a lax approach to public spending and implementing macroeconomic and sectoral support measures through a Next Generation EU financial instrument.

The economic policies considered include all economic and social sectors, prioritizing them according to the importance that each one represents for the respective country, but also taking into account, at the same time, the targets identified in the development strategies. Thus, among the targeted sectors will not be missing the industrial ones specific to each country: extractive, manufacturing, high processing; energy, including renewable energy; agriculture, forestry, fishing and food industry; constructions, etc., and to all these are added the social sectors - of equal or even greater importance.

When creating development policies for economic sectors, especially industrial, agricultural, etc., that are considered strategic, the governments of states that introduce a series of measures to eliminate the effects of the pandemic and resumption of growth must take into account a number of situations generated by the health crisis, but also the whole economic situation before the crisis, its challenges not yet being solved. Among other things, it is about the revaluation of supply chains and the rethinking of the interdependencies between the states of the world in an increasingly extended and also contested globalization. Some examples of magnitude:

- the separation of Great Britain from the European Union (BREXIT);
- American Trump policy against economic competition exercised by China, but also by other geographical areas of the world, such as the European Union, Canada, etc., a policy that seems to be continued by the Biden administration;
- the fierce technological competition in the top fields, such as artificial intelligence, 5G, semiconductors, etc.

[6] According to the Romanian legislation (Law no. 500 of 2002, consolidated, regarding public finances), the multiannual legal commitments include the maximum amounts that can be budgeted in the years for which the commitment is concluded. The budget credit represents the maximum amount that can be ordered and paid in the current budget year for the legal commitments contracted in the respective year and / or in the previous years.

It is predicted that the new American geopolitics and the Chinese response to it will affect investment and, consequently, medium and long-term economic growth in both major states, as well as in other countries that are in close economic and financial relations with them, such as for example, many South-East Asian states.

Thus, for the post-Covid-19 period, the industrial policies elaborated by the national public authorities, especially for the fields considered strategic will take into account the characteristics of a complicated economic-social, given and political conjuncture:

- the need to strengthen the role of the state in the national economy, both in terms of adopting the regulatory framework in all aspects of domestic economic and social life and international relations, and as a provider of public services in most areas: economic, health, education, social protection, protection environment, but also economic and financial control, population security, etc .;
- significant changes in the geopolitics of the world's regions, affecting material and financial supply chains, including relations between and even within companies - mainly in the case of multinationals, which in many situations, such as the US, are facing the requirement of the authorities to relocate;
- the requirements expressed by all media: scientific, economic, domestic and international social, regarding the need to improve environmental conditions.

Regulations proposed by international courts and adopted, in part for the most part, by many countries around the world, require access to clean technologies, which are generally expensive.

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